I begin by thanking the Pennsylvania Bar Institute and the Pennsylvania Bar Association Civil Rights Committee for inviting me to speak today. I wish I could be with you “live”, but being “virtually” there is better than not being there at all.

I want to note at the outset that my remarks today will reflect personal views, and not those of the American Bar Association or any other organization.

My principal topic is an issue of importance to all Americans: What is the proper balance between national security and individual freedoms? Put differently, is our government doing enough to preserve our freedoms in the fight against terrorism?

Striking this balance is particularly important with regard to domestic spying on citizens and freedom of the press.

The American people have a right to expect that the Executive Branch, no less than the other two branches of our government, will safeguard both our borders and our freedoms.

As you heard in the Introduction, I was privileged during the past year to serve as president of the American Bar Association. The ABA, in a series of policy recommendations adopted in the months and years following September 11, has expressed support for the Administration’s efforts to pursue terrorists and deter terrorist attacks --- but in a manner consistent with the freedoms guaranteed by the Constitution.

The threat of terrorist attacks has led this Administration to restrict significantly the freedoms and sense of openness that have defined our democracy. Until recently the majority of Americans and members of Congress – and the media – with a mixture of patriotism, trust, and fear – gave the Administration wide leeway. But increasing
numbers of Americans now believe that the Administration is not adequately balancing national security and our freedoms.

History should be our guide.

While foreign terrorism in America is new, grave threats to our national security are not. When faced with such threats in the past, we managed to prevail against the enemy without abandoning our freedoms and our adherence to the rule of law.

On those occasions when our government has abandoned the ideals and principles on which our republic was founded, it brought shame on our country. Some of the sorriest chapters of American history were written when our Constitutional freedoms were suspended in times of emergency: the internment of Japanese Americans during World War II; the Communist scares of the 1920s and 1950s. In time, we came to our senses -- we came to realize that we had made serious mistakes in ignoring the protection afforded to all of us by the U.S. Constitution.

It is now time for us again to come to our senses with respect to the erosion of freedoms since 9/11.

Congress must finally exercise its constitutionally-mandated oversight role to restore a proper balance between freedom and security. More and more Americans are troubled that our privacy is unnecessarily being invaded by unprecedented warrantless government spying programs that search bank records, personal emails and even our US mail. They are concerned, too, about government efforts to intimidate the press and restrict the free flow of information that helps ensure our freedom.

Since 9/11 the Administration repeatedly has given Americans a choice that I reject as being a false choice – that Americans must sacrifice their freedom in order to gain security.

More Americans now are rejecting the fear-mongering and scare tactics employed by this Administration since 9/11 as the means of persuasion and decision-making. Americans must firmly insist that our government protect both freedom and security, as it has throughout our nation’s history. In this past November’s elections the people sent a clear message to the US government about the way it is conducting the war in Iraq, the war on terrorism, and the erosion of our freedoms.

I have a deep faith in the rule of law. It is my strong belief that the rule of law can protect our rights at all times, even perilous ones. We should be suspicious of politicians who say otherwise. The law is resilient enough to resolve conflicting needs. And when individual laws fail, in our democracy we work together to change them.

This, in fact, is more than just faith. It is our nation’s history. And it is a road map to how we, as a nation, can maintain the rule of law in America as we fight terrorism. That road map was given to us by the Founders of our country, the drafters of our
Constitution, and until recently it was followed by presidents, members of Congress and our courts for more than two centuries—in peace and in war.

Our republic—the greatest and longest-lasting democracy in history —was formed as a response to runaway, unchecked power. The first Americans rebelled against paying taxes without representation and against unreasonable searches of their property without warrants. The outrage and disgust of Americans with the English King’s warrantless searches of their property, and invasions of their privacy, was the match that ignited the American Revolution.

Electronic spying without a search warrant is today’s version of the warrantless searches that led the colonists to start the American Revolution.

The question today is not whether the government lawfully can eavesdrop on Americans to protect our security. It can. But Congress carefully set forth limitations on surveillance of American citizens when it enacted the 1978 law known as the Foreign Intelligence Surveillance Act (FISA) in response to privacy abuses during the Nixon Administration.

The real issue today is whether the Executive Branch unilaterally – that is, without Congressional authorization or court approval -- can conduct long-term, secret, spying on Americans in the US without the checks and balances from the Judiciary or Congress that is required by our Constitution. It cannot.

A victory in the war on terror—which is a war of ideas and values, not just of weapons—demands that all of us – including our own government -- steadfastly adhere to the rule of law.

The disclosure by the New York Times in December 2005 of the Administration’s secret spying program, in which telephone calls and emails were, and today still are, being monitored, shocked Americans and constitutional scholars alike. This program, which the Administration continues to keep secret 18 months after its disclosure, has subjected thousands of persons within the United States to secret electronic spying without authorization by courts or Congress, and in clear violation of both the Constitution and FISA.

Several weeks ago the Justice Department’s Inspector General revealed that the FBI, by engaging in domestic spying pursuant to the USA Patriot Act, has violated the rights of thousands of United States citizens. In testimony to members of the House of Representatives, the Inspector General said that the FBI may have violated the law or government policies more than 3,000 times since the spying program began.

That is outrageous.
Republicans and Democrats alike expressed shock and dismay at the report, because it shows how vulnerable our liberties are when we sacrifice checks and balances, separation of powers, and the rule of law in the name of national security.

On March 27, FBI Director Robert Mueller, testifying before an angry Senate Judiciary Committee, admitted that the FBI has acted unlawfully. The leadership of the Senate Committee vowed to consider whether the USA Patriot Act should be amended to address these abuses.

It’s about time.

In December 2005, in response to the New York Times’ belated disclosure of the President’s spying program (the Times delayed reporting the story at the Administration’s insistence by more than a year), I appointed the ABA Task Force on Domestic Surveillance in the Fight against Terrorism.

