



AMERICAN BAR ASSOCIATION

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Statement of

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President

on behalf of the

AMERICAN BAR ASSOCIATION

before the

PERMANENT SELECT COMMITTEE ON INTELLIGENCE

UNITED STATES HOUSE OF REPRESENTATIVES

on the subject of

**MODERNIZATION OF THE FOREIGN INTELLIGENCE
SURVEILLANCE ACT**

July 19, 2006

Mr. Chairman and Members of the Committee:

I am Michael S. Greco, and I am pleased to appear before the Committee in my capacity as President of the American Bar Association. I thank the Committee for inviting me to present the views of the Association on matters that are pending before you.

The American Bar Association is the world's largest voluntary professional organization with a membership of more than 410,000 lawyers, judges, and law students worldwide, including a broad cross-section of criminal defense and national security lawyers, prosecutors and judges. As it has done during its 128-year existence, the ABA strives continually to improve the American system of justice and to advance the rule of law throughout the world.

I appear before you to voice the ABA's position with respect to the warrantless electronic surveillance of American citizens. At the outset, I commend the leadership of the Committee for demonstrating the importance of Congressional oversight on issues that are of such grave importance to the American people and our country.

I. ABA Policy

On December 16, 2005, the New York Times reported that the President had "secretly authorized the National Security Agency (NSA) to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying, according to government officials."¹

With due regard to the gravity of that revelation, I appointed the American Bar Association Task Force on Domestic Surveillance in the Fight Against Terrorism to examine the constitutional and legal issues surrounding the federal government's electronic surveillance of American citizens in the United States, and to report its recommendations to the ABA House of Delegates.

The Task Force is composed of a bipartisan group of distinguished lawyers that includes a former Director of the Federal Bureau of Investigation, a former General

¹ James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts," New York Times, December 16, 2005.

Counsel of the National Security Agency and the Central Intelligence Agency, the General Counsel of the National Institute of Military Justice, and other scholars and lawyers with strong knowledge of national security law.²

The Task Force developed a unanimous report and unanimous expert recommendations, and the recommendations were adopted by an overwhelming voice vote of the Association's 550-member House of Delegates in February 2006 as the official policy views of the ABA.

Our policy addresses several constitutional and legal issues raised by warrantless electronic surveillance.

First, the policy urges the President to respect the limitations that the Constitution imposes on a president under our system of checks and balances and to honor the essential roles of the Congress and the Judicial Branch in ensuring that our nation's security is protected in a manner consistent with constitutional guarantees.

Second, the policy urges that any electronic surveillance within the United States by any U.S. government agency for foreign intelligence purposes comply with the provisions of the Foreign Intelligence Surveillance Act (FISA). If the President believes that FISA is inadequate to safeguard national security, he should seek appropriate amendments or new legislation rather than acting without explicit statutory authorization.

Third, the ABA policy urges Congress to conduct a comprehensive investigation of the issues and details surrounding the NSA domestic surveillance program. The proceedings should be open to the public and conducted in a fashion that provides a clear and credible account to the American people, with appropriate safeguards to protect classified or other protected information.

Fourth, the ABA urges Congress to review thoroughly and make recommendations concerning the intelligence oversight process. To assist in that process, the President should ensure that the House and Senate are fully and currently informed of all intelligence operations as required by the National Security Act of 1947.

² The Task Force is chaired by **Neal R. Sonnett**, and includes **Mark D. Agrast**, **Deborah Enix-Ross**, **Stephen A. Saltzburg**, **Hon. William S. Sessions**, **James R. Silkenat**, and **Suzanne Spaulding**. **Dean Harold Hongju Koh** and **Dean Elizabeth Rindskopf Parker** serve as Special Advisers, and **Alan J. Rothstein** of the New York City Bar is a Liaison to the Task Force.

Finally, the ABA policy urges Congress to affirm that the Authorization for Use of Military Force approved by Congress on September 18, 2001³ (AUMF) did not provide a statutory exception to the FISA requirements. Any such exception should be authorized only through affirmative and explicit Congressional action.

II. Congressional Response

There should be no doubt in anyone's mind that the American Bar Association supports our government's strong, aggressive response to terrorism. The very first policy adopted by the ABA House of Delegates following the September 2001 terrorist attacks on the United States, adopted in February 2002, gave our unanimous support to the President. The policies adopted by the ABA since then reflect our commitment to ensuring that the government achieves the proper balance in protecting both the nation's security and the American people's constitutional rights. The government can, and must, protect both, as it has done for more than two centuries.

The American Bar Association urges that, before altering our intelligence laws, Congress insist that the nature and extent of the administration's warrantless domestic electronic surveillance be explained to Congress by the administration. Congress can make responsible policy determinations only if it knows what surveillance programs are in place, why they are necessary, and why the current FISA framework is insufficient to accommodate them. To do otherwise would be an abdication of the authority given Congress under Article I of the Constitution of the United States, and its duty to protect the rights guaranteed to our citizens.

