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109TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 109–383

REQUESTING THE PRESIDENT AND DIRECTING THE ATTORNEY GENERAL TO TRANSMIT TO THE HOUSE OF REPRESENTATIVES NOT LATER THAN 14 DAYS AFTER THE DATE OF THE ADOPTION OF THIS RESOLUTION DOCUMENTS IN THE POSSESSION OF THOSE OFFICIALS RELATING TO THE AUTHORIZATION OF ELECTRONIC SURVEILLANCE OF CITIZENS OF THE UNITED STATES WITHOUT COURT APPROVED WARRANTS

MARCH 2, 2006.—Referred to the House Calendar and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

ADVERSE REPORT

together with

DISSENTING VIEWS

[To accompany H. Res. 644]

The Committee on the Judiciary, to whom was referred the resolution (H. Res. 644) requesting the President and directing the Attorney General to transmit to the House of Representatives not later than 14 days after the date of the adoption of this resolution documents in the possession of those officials relating to the authorization of electronic surveillance of citizens of the United States without court approved warrants, having considered the same, report unfavorably thereon without amendment and recommend that the resolution not be agreed to.

PURPOSE AND SUMMARY

House Resolution 644, introduced by Representative John Conyers (D–MI) on December 22, 2005, requests the President and directs the Attorney General to transmit to the House of Representatives, not later than 14 days after the date of adoption of this resolution, documents in the possession of those officials relating to the authorization of electronic surveillance of citizens of the United States without court approved warrants. The resolution then sets forth a list of nine types of documents that are requested.

BACKGROUND

House Resolution 644 is a resolution of inquiry. Under the rules and precedents of the House of Representatives, a resolution of in-

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quiry allows the House to request information from the President of the United States or to direct the head of one of the executive departments to provide such information. More specifically, according to Deschler's Precedents, it is a "simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific factual information in the possession of the executive branch. The practice is nearly as old as the Republic, and is based on principles of comity between the executive and legislative branches rather than on any specific provision of the Constitution that a Federal court may be called upon to enforce." [1]

A resolution of inquiry is privileged and thus may be considered at any time after it is properly reported or discharged from the committee to which it is referred.[2] Clause 7 of rule XIII of the Rules of the House of Representatives provides that if the committee to which the resolution is referred does not act on the resolution within 14 legislative days, a privileged motion to discharge that committee is accorded privileged consideration on the House floor. In calculating the days available for committee consideration, the day of introduction and the day of discharge are not counted.[3]

A committee has a number of choices in disposing of a resolution of inquiry. It may vote on the resolution without amendment, or it may amend it. It may report the resolution favorably, adversely, or with no recommendation. A committee that adversely reports a resolution of inquiry does not necessarily oppose the resolution under consideration. In the past, resolutions of inquiry have frequently been reported adversely for various reasons. Two common ones are that an administration is in substantial compliance with the request made by the resolution or that there is an ongoing competing investigation. There is also past precedent for a resolution of inquiry to be adversely reported because the nature of the information requested was highly sensitive.[4] Upon its introduction on December 22, 2005, H. Res. 644 was referred to the Committee on the Judiciary. On February 15, 2006 H.Res. 644 was ordered reported adversely by the Committee, which was within the 14 legislative day period.

House Resolution 644 directs the Attorney General to transmit to the House of Representatives documents related to opinions of the legality of the surveillance and documents that are of a highly sensitive nature. Furthermore, Congress has received and continues to receive information responsive to the request for information contained in the resolution.

