

## **RESOLUTION 05-18-06**

### **DIGEST**

#### Federal Electronic Surveillance: Congressional Investigation

Recommends the adoption of American Bar Association (ABA) Resolution 302 urging Congress to investigate warrantless electronic surveillance.

### **RESOLUTIONS COMMITTEE RECOMMENDATION**

#### **APPROVE IN PRINCIPLE**

#### History:

Similar to Resolution 05-06-06.

#### Reasons:

This resolution recommends the adoption of American Bar Association (ABA) Resolution 302 urging Congress to investigate warrantless electronic surveillance. This resolution should be approved in principle because the Executive Branch's admitted circumvention of the Foreign Intelligence Surveillance Act (FISA) requires congressional 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 FISA to engage in warrantless wiretaps and eavesdropping on American citizens. The President claims that broad wartime powers as Commander-in-Chief allow the circumvention of certain acts of Congress, including FISA, while fighting the "war on terror". 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 FISA cannot be followed. Such a position threatens the constitutional checks and balances underpinning our democracy. (U.S. Const., art. I, § 1, art. II, §1, & art. III, § 1.)

ABA resolution 302 calls on the President to abide by constitutional and statutory constraints on electronic surveillance of Americans and for Congress to conduct a thorough inquiry, with public hearings, of the NSA program. The ABA resolution, which was crafted by a bipartisan task force including a former FBI director and former lawyers for the NSA and the CIA, was overwhelmingly passed by the ABA's House of Delegates. CDCBA adoption of this resolution will demonstrate its support for protecting national security in a manner consistent with constitutional guarantees.

### **TEXT OF RESOLUTION**

RESOLVED, that the Conference of Delegates of California Bar Associations adopts American Bar Association (ABA) Resolution 302 regarding the roles of Congress and the President in the fight against terrorism.

We, the Conference of Delegates of California Bar Associations, hereby adopt American Bar Association (ABA) Resolution 302, as set forth below, in its entirety. The ABA resolution urges

Congress to: conduct a comprehensive investigation to determine the nature and extent of any electronic surveillance of U.S. persons that does not comply with the Foreign Intelligence Surveillance Act (FISA); the bases for the legality of such surveillance; whether Congress was properly informed of and consulted as to the surveillance; the nature of the information obtained and whether it was retained or shared with other agencies; and whether this information was used in legal proceedings against any U.S. citizen. The U.S. Constitution, the system of checks and balances established by our Constitution and the individual rights and liberties set forth in our Constitution must be protected. We call upon bar associations and legal organizations nationwide to join in this statement in support of ensuring that our national security is protected in a manner consistent with constitutional guarantees.

PROPONENT: Beverly Hills Bar Association.

STATEMENT OF REASONS:

Existing Law: U.S. Constitution; Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 et seq. (FISA); Authorization for Use of Military Force of Sept. 18, 2001, Pub. L. No. 107-40, 115 Stat. 224 § 2(a)(2001)(AUMF); Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 314(a)(2)(B), 115 Stat. 1394 (Dec. 28, 2001)(IAA); USA Patriot Act, Pub. L. 107-56, § 218, 115 Stat. 272 (Oct. 26, 2001).

This Resolution: Will emphasize the importance of conducting foreign intelligence in a manner consistent with the Constitution, Congressionally-enacted legislation and Judicial oversight. This resolution calls upon the President to abide by Constitutional limitations on his executive powers and upon Congress to assume its constitutionally-designated role and investigate and oversee the intelligence process in an open forum, closing hearings only when necessary given the nature of the inquiry. The legal community must educate the public on the important roles that all branches of government bring to our democratic system regardless of whether our nation is at peace or at war. It is also important to remind all elected officials and their constituents that a healthy democratic society cannot survive without respect for, and adherence to, the rule of law. Unification of the legal community on this matter is necessary so that our constitutional freedoms do not become victims of the fight against terrorism.