While members of this committee have been privy to the classified details about the operations of the NSA surveillance program, most Members of Congress are still without sufficient knowledge of this and perhaps other surveillance programs conducted by the administration that do not comply with the requirements of FISA. At this juncture, seven months after the secret surveillance program was disclosed to the American people, the administration continues to impede Congress in its critically important function of checking and balancing the powers of the Executive Branch under the separation of powers doctrine.

³ Pub.L.No. 107-40, 115 Stat. 224 § 2(a) (2001).

We appreciate the need to protect classified operational information; however, we are concerned about the lack of adequate Congressional scrutiny, and the lack of public discourse, regarding the administration's assertion that the existing FISA statute is not sufficiently flexible to deal with terrorist threats. We appreciate the leadership demonstrated by this Committee in addressing this very issue and insisting that the Intelligence Committee is adequately briefed to do its job properly. Mr. Chairman, we agree wholeheartedly with your May 2006 letter to the administration regarding its fundamental responsibility to keep Congress informed of its intelligence activities. Without such scrutiny and public debate about these issues, it is hard to see how Congress can make an informed decision about any proposed amendments to FISA.

The ABA believes that the process established by FISA must continue to be the exclusive framework under which electronic surveillance is conducted within the United States for foreign intelligence purposes. FISA, a detailed and comprehensive statute, was enacted to provide for the collection of foreign intelligence information in a manner consistent with the Fourth Amendment. FISA provides the government with flexibility by making specific provision for exceptions to its requirements in emergencies and in the event of war. Moreover, following 9/11, FISA was amended by the Patriot Act, at the behest of the President, to provide even greater flexibility to the administration. The Patriot Act, and its subsequent reauthorization, however, left intact FISA's explicit provisions declaring its procedures to be the exclusive means for conducting electronic surveillance for foreign intelligence purposes in the United States.

The ABA believes that any legislative efforts that attempt to alter FISA procedures must preserve the careful constitutional balance among the three branches of government that is reflected in FISA. We strongly urge that any legislative revision of this framework retain the system of independent judicial review of applications by the government to conduct electronic surveillance within the United States that is essential to ensuring that such surveillance complies with Fourth Amendment requirements. We also urge that any changes to FISA or other statutes preserve the vital role of this committee and Congress as a whole in overseeing intelligence activities. For Congress to amend FISA without such provisions would be to give the Executive Branch a blank check to spy on Americans when and as it sees fit. Such a result would betray the system of

separation of powers crafted by the Founders that has enabled our democracy to survive for more than two centuries.

III. The LISTEN ACT

Congress needs adequate information from the Executive Branch before enacting substantial revisions to the intelligence laws. One of the pending legislative proposals, H.R. 5371, the LISTEN ACT, introduced by Ranking Member Harman, addresses this need. The American Bar Association supports the LISTEN ACT because we believe that it provides the Congress with the tools that it needs to achieve an improved understanding of the complexities surrounding amendment of the FISA law.

The ABA commends the provision in the LISTEN Act that reinforces the principle that FISA and Title III of the criminal code are the exclusive means for authorizing electronic surveillance.⁴ We believe that the exclusivity provisions are an essential component of FISA.

In addition, the ABA endorses the express statement in the LISTEN Act that the AUMF did not provide a statutory exception to the FISA requirements. There is nothing in either the language of the AUMF or its legislative history to justify the administration's assertion that the general grant of authority to use "all necessary and appropriate force" against Al Qaeda and those affiliated with or supporting it, was intended to amend, repeal or nullify the very specific and comprehensive terms of FISA. It is incumbent on Congress to clarify this point not only for this surveillance program, but for any other programs that may be carried out in the future. If Congress wishes to amend FISA, it should do so explicitly.

Last month, in Hamdan v. Rumsfeld, the Supreme Court of the United States expressly repudiated the administration's argument that the AUMF and the President's inherent constitutional authority gave President Bush the power to establish military commissions that do not comport with the Uniform Code of Military Justice and

⁴ Two separate statutes regulate electronic surveillance: FISA governs electronic surveillance for foreign intelligence purposes; Title III of the Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510 *et seq.*, 2701 *et seq.*, and 3121 *et seq.*, governs domestic electronic surveillance. 18 U.S. C. § 2511 expressly makes these two statutes the exclusive means for conducting electronic surveillance for foreign intelligence or domestic purposes.

Common Article 3 of the Geneva Conventions.⁵ Many legal and constitutional scholars have argued that if the AUMF did not provide authorization for the establishment of military commissions for battlefield detainees, then it is implausible that Congress intended the AUMF to authorize the warrantless surveillance of American citizens.