The war on terror

Osama Bin Laden, the head of the terrorist organization al-Qaeda, declared war on the United States in 1996. America ignored that declaration until the morning of September 11, 2001, when members of the terrorist organization attacked the United States by crashing four hijacked civilian airliners into the World Trade Center, the Pentagon, and a Pennsylvania field, killing over 3,000

[1] 7 Deschler's Precedents of the House of Representatives, ch. 24, § 8.
[2] 7 Deschler's Precedents of the House of Representatives, ch. 24, § 8.
[3] William Holmes Brown, House Practice: A Guide to the Rules, Precedents and Procedures of the House 819 (2003).
[4] H.R. Rep. No. 1079, 92nd Cong., 2nd Sess., (1972).

people and injuring over 2,000. In response to this act of war by a terrorist organization—rather than a nation state—Congress passed the Authorization for Use of Military Force (AUMF) on September 14, 2001, which the President signed into law on September 18, 2001.[5]

The leak of the highly classified terrorist surveillance program (TSP)

On December 16, 2005, the New York Times reported that President Bush ordered the National Security Agency (NSA) to conduct warrantless wiretaps on calls placed or received in the United States, to or from a foreign country. One of the New York Times reporters who broke the story, James Risen, also included an account of the NSA program in a book already submitted for publication. When explaining the decision to delay publication of the story for nearly a year, New York Times executive Bill Keller stated after its publication that: "[I]n the course of subsequent reporting we satisfied ourselves that we could write about this program—withholding a number of technical details—in a way that would not expose any intelligence-gathering methods or capabilities that are not already on the public record." The date of publication coincided with the date upon which the Senate voted on a motion to end debate on H.R. 3199, the "USA PATRIOT Improvement and Reauthorization Act of 2005." The New York Times article has subsequently spurned a debate as to whether the President went beyond his Executive powers when he authorized the NSA Terrorist Surveillance Program (TSP).

Pending criminal investigation into the unauthorized disclosure investigation of the Terrorist Surveillance Program

On December 30, 2005, the Justice Department opened a criminal investigation into the unauthorized disclosure of the existence of this highly classified program. MSNBC.com reported that, "White House spokesman Trent Duffy said Justice undertook the action on its own, and the president was informed of it on Friday. 'The leaking of classified information is a serious issue. The fact is that al-Qaeda's playbook is not printed on Page One and when America's is, it has serious ramifications,' Duffy told reporters in Crawford, Texas, where Bush was spending the holidays."[6] Several additional reports confirm the existence of an ongoing criminal investigation into this matter.[7]

Documents and information pertaining to TSP already presented to Congress and to the public

H. Res. 644 requests internal documents that are related to a highly sensitive national security program. The following summary highlights efforts by the Department of Justice and the Administration to provide information about TSP to Congress and the public. These efforts include providing documents, conducting classified

[5] Pub. L. No. 107–40.

[6] Justice Dept. to probe leak of spy program, the Associated Press, Dec. 30, 2005, available at http://msnbc.msn.com/id/10651154/from/RL.1/.

[7] David Johnston, Officials interviews in widening inquiry into eavesdropping article, N.Y. Times, February 13, 2006. Dan Eggen, Eavesdropping Inquiry Begins Officials Question if Secret Material Leaked Illegally, the Washington Post, Dec. 31, 2005.

briefings, and presenting hearing testimony relating to these issues.

(1) December 17, 2005 Radio Address by the President[8]

The day following the publication of the New York Times story, the President gave a radio address and acknowledged the existence of the program. He stated: "To fight the war on terror, I am using authority vested in me by Congress, including the Joint Authorization for Use of Military Force, which passed overwhelmingly in the first week after September the 11th. I'm also using constitutional authority vested in me as Commander-in-Chief."[9] The President stated that the TSP began "[i]n the weeks following the terrorist attacks on our nation," when "[he] 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."[10]

The President explained that these intercepts were related to the war on terrorism and that "[b]efore we intercept these communications, the government must have information that establishes a clear link to these terrorist networks." He also explained that the program was a "highly classified program" and "crucial to our national security."[11]

He reminded the public that as the "9/11 Commission pointed out, it was clear that terrorists inside the United States were communicating with terrorists abroad before the September the 11th attacks, and the Commission criticized our nation's inability to uncover links between terrorists here at home and terrorists abroad. Two of the terrorist hijackers who flew a jet into the Pentagon, Nawaf al Hamzi and Khalid al Mihdhar, communicated while they were in the States to other members of al-Qaeda who were overseas. But we didn't know they were here, until it was too late."[12]