The Task Force was comprised of an extraordinarily distinguished and balanced, bi-partisan group, including a former Director of the FBI, a former General Counsel to the CIA and the National Security Agency (which is conducting the Administration’s spying program), and respected experts in constitutional law and national security law.

The Task Force produced a unanimous report and policy recommendations that were adopted by an overwhelming majority vote by the ABA House of Delegates last February (there were, at most, only 4 or 5 “no” votes heard among the 550 delegates).

I encourage you to read the full report, available on the ABA website at www.abanet.org.

Based on the Task Force’s recommendations, the new ABA policy adopted by the House of Delegates urges –

First, that any electronic surveillance inside the United States for foreign intelligence purposes must comply with the provisions of the Foreign Intelligence Surveillance Act (FISA). That means that all electronic eavesdropping must be overseen by the Foreign Intelligence Surveillance Court—a court that was designed specifically to balance national security investigations with constitutional requirements to safeguard civil liberties.

Recently the Administration announced that, as the ABA has been urging since February 2006, it would now work with the Foreign Intelligence Surveillance court to spy on Americans. The announcement came two weeks before the US Court of Appeals for the 6th Circuit, was to hear the Administration’s appeal from a federal court decision in a case brought by the ACLU in which the surveillance program was ruled unconstitutional. Critics responded probably correctly that the Administration’s last-minute announcement was intended to circumvent judicial review and oversight of its spying program.
Second, the ABA Task Force also urged Congress to discharge its solemn responsibility under the Constitution, to reclaim its oversight role and conduct thorough investigations of all surveillance and data-gathering programs conducted in the United States. The Congress elected by the American people last November is giving signs that, unlike the prior Republican-controlled Congress, it finally will discharge its constitutionally mandated role of checking and balancing the power of the Executive Branch.

The new ABA policy is consistent with US Supreme Court rulings and acts of Congress over the years, specifically in the area of electronic surveillance. As the Supreme Court said in a 1971 wiretapping case, the “very heart” of the Fourth Amendment, which bars unreasonable search and seizures, requires a particularized search warrant and review by an independent court.

Those values were preserved in the 1978 FISA law, and they must continue to be preserved. The ABA’s policy on secret surveillance reflects, as was the case in 1776 that Americans view with disgust warrantless searches whether conducted by the King of England or the President of the United States.

The awesome power of government to invade citizens’ most private communications must not be held solely in the hands of the Chief Executive. All Americans want to trust that their government is protecting both their physical security and their freedoms, but the word solely of the Executive branch – the “trust us” pledge – is not good enough.

Our system guarantees accountability and adherence to the law by requiring that more than one branch of government certify the legality of actions. The crucial roles that Congress and the courts have in holding the Executive Branch accountable cannot be ignored by this or any Administration.

From the beginning of our country, our system of government also has entrusted the press with a special role in our democratic society.

In addition to the checks and balances and separation of powers doctrines of our form of government, a free press is of vital importance to hold the government accountable and make sure that government officials are obeying the law.

When the press exposed the Administration’s domestic spying program and other violations such as the torture of prisoners by our military, the abuse of Guantanamo detainees, and the misuse of presidential signing statements, the press was vigorously attacked and threatened with criminal prosecution by the Justice Department.

This too is outrageous.
The goal of those who threaten prosecution and punishment of reporters and publishers is to bully and intimidate them, to make them fearful of performing their duty. With an intimidated and fearful press, democracy will not long survive.

Our Founders recognized that an informed citizenry is crucial to democracy. For this reason, they took the extraordinarily wise step of declaring, in the very First Amendment to the Constitution, that Congress can pass no law that abridges freedom of the press. The Founders did so knowing that they themselves had felt and would continue to feel the sting of a press that was vitriolic, even slanderous, by today’s standards.

It is not surprising that government officials who are exposed by the press for misconduct and bad judgment attack the messenger, but it is surprising that the American people in outrage do not more vigorously condemn those unlawful officials – the thieves of rights – whom the press exposes, and do not more vigorously protect a free press.

During the past several years a growing number of journalists have been threatened with jail to force them to identify their sources – an ominous shift that could dry up the kind of crucial public service reporting made famous during the political disgrace that was Watergate. For this reason, the American Bar Association supports a federal shield law that allows reporters to protect sources unless the government can satisfy certain criteria justifying disclosure, including a showing that the government’s need outweighs the public’s interest in a free flow of information.

The public – and particularly lawyers – have a crucial responsibility to protect the freedom of the press.

In many countries government officials can hide the truth from people because they control the press. Fortunately, ours is still not one of them. We must be vigilant to ensure that it will always be so.

Neither this nor any future Administration can be allowed to disregard laws enacted by Congress or the rule of law, or gag the press, in the name of national security. In America, no one is above the law – not even the President.

So, what is to be done?

In November the American people sent a strong message to the Administration and to the Republican-controlled Congress. Regardless of which political party holds the majority, the people – by the power of the vote – and the power of a free press -- continuously must remind the Administration, and Congress, that we will not permit our Constitution and laws to be violated.
The message to be delivered to elected officials is simple: We will not allow you to trample on our freedoms.

Delivery of that message should not depend on political party affiliation or partisan politics.

This is not about partisan politics.

It is not about conservatives or liberals, Republicans or Democrats.

It is about preserving cherished American values and principles.

It is about preserving freedoms that countless Americans throughout history have sacrificed their lives to protect.

It is about reclaiming America’s proud standing throughout the world as the land of the free, the land of the just.

If we permit our own government, now or ever, to take away our freedoms in the name of national security, we will give the enemy a victory that he could never achieve on his own.

You and I must prevent that from happening, with every ounce of our might.