

REQUESTING THE PRESIDENT TO PROVIDE TO THE HOUSE OF REPRESENTATIVES CERTAIN DOCUMENTS IN HIS POSSESSION RELATING TO ELECTRONIC SURVEILLANCE WITHOUT SEARCH WARRANTS ON INDIVIDUALS IN THE UNITED STATES

MARCH 7, 2006.—Referred to the House Calendar and ordered to be printed

Mr. HOEKSTRA, from the Permanent Select Committee on Intelligence, submitted the following

ADVERSE REPORT

together with

ADDITIONAL VIEWS

[To accompany H. Res. 641]

The Permanent Select Committee on Intelligence, to whom was referred the resolution (H. Res. 641) requesting the President to provide to the House of Representatives certain documents in his possession relating to electronic surveillance without search warrants on individuals in the United States, having considered the same, report unfavorably thereon without amendment and recommend that the resolution not be agreed to.

COMMITTEE STATEMENT AND VIEWS

A. Purpose and summary

H. Res. 641 is a resolution of inquiry requesting the President to provide to the House of Representatives not later than 14 days after its adoption “all documents in the possession of the President, including telephone and electronic mail records, logs, calendars, minutes, memoranda, and advisory legal opinions on, and identities of all individuals subject to, electronic surveillance without search warrants by the National Security Agency within the United States since September 11, 2001.”

B. Background

A resolution of inquiry may be adopted by the House as a means of obtaining documents from the Executive Branch for investigative purposes. Clause 7 of rule XIII of the House of Representatives provides for specific procedures regarding resolutions of inquiry in the House, including that a motion to discharge a committee from its

consideration shall be privileged if not reported to the House within 14 legislative days after its introduction. H. Res. 641 was introduced on December 18, 2005. Including recess days, the Committee adversely reports H. Res. 641 to the House within 14 legislative days of its introduction in the House.

The resolution seeks documents that relate to “electronic surveillance without search warrants by the National Security Agency within the United States since September 11, 2001”. On December 17, 2005, the President disclosed that he had “authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations”¹ following the unauthorized disclosure of a sensitive and highly classified national security program to and by the news media.² The President also noted, “Leaders in Congress [had] been briefed more than a dozen times on this authorization and the activities conducted under it.”³

Subsequently, the Executive Branch has provided additional information with respect to the legal authority supporting the program in an unclassified format to the House, to the Committee and to the public. On December 19, 2005, Attorney General Alberto Gonzales and Principal Deputy Director of National Intelligence General Michael Hayden conducted a briefing for members of the news media. On December 22, 2005, Assistant Attorney General William Moschella provided a letter to the bipartisan leadership of the Congressional intelligence committees summarizing the legal authority supporting the NSA activities described by the President. On January 19, 2006, the Attorney General transmitted a more detailed legal analysis to bipartisan House and Senate leadership and leadership of the Congressional intelligence committees.

In addition, Attorney General Gonzales and Principal Deputy Director of National Intelligence Hayden conducted a classified briefing for the full membership of the Permanent Select Committee on Intelligence on February 8, 2006 with respect to certain operational details of the program and relevant legal authorities.

Under the precedents of the House, a Committee may choose to adversely report a resolution of inquiry when the Executive Branch has already provided information on the relevant subject matter or it concludes that the resolution would compete with other investigations that are regarded as more appropriate.⁴ Both considerations are relevant with respect to H. Res. 641. First, the Executive Branch conducted numerous briefings for Members of Congress on the program prior to its public disclosure and has subsequently briefed and answered questions from the full Permanent Select Committee on Intelligence with respect to operational details and legal authorities that are the subject of the Resolution of Inquiry. Second, the Committee has already undertaken a broader examination of issues relating to potential reform and modernization of the

¹“Radio Address by the President to the Nation,” December 17, 2005.

²The President also noted that “our enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country.” *Id.*

³*Id.*

⁴See generally Fisher, “House Resolutions of Inquiry,” Congressional Research Service Report for Congress RL31909 (May 12, 2003).

Foreign Intelligence Surveillance Act (“FISA”) that it believes will provide a fuller opportunity to consider the entire range of relevant issues rather than considering a single discrete program in isolation.

The Committee intends to go forward with multiple steps in its inquiry. First, the Chairman and Ranking Member have transmitted a letter to the Attorney General asking for clarification of a number of discrete issues relating to the current state of practice and procedure under FISA. The letter is not directed only to issues relating to the program described by the President, but more broadly at the everyday functioning of FISA as a whole.

Second, the Committee will conduct a classified briefing with officials from the Justice Department and the Federal Bureau of Investigation to allow members to directly ask questions about the FISA process and how it is operating in practice.

Third, the Chairman is working with the Executive Branch in an effort to arrange for additional members of the Committee to visit the National Security Agency to meet with personnel operating the program.