The President stated that "[t]he authorization [he] gave the National Security Agency after September the 11th helped address that problem in a way that is fully consistent with [his] constitutional responsibilities and authorities." He stated that "the activities [he] authorized are reviewed approximately every 45 days. Each review is based on a fresh intelligence assessment of terrorist threats to the continuity of our government and the threat of catastrophic damage to our homeland. During each assessment, previous activities under the authorization are reviewed. The review includes approval by our nation's top legal officials, including the Attorney General and the Counsel to the President. [He has] reauthorized this program more than 30 times since the September the 11th attacks, and [he] intend[s] to do so for as long as our nation faces a continuing threat from al-Qaeda and related groups."[13]

The President explained that a review process of the NSA's activities exists that includes thorough review by the Justice Department and NSA's top legal officials, including NSA's general counsel and inspector general. He also pointed out that the leadership and

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[8] Radio Address of the President to the Nation, Dec. 17, 2005, http://www.whitehouse.gov/news/releases/ 2005/12/20051217.html (last visited February 2, 2006)
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*

the Intelligence Committee chairs and ranking members "have been briefed more than a dozen times on this authorization and the activities conducted under it." [14]

The President concluded that "[t]he American people expect [him] to do everything in [his] power under our laws and Constitution to protect them and their civil liberties." He promised that that "is exactly what [he] will continue to do, so long as [he's] the President of the United States." [15]

(2) December 18, 2005 Broadcast Television Interview of the Vice President of the United States

On December 18, 2005, the Vice President discussed the TSP, and other issues in a network television interview. The Vice President explained the legal authority of the program and stated that it was "consistent with the President's constitutional authority as Commander-in-Chief. It's consistent with the resolution that passed by the Congress after 9/11. And it has been reviewed repeatedly by the Justice Department . . . ." [16]

(3) December 19, 2005 Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence

On December 19, 2005, the White House held a press briefing with Attorney General Alberto Gonzales and General Hayden, the Principal Deputy Director for National Intelligence, to brief the press and the public on the legal issues surrounding the authorization of the TSP. At the briefing, the Attorney General and General Hayden explained the legal bases of the program and provided details on unclassified aspects of the program. The Attorney General emphasized that the targeted phone calls were not domestic but rather "intercepts of contents of communications where one of the—one party to the communication is outside the United States." He went on to state:

> [W]e also believe the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity. Signals intelligence has been a fundamental aspect of waging war since the Civil War, where we intercepted telegraphs, obviously, during the world war, as we intercepted telegrams in and out of the United States. Signals intelligence is very important for the United States government to know what the enemy is doing, to know what the enemy is about to do. It is a fundamental incident of war, as Justice O'Connor talked about in the Hamdi decision. We believe that—and those two authorities exist to allow, permit the United States government to engage in this kind of surveillance.[17]

General Hayden added that the program "is less intrusive [than FISA]. It deals only with international calls. It is generally for far shorter periods of time. And it is not designed to collect reams of

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[14] *Id.*

[15] *Id.*

[16] Interview by ABC News with Richard Cheney, Vice President, United States (December 18, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051218–4.html.

[17] Alberto Gonzales, U.S. Attorney General, NSA Terrorist Surveillance Program, Press Briefing before the White House Press Corp (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219–1.html.

intelligence, but to detect and warn and prevent [future] attacks."[18]

(4) December 22, 2005 Department of Justice Letter to the Chairmen and Ranking Members of the House and Senate Intelligence Committees

