

RESOLUTION 05-06-06

DIGEST

Appointment of Special Counsel: Investigation of Warrantless Electronic Surveillance
Recommends the appointment of special counsel to investigate and prosecute members of the U.S. Executive Branch conducting warrantless electronic surveillance.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Related to Resolution 05-18-06.

Reasons:

This resolution recommends the appointment of special counsel to investigate and prosecute members of the U.S. Executive Branch conducting warrantless electronic surveillance. This resolution should be approved in principle because the Executive Branch's admitted circumvention of the Foreign Intelligence Surveillance Act requires independent review and remediation to preserve the constitutional requirement of separation of powers.

President Bush has admitted that, under his direction, the National Security Agency has bypassed the requirements of the Foreign Intelligence Surveillance Act ("FISA") to engage in warrantless wiretaps and eavesdropping on American citizens. The President claims that broad wartime powers as Commander-in-Chief allow the President to circumvent certain acts of Congress, including the FISA, while fighting the "war on terror" that will continue for many years, perhaps decades. The Bush Administration has further refused to provide detailed information to Congress or the public regarding the breadth of the domestic surveillance program or why the FISA law cannot be followed. Many believe that such a position, which has been sanctioned by the current U.S. Attorney General and his predecessor, threatens the constitutional checks and balances that underpin our democracy and charts a course for a full blown constitutional crisis.

It appears unlikely that Congress is going to act to investigate thoroughly the NSA's actions in violation of the FISA. The Congressional response can be found in the introduction of the Terrorist Surveillance Act of 2006, which would legalize but limit domestic surveillance of U.S. citizens without a warrant. It appears clear that an independent investigation is called for, and the appointment of a neutral special counsel is the appropriate mechanism for conducting such an investigation.

Finally, passage of this resolution would also be consistent with the American Bar Association's recently passed resolution calling on Congress to conduct a thorough inquiry, with public hearings, of the NSA program.

TEXT OF RESOLUTION

RESOLVED, that this Conference strongly urges the California members of Congress, Representatives and Senators, to support the call by the American Civil Liberties Union on the Department of Justice, to appoint immediately an outside special counsel to investigate and

prosecute any and all criminal acts committed by any member of the Executive Branch in the warrantless electronic surveillance of people in the United States.

PROPONENT: National Lawyers Guild, San Francisco Bay Area Chapter

STATEMENT OF REASONS

Existing Law: The Foreign Intelligence Surveillance Act begins at 50 US Sec. Code 1801. Section 1801 requires a court order. The provision on court orders for surveillance which includes the provision allowing the Attorney General to commence surveillance without a court order, but advising a judge of the Foreign Intelligence Surveillance Court or to have done so, with then an obligation either to cease surveillance within 72 hours or to make an application to the Court within 72 hours in at 50 US Code. Sect. 1805.

This Resolution: Seeks acknowledgement of existing law and appropriate sanctions for violation of existing law.

The Problem: The Executive Branch has conducted electronic surveillance without a court order and without notification to the Foreign Intelligence Surveillance Court and the obtaining of a warrant therefrom.

The Executive Branch of the United States government has conducted secret electronic surveillance beginning shortly after September 11, 2001.

Among the constitutional scholars, lawyers and other public and private persons and institutions who have published analyses and condemned this surveillance as criminal are Curtis Bradley, Walter Dellinger, Phillip Heymann, Beth Nolan, Richard Epstein and Lawrence Tribe, as well as the American Civil Liberties Union and Barrons.

This surveillance, and the analyses from so many public figures, demonstrate the need for a special prosecutor to perform a full and independent investigation of these acts of the Executive Branch and to prosecute any criminal violations found.

IMPACT STATEMENT

This resolution does not affect any law, statute, or other rule.

AUTHOR OR PERMANENT CONTACT: Doris Brin Walker, c/o Richard P. Koch, 760 Market St. Suite 524, San Francisco, CA 94102. Telephone: 415-282-3272 or 415-397-1060 Fax: (415) 397-3077, email rpkoch@dnai.com

RESPONSIBLE FLOOR DELEGATE: Richard P. Koch