The American Bar Association also believes that the enhanced reporting requirements in the LISTEN Act would be extremely beneficial to Congress. The legislation requires the administration to report to the full House and Senate Intelligence and Judiciary Committees if it encounters difficulty in complying with FISA in its pursuit of foreign intelligence objectives through electronic surveillance. The information provided by such a required comprehensive reporting regime will facilitate congressional oversight and will further educate Members about any future need to amend the law to meet changing circumstances.

IV. The Specter-White House Proposal

In view of the attention being given to a bill recently negotiated between Senate Judiciary Committee Chairman Arlen Specter and the White House (the “Specter-White House Proposal”), I will briefly convey the views of the ABA on this proposed legislation. Although the legislation is pending before the other body of Congress, the ABA’s major concerns with the Specter-White House Proposal reflect principles that must be considered in crafting any new legislation in this area.

First, the Specter-White House Proposal regrettably abandons the concept that the administration must seek a review of the legality of its electronic surveillance activities from the Foreign Intelligence Surveillance Court, and instead relies on the President voluntarily to submit it for judicial review. The administration would be free to appeal or resubmit an application for the program until it receives the FISA court’s blessing, but the bill inexplicably fails to provide for an appeal from a finding that the program is constitutional.

Moreover, the FISA court review contemplated by the legislation would allow the court to authorize an entire electronic surveillance *program*, rather than individual warrant applications, reasonably designed to capture the communications of “a person

⁵ Hamdan v. Rumsfeld, No. 05-184.

reasonably believed to have communication with” a foreign power or a terrorist group. The proposed legislation also allows for the perpetual renewal of the program so long as the court determines it to be reasonable. The ABA opposes both of these unsound provisions.

While the American Bar Association believes that it is essential to restore judicial review of the administration’s surveillance activities, the Specter-White House Proposal is an enormous and unwarranted departure from the FISA framework and the particularity requirements of the Fourth Amendment, which require that any government surveillance be reasonable, supported by individual warrants issued by courts, and based upon specific probable cause in each case.

Second, the Specter-White House Proposal unwisely repeals the exclusivity provisions of FISA. In enacting FISA, Congress demonstrated its concern not only with violations of the Fourth Amendment, but with the chilling effect that abuses of electronic surveillance by the Executive Branch have on free speech and association. By providing that “nothing in this Act shall be construed to limit the constitutional authority of the President,” the Specter-White House Proposal would significantly and unacceptably alter the balance of power between the branches established by FISA and sanction surveillance conducted outside of its protective framework.

Third, the Specter-White House Proposal would authorize the transfer to the Foreign Intelligence Court of Review of all cases challenging the legality of classified communications or intelligence activities, including electronic surveillance, upon an affidavit by the Attorney General. This provision would allow the administration to shop for the most favorable forum and for the FISA Court or the originating court to dismiss such a challenge for any reason. The potential effect of a broad mandatory transfer of such pending cases is that the legal questions at issue unfortunately would be removed from a public forum and addressed in secret proceedings. The ABA believes that this secrecy would seriously compromise the confidence of citizens in the independence of judicial review and in the legality of the government’s actions.

These are only several of the ABA’s numerous concerns about the Specter-White House Proposal. The ABA finds little to support in the Proposal. While the ABA commends the leadership that Chairman Specter has demonstrated in keeping these issues

at the forefront of national attention, we are concerned that the Specter-White House Proposal would legitimize administration surveillance programs without any demonstrated justification. There are other Members of Congress, a number of whom sit on this committee, who have been fully briefed on the NSA surveillance program and who feel, correctly in the ABA's view, that the changes proposed by the Specter-White House Proposal are not necessary.

If the majority of the Members of Congress, once fully informed about the surveillance program, determine that there is a need for reasonable changes to FISA to achieve additional flexibility, then the ABA is prepared to work with the Congress to accomplish this goal. However, we urge that Congress, before it takes action on the Specter-White House Proposal, thoughtfully consider the more narrowly-tailored approaches to electronic surveillance that are reflected in the Harman legislation and in the previously-introduced Specter-Feinstein legislation in the Senate. We urge you to keep these concerns in mind as you consider legislation regarding warrantless electronic surveillance.

Conclusion

The awesome power to penetrate Americans' most private communications is too great to be held solely by the Executive Branch of government. To restore public confidence in our government, there is now a pressing need for Congress to oversee these issues with the authority, and the responsibility, that the Constitution mandates.

As Supreme Court Associate Justice O'Connor observed, "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."⁶ The American Bar Association urges Congress to assert its proper role, and prevent our constitutional freedoms from falling victim to the terrorists. A failure to do so would give the enemy a victory in undermining democracy that he could never achieve on his own.

On behalf of the American Bar Association, I thank you for considering our views on an issue of such grave consequence to the American people.

⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (quoting *Mistretta v. United States*, 488 U.S. 361, 380 (1989)).