The Department of Justice sent a letter to the Chairmen and Ranking Members of the House and Senate Committees on Intelligence on December 22, 2006, to provide "an additional brief summary of the legal authority supporting the NSA activities described by the President."[19] In summary, the letter states that "[u]nder Article II of the Constitution, including in his capacity as Commander-in-Chief, the President has the responsibility to protect the Nation from further attacks, and the Constitution gives him all necessary authority to fulfill that duty."[20] In the letter, the Attorney General further states that "this constitutional authority includes authority to order warrantless foreign intelligence surveillance within the United Sates, as all Federal appellate courts, including at least four circuits to have addressed the issue, have concluded."[21] The Attorney General also emphasized that the TSP is consistent with the Foreign Intelligence Surveillance Act because Congress provided authority in the Authorization of the Use of Military Force (Pub. L. No. 107–40) that "the President has the authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."[22]

(5) January 11, 2006, Presidential Discussion of the Global War on Terror at the Kentucky International Convention Center, Louisville, Kentucky

On January 11, 2006, the President participated in a discussion on the Global War on Terror at the Kentucky International Convention Center in Louisville, Kentucky at which he provided additional legal justification for the establishment of the TSP.[23]

(6) January 19, 2006 Department of Justice White Paper on Legal Authorities Supporting the Activities of the National Security Agency Described by the President

On January 19, 2006, the Department of Justice sent a 42-page legal analysis explaining the "legal authorities supporting the activities of the National Security Agency described by the President." Addressed to Senate Majority Leader Frist and signed by Attorney General Alberto Gonzales, the cover letter stated:

> As I have previously explained, these NSA activities are lawful in all respects. They represent a vital effort by the President to ensure that we have in place an early warn-

[18] General Michael Hayden, U.S. Principal Deputy Director for National Intelligence, NSA Terrorist Surveillance Program, Press Briefing before the White House Press Corp (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219–1.html.

[19] Letter from William A. Moschella, U.S. Assistant Attorney General, Department of Justice, to Chairmen Pete Hoekstra and Pat Roberts, Ranking Member Jane Harman and Vice Chairman John D. Rockefeller IV, House and Senate Intelligence Committees, available at http://www.epic.org/privacy/terrorism/fisa/nsaletter122205.pdf.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] A transcript of these remarks can be found at http://www.whitehouse.gov/news/releases/2006/01/20060111–7.html.

> ing system to detect and prevent another catastrophic terrorist attack on America. In the ongoing armed conflict with al-Qaeda and its allies, the President has the primary duty under the Constitution to protect the American people. The Constitution gives the President the full authority necessary to carry out that the solemn duty, and he has made clear that he will use all authority available to him, consistent with the law, to protect the Nation. The President's authority to approve these NSA activities is confirmed and supplemented by Congress in the Authorization for Use of Military Force (AUMF), enacted on September 18, 2001. As discussed in depth in the attached paper, the President's use of his constitutional authority, as supplemented by statute in the AUMF, is consistent with the Foreign Intelligence Surveillance Act and is also fully protective of the civil liberties guaranteed by the Fourth Amendment.[24]

(7) January 23, 2006 Press Conference by Former NSA Director General Hayden

On January 23, 2006, General Hayden held a press conference in which he provided unclassified details concerning the TSP. He emphasized that the TSP only intercepted suspected enemy electronic signals when there was "reason to believe that one or both communicants are affiliated with al-Qaeda."[25]

In explaining what NSA is not doing, General Hayden discussed the volume of misinformation in the public record concerning the NSA and stressed that the NSA is acutely aware of the balance between security and civil liberties. He stated that:

> The great urban legend out there then was something called 'Echelon,' and the false accusation that NSA was using its capabilities to advance American corporate interests: signals intelligence for General Motors, or something like that.
>
> You know, with these kinds of charges, the turf back then feels a bit familiar now. How could we prove a negative, that we weren't doing certain things, without revealing the appropriate things we were doing that kept America safe? You see, NSA had—NSA has—an existential problem. In order to protect American lives and liberties, it has to be two things: powerful in its capabilities and secretive in its methods. And we exist in a political culture that distrusts two things most of all: power and secrecy.
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> Modern communications didn't make this any easier. Gone were the days when signals of interest—that's what NSA calls the things that they want to copy—gone were the days when signals of interest went along some dedicated microwave link between Strategic Rocket Force's

[24] Letter from Alberto Gonzales, U.S. Attorney General, Department of Justice, to Senator Bill Frist, Majority Leader, U.S. Senate (January 19, 2006), available at http://permanent.access.gpo.gov/lps66493/ White%20Paper%20on%20NSA%20Legal%20Authorities.pdf.