The Problem: The President has admitted that he authorized the National Security Agency (NSA) to engage in domestic surveillance of U.S. residents without first obtaining court-approved warrants, and that the NSA has engaged in such activity for the past four years. The President contends that his Administration has the authority to conduct foreign intelligence electronic surveillance without obtaining court orders. In support of this authority, he has cited the executive powers granted by the Constitution and the AUMF's grant of authority to use "all necessary and appropriate force" against Al Qaeda and its supporters.

After revelations of wiretapping abuses during the Nixon administration and a Senate committee's investigation of Executive branch surveillance procedures, FISA was enacted in 1978. FISA required, for the first time, a prior judicial warrant for all electronic surveillance for foreign intelligence or counterintelligence purposes in the U.S. in which communications of a "United States person" might be intercepted. The Patriot Act and the IAA amended FISA to expand the period for emergency electronic surveillance (without a court order) from 24 to 72 hours. Congress also reduced the standard for obtaining

a warrant from a showing that foreign intelligence gathering was the “primary purpose” to a showing that it was for a “significant purpose”.<sup>1</sup>

Despite the flexibility provided to the Administration by Congress, the President insists that he has unlimited power to order unlimited warrantless wiretapping of Americans with no judicial review. For the reasons set forth above, bar associations and legal organizations nationwide should join in this statement in support of ensuring that our national security is protected in a manner consistent with constitutional guarantees.

## **IMPACT STATEMENT**

This resolution does not affect any other laws.

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**RESPONSIBLE FLOOR DELEGATE:** Robin Yeager

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<sup>1</sup> For a more detailed analysis of the problem, see the ABA Task Force’s report in support of Resolution 302, which can be found online at [http://www.abanet.org/op/greco/memos/aba\\_house302-0206.pdf](http://www.abanet.org/op/greco/memos/aba_house302-0206.pdf).

**AMERICAN BAR ASSOCIATION****Adopted by the House of Delegates  
February 13, 2006**

RESOLVED, that the American Bar Association calls upon the President to abide by the limitations which the Constitution imposes on a president under our system of checks and balances and respect the essential roles of the Congress and the judicial branch in ensuring that our national security is protected in a manner consistent with constitutional guarantees;

FURTHER RESOLVED, that the American Bar Association opposes any further electronic surveillance inside the United States by any U.S. government agency for foreign intelligence purposes that does not comply with the provisions of the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 et seq. (FISA), and urges the President, if he believes that FISA is inadequate to safeguard national security, to seek appropriate amendments or new legislation rather than acting without explicit statutory authorization;

FURTHER RESOLVED, that the American Bar Association urges the Congress to affirm that the Authorization for Use of Military Force of September 18, 2001, Pub. L. No. 107-40, 115 Stat. 224 § 2(a) (2001) (AUMF), did not provide a statutory exception to the FISA requirements, and that any such exception can be authorized only through affirmative and explicit congressional action;

FURTHER RESOLVED, that the American Bar Association urges the Congress to conduct a thorough, comprehensive investigation to determine: (a) the nature and extent of electronic surveillance of U.S. persons conducted by any U.S. government agency for foreign intelligence purposes that does not comply with FISA; (b) what basis or bases were advanced (at the time it was initiated and subsequently) for the legality of such surveillance; (c) whether the Congress was properly informed of and consulted as to the surveillance; (d) the nature of the information obtained as a result of the surveillance and whether it was retained or shared with other agencies; and (e) whether this information was used in legal proceedings against any U.S. citizen.

FURTHER RESOLVED, that the American Bar Association urges the Congress to ensure that such proceedings are open to the public and conducted in a fashion that will provide a clear and credible account to the people of the United States, except to the extent the Congress determines that any portions of such proceedings must be closed to prevent the disclosure of classified or other protected information; and

FURTHER RESOLVED, that the American Bar Association urges the Congress to thoroughly review and make recommendations concerning the intelligence oversight process, and urges the President to ensure that the House and Senate are fully and currently informed of all intelligence operations as required by the National Security Act of 1947.<sup>2</sup>

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<sup>2</sup> Resolution 302 was sponsored by the ABA Task Force on Domestic Surveillance in the Fight Against Terrorism, the Association of the Bar of the City of New York Sections of Criminal Justice, Individual Rights and Responsibilities, International