Fourth, the Committee expects to hold a public hearing on general issues relating to the FISA process and FISA modernization in the near future. There has been widespread misunderstanding and misinformation circulating about FISA. It is important that the public have an opportunity to understand, to the extent possible in an open session, what is myth and what is reality.

These will be comprehensive efforts to review not just issues relating to the program described by the President, but also equally or more pressing issues relating to FISA that may be hindering our nation’s ability to conduct foreign intelligence and effectively fight the war on terror.

The Committee also notes that the resolution would have requested the President to provide highly sensitive materials relating to intelligence sources and methods, including the identities of the specific targets of surveillance, to the House without restricting the information to the Permanent Select Committee on Intelligence or expressly permitting it to be submitted in a classified format. Information on specific intelligence targets is so sensitive that the Committee ordinarily does not receive or request it, even for routine operations.

Because the resolution would likely be counterproductive to the more comprehensive efforts underway to review these issues, the Committee adversely reports H. Res. 641 to the House.

HEARINGS

The Committee held no hearings on H. Res. 641.

COMMITTEE CONSIDERATION AND VOTES

On March 2, 2006, the Committee met in open session and ordered H. Res. 641 adversely reported, without amendment. The Committee took the following votes:

1. Ms. Harman offered an amendment in the nature of a substitute, which requested that the President provide to the House of Representatives “all legal advisory opinions and finished intelligence reports related to electronic surveillance conducted in the United States without a warrant by the National Security Agency

on or after September 11, 2001". It was not agreed to by a record vote of 8 ayes to 10 noes:

Voting aye: Ms. Harman, Mr. Reyes, Mr. Boswell, Mr. Cramer, Ms. Eshoo, Mr. Holt, Mr. Ruppertsberger, Mr. Tierney.

Voting no: Mr. Hoekstra (Chairman), Mr. LaHood, Mr. Everett, Ms. Wilson, Ms. Davis, Mr. Thornberry, Mr. McHugh, Mr. Tiahrt, Mr. Rogers, Mr. Renzi.

2. Mr. Hoekstra offered a motion to report H. Res. 641 adversely to the House, which was agreed to by voice vote.

SECTION-BY-SECTION ANALYSIS

The resolution requests the President to transmit to the House of Representatives not later than 14 days after its enactment all documents in his possession relating to "electronic surveillance without search warrants by the National Security Agency within the United States since September 11, 2001." The resolution would apply (but is not limited) to "telephone and electronic mail records, logs, calendars, minutes, memoranda, and advisory legal opinions on, and identities of all individuals subject to" such electronic surveillance.

The Committee adopted no amendments.

OVERSIGHT FINDINGS AND RECOMMENDATIONS

In accordance with clause 3(c)(1) of rule XIII of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the House of Representatives is inapplicable because this resolution does not provide new budgetary authority or increased tax expenditures.

GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c)(4) of rule XIII of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report.

UNFUNDED MANDATE STATEMENT

H. Res. 641 provides no federal mandates.

ADDITIONAL VIEWS

H. Res. 641, introduced by Representative Barbara Lee of California, would have required the Administration to provide Congress with documents relating to warrantless electronic surveillance of U.S. persons by the National Security Agency since September 11, 2001. In addition to seeking documents, the Resolution called for “identities of all individuals” subject to the surveillance.

With the consent of Representative Lee, Ranking Member Harman offered an amendment in the nature of a substitute to limit the request to “legal advisory opinions and finished intelligence products.”

We are disappointed that Committee Republicans voted to reject the Harman Substitute to the Lee Resolution. The Harman Substitute would have facilitated greater oversight over the President’s NSA Program. As we have repeatedly said, treatment should follow diagnosis. Before considering changes to the FISA process, the Committee must understand whether the current FISA process is inadequate. To date, the Committee has received no evidence that FISA is inadequate.

Contrary to the arguments set forth in this Report, the Harman Substitute to the Lee Resolution would have imposed very minimal burdens on the Administration and would not have risked exposure of any sensitive intelligence sources and methods. Resolutions of Inquiry have been used numerous times to obtain information regarding national security activities of the United States Government, and there is precedent for HPSCI retaining control over all classified records turned over to Congress under Resolutions of Inquiry. (See House Resolutions of Inquiry, CRS Study, May 12, 2003, p. 25).

At the mark-up, Chairman Hoekstra stated his intention to request "legal advisory opinions and finished intelligence products" from the Administration in a letter-request. If the Administration does not comply with the Committee's request for these documents, we strongly urge the Chairman to use the Committee's subpoena power to compel their production.

JANE HARMAN, *Ranking
Democrat.*

ALCEE L. HASTINGS.

SILVESTRE REYES.

LEONARD L. BOSWELL.

BUD CRAMER.

ANNA G. ESHOO.

RUSH HOLT.

C.A. DUTCH RUPPERSBERGER.

JOHN F. TIERNEY.