[25] General Michael Hayden, U.S. Principal Deputy Director for National Intelligence, What American Intelligence and Especially the NSA Have Been Doing to Defend the Nation, Remarks before the National Press Club (January 23, 2006), available at http://www.dni.gov/release__letter__012306.html.

headquarters in Moscow and some ICBM in western Siberia.

By the late '90s, what NSA calls targeted communications—things like al-Qaeda communications—coexisted out there in a great global web with your phone calls and my e-mails. NSA needed the power to pick out the ones, and the discipline to leave the others alone. So, this question of security and liberty wasn't a new one for us in September of 2001. We've always had this question: How do we balance the legitimate need for foreign intelligence with our responsibility to protect individual privacy rights? It's a question drilled into every employee of NSA from day one, and it shapes every decision about how NSA operates.

September 11th didn't change that.[26]

(8) January 24, 2006 Remarks by Attorney General Gonzales at the Georgetown University Law Center Concerning the Legal Basis of the TSP

On January 24, 2006, the Attorney General publicly outlined the Administration's view of its legal authority to conduct wartime electronic surveillance:

Some contend that even if the President has constitutional authority to engage in the surveillance of our enemy in a time of war, that authority has been constrained by Congress with the passage in 1978 of the Foreign Intelligence Surveillance Act. Generally, FISA requires the government to obtain an order from a special FISA court before conducting electronic surveillance. It is clear from the legislative history of FISA that there were concerns among Members of Congress about the constitutionality of FISA itself.

For purposes of this discussion, because I cannot discuss operational details, I'm going to assume here that intercepts of al-Qaeda communications under the terrorist surveillance program fall within the definition of "electronic surveillance" in FISA.

The FISA Court of Review, the special court of appeals charged with hearing appeals of decisions by the FISA court, stated in 2002 that, quote, "[w]e take for granted that the President does have that [inherent] authority" and, "assuming that is so, FISA could not encroach on the President's constitutional power." We do not have to decide whether, when we are at war and there is a vital need for the terrorist surveillance program, FISA unconstitutionally encroaches—or places an unconstitutional constraint upon—the President's Article II powers. We can avoid that tough question because Congress gave the President the Force Resolution, and that statute removes any possible tension between what Congress said in 1978 in FISA and the President's constitutional authority today.

Let me explain by focusing on certain aspects of FISA that have attracted a lot of attention and generated a lot of confusion in the last few weeks.

[26] *Id.*

First, FISA, of course, allows Congress to respond to new threats through separate legislation. FISA bars persons from intentionally "engag[ing] . . . in electronic surveillance under color of law except as authorized by statute." For the reasons I have already discussed, the Force Resolution provides the relevant statutory authorization for the terrorist surveillance program. Hamdi makes it clear that the broad language in the Resolution can satisfy a requirement for specific statutory authorization set forth in another law.

Hamdi involved a statutory prohibition on all detention of U.S. citizens except as authorized "pursuant to an Act of Congress." Even though the detention of a U.S. citizen involves a deprivation of liberty, and even though the Force Resolution says nothing on its face about detention of U.S. citizens, a majority of the members of the Court nevertheless concluded that the Resolution satisfied the statutory requirement. The same is true, I submit, for the prohibition on warrantless electronic surveillance in FISA.

You may have heard about the provision of FISA that allows the President to conduct warrantless surveillance for 15 days following a declaration of war. That provision shows that Congress knew that warrantless surveillance would be essential in wartime. But no one could reasonably suggest that all such critical military surveillance in a time of war would end after only 15 days.

Instead, the legislative history of this provision makes it clear that Congress elected NOT TO DECIDE how surveillance might need to be conducted in the event of a particular armed conflict. Congress expected that it would revisit the issue in light of events and likely would enact a special authorization during that 15–day period. That is exactly what happened three days after the attacks of 9/11, when Congress passed the Force Resolution, permitting the President to exercise "all necessary and appropriate" incidents of military force.

Thus, it is simply not the case that Congress in 1978 anticipated all the ways that the President might need to act in times of armed conflict to protect the United States. FISA, by its own terms, was not intended to be the last word on these critical issues.

Second, some people have argued that, by their terms, Title III and FISA are the "exclusive means" for conducting electronic surveillance. It is true that the law says that Title III and FISA are "the exclusive means by which electronic surveillance . . . may be conducted." But, as I have said before, FISA itself says elsewhere that the government cannot engage in electronic surveillance "except as authorized by statute." It is noteworthy that, FISA did not say "the government cannot engage in electronic surveillance 'except as authorized by FISA and Title III.'" No, it said, except as authorized by statute—any statute. And, in this case, that other statute is the Force Resolution.

Even if some might think that's not the only way to read the statute, in accordance with long recognized canons of

construction, FISA must be interpreted in harmony with the Force Resolution to allow the President, as Commander in Chief during time of armed conflict, to take the actions necessary to protect the country from another catastrophic attack. So long as such an interpretation is "fairly possible," the Supreme Court has made clear that it must be adopted, in order to avoid the serious constitutional issues that would otherwise be raised.

Third, I keep hearing, "Why not FISA? Why didn't the President get orders from the FISA court approving these NSA intercepts of al-Qaeda communications?"

We have to remember that we're talking about a wartime foreign intelligence program. It is an "early warning system" with only one purpose: To detect and prevent the next attack on the United States from foreign agents hiding in our midst. It is imperative for national security that we can detect RELIABLY, IMMEDIATELY, and WITHOUT DELAY whenever communications associated with al-Qaeda enter or leave the United States. That may be the only way to alert us to the presence of an al-Qaeda agent in our country and to the existence of an unfolding plot.

Consistent with the wartime intelligence nature of this program, the optimal way to achieve the necessary speed and agility is to leave the decisions about particular intercepts to the judgment of professional intelligence officers, based on the best available intelligence information. They can make that call quickly. If, however, those same intelligence officers had to navigate through the FISA process for each of these intercepts, that would necessarily introduce a significant factor of DELAY, and there would be critical holes in our early warning system.

Some have pointed to the provision in FISA that allows for so-called "emergency authorizations" of surveillance for 72 hours without a court order. There's a serious misconception about these emergency authorizations. People should know that we do not approve emergency authorizations without knowing that we will receive court approval within 72 hours. FISA requires the Attorney General to determine IN ADVANCE that a FISA application for that particular intercept will be fully supported and will be approved by the court before an emergency authorization may be granted. That review process can take precious time.

Thus, to initiate surveillance under a FISA emergency authorization, it is not enough to rely on the best judgment of our intelligence officers alone. Those intelligence officers would have to get the sign-off of lawyers at the NSA that all provisions of FISA have been satisfied, then lawyers in the Department of Justice would have to be similarly satisfied, and finally as Attorney General, I would have to be satisfied that the search meets the requirements of FISA. And we would have to be prepared to follow up with a full FISA application within the 72 hours.

> A typical FISA application involves a substantial process in its own right: the work of several lawyers; the preparation of a legal brief and supporting declarations; the approval of a Cabinet-level officer; a certification from the National Security Adviser, the Director of the FBI, or another designated Senate-confirmed officer; and, finally, of course, the approval of an Article III judge.
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> We all agree that there should be appropriate checks and balances on our branches of government. The FISA process makes perfect sense in almost all cases of foreign intelligence monitoring in the United States. Although technology has changed dramatically since FISA was enacted, FISA remains a vital tool in the War on Terror, and one that we are using to its fullest and will continue to use against al-Qaeda and other foreign threats. But as the President has explained, the terrorist surveillance program operated by the NSA requires the maximum in speed and agility, since even a very short delay may make the difference between success and failure in preventing the next attack. And we cannot afford to fail.[27]

(9) January 25, 2006 Presidential Visit and Speech at the National Security Agency

In a speech delivered during a visit to the National Security Agency on January 25, 2006, the President stated " . . . I authorized a terrorist surveillance program to detect and intercept al-Qaeda communications involving someone here in the United States. This is a targeted program to intercept communications in which intelligence professionals have reason to believe that at least one person is a member or agent of al-Qaeda or a related terrorist organization. The program applies only to international communications. In other words, one end of the communication must be outside the United States."[28]

He went on to explain:

> We know that two of the hijackers who struck the Pentagon were inside the United States communicating with al-Qaeda operatives overseas. But we didn't realize they were here plotting the attack until it was too late.
>
> Here's what General Mike Hayden said—he was the former director here at NSA. He's now the Deputy Director of the National Intelligence—Deputy Director of National Intelligence—and here's what he said earlier this week: "Had this program been in effect prior to 9/11, it is my professional judgment that we would have detected some of the 9/11 al-Qaeda operatives in the United States, and we would have identified them as such."
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> The 9/11 Commission made clear, in this era of new dangers we must be able to connect the dots before the terrorists strike so we can stop new attacks. And this NSA pro-

[27] Alberto Gonzales, U.S. Attorney General, Department of Justice, Remarks at the Georgetown University Law Center (January 24, 2006) available at http://www.usdoj.gov/ag/speeches/2006/ag_speech_0601241.html.

[28] George W. Bush, President of the United States, Remarks at the National Security Agency (January 25, 2006), available at http://www.whitehouse.gov/news/releases/2006/01/20060125–1.html.

> gram is doing just that. General Hayden has confirmed that America has gained information from this program that would not otherwise have been available. This information has helped prevent attacks and save American lives. This terrorist surveillance program includes multiple safeguards to protect civil liberties, and it is fully consistent with our nation's laws and Constitution. Federal courts have consistently ruled that a President has authority under the Constitution to conduct foreign intelligence surveillance against our enemies.[29]

(10) January 26, 2006 Department of Justice Briefing to the Senate Judiciary Committee

The Department of Justice provided the Senate Judiciary Committee a briefing prior to the scheduled February 6, 2006 hearing.

(11) February 1, 2006 Department of Justice briefing to the Senate Select Committee on Intelligence

On February 1, 2006, the Administration provided a classified briefing to the Senate Select Committee on Intelligence.

(12) February 3, 2006 Department of Justice response to January 24, 2006 Letter from Senate Judiciary Chairman Arlen Specter

On January 24, 2006, Senator Specter, Chairman of the Senate Committee on the Judiciary, sent a letter to the Department of Justice that contained 15 questions in advance of the panel's February 6, 2006, hearing requesting the Department to explain the legal authority for the program. The Attorney General responded in writing on February 3, 2006, answering each question.

(13) February 3, 2006 Department of Justice Response to January 24, 2006 Letter from Senate Judiciary Democrat Members

On January 27, 2006, Democratic Members of the Senate Judiciary Committee sent a letter to the Department of Justice regarding the TSP. On February 3, 2006, the Department of Justice sent a letter notifying the Senators that the Department had received the letter and was in the process of responding.

(14) February 3, 2006 Department of Justice Response to January 30, 2006 Letter from Senator Feinstein

On January 30, 2006, Senator Feinstein sent the Department of Justice a letter regarding the TSP. On February 3, 2006, the Department of Justice sent a letter notifying the Senator that the Department was working on a response.

(15) February 3, 2006 Department of Justice response to January 30, 2006 Letter from Senator Feingold

On January 30, 2006, Senator Feingold sent a letter to the Department of Justice about the TSP. On February 3, 2006, the Department of Justice responded to the Senator's letter notifying the Senator that the Department was working on a response.

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[29] *Id.*

(16) February 3, 2006 Department of Justice Response to January 31, 2006 Letter from Senator DeWine

On January 31, 2006, Senator DeWine sent a letter questioning the Department of Justice about the TSP. On February 3, 2006, the Department of Justice responded to Senator DeWine notifying the Senator that the Department was working on a response.

(17) February 6, 2006 Senate Judiciary Hearing: "Wartime Executive Power and the NSA's Surveillance"

The Attorney General testified before the Senate Judiciary Committee on February 6, 2006 from 9:30 a.m. to shortly after 5:30 p.m. The Attorney General provided detailed information pertaining to the legal authority and scope of the program.

(18) February 8, 2006 hearing before the House Permanent Select Committee on Intelligence

On February 8, 2006, Attorney General Gonzales and General Hayden testified in a closed classified hearing before the House Permanent Select Committee on Intelligence answering questions about the TSP.

(19) February 8, 2006 Departments of Justice and Defense Briefing to the House Armed Services Committee

On February 8, 2006, the Departments of Justice and Defense presented a classified briefing to the House Committee on Armed Services regarding the National Security Agency Terrorism Surveillance Program.

(20) February 9, 2006 Hearing Before the Senate Select Committee on Intelligence

On February 9, 2006, Attorney General Gonzales and former NSA Director General Hayden testified in a closed classified hearing before the Senate Select Committee on Intelligence answering questions about the National Security Agency Terrorism Surveillance Program.

(21) February 9, 2006 Department of Justice Response to the February 8, 2006 Letter from House Judiciary Committee Chairman F. James Sensenbrenner, Jr.

On February 8, 2006, Judiciary Committee Chairman Sensenbrenner, Jr., sent a 14–page letter to the Department of Justice with 51 questions regarding the legal authority, the review process, and scope of the TSP. On February 9, 2006, the Department of Justice sent a letter notifying the Chairman that the Department had received the letter and was in the process of answering the questions.

(22) February 13, 2006 Department of Justice Briefing to the House Committees on Judiciary and Appropriations

On February 13, 2006, the Department of Justice presented a briefing to the House Committees on Judiciary and Appropriations on the legal authority of the program.

Sensitive documents requested

The United States is engaged in a war against terrorism and this resolution calls for integral information, much of which is of a highly sensitive and classified nature.

As the Weapons of Mass Destruction Commission explained as it discussed the threats from other countries: ". . . for several reasons, penetrating these targets has also become more difficult than ever before. For example, authorized and unauthorized disclosures of U.S. sources and methods have significantly impaired the effectiveness of our collection systems. Put simply, our adversaries have learned much about what we can see and hear, and have predictably taken steps to thwart our efforts." [30]

Echoing this concern, on a February 12, 2006 television appearance, Representative Hoekstra, Chairman of the House Intelligence Committee stated: "Does anyone really believe that after 50 days of having the program on the front page of our newspapers, across talk shows across America, that al-Qaeda has not changed the way that it communicates?" [31]

CONCLUSION

The Committee is reporting this resolution adversely for several reasons. First, as the Committee on Armed Services concluded in H.R. Rep. No. 92–1003, because of the highly sensitive nature of the information requested, the public revelation of such information would not be compatible with national security interests. The United States is at war against a diffuse and shifting international terrorist threat and the information requested is directly related to a classified program aimed at preventing future terrorist attacks. The information requested concerns signals intelligence and communications surveillance upon al-Qaeda. The disclosure of this information could disrupt the efforts of our military and Intelligence Community to prevent another attack upon the United States. While this resolution contains language intended to protect classified information, past disclosures have led to leaks of valuable information. In addition, the Committee is concerned that even unclassified briefings have aided the country's enemies as the Administration has been required to explain in an accessible public forum strategies and operational details of operations aimed at preventing terrorist attacks. Furthermore, the Administration has already demonstrated a willingness to provide information sought by the resolution. Therefore, the Committee is following the precedents established in H.R. Rep. Nos. 109–230, 108–658, and 92–1003, which concluded that the sensitive nature of the information requested was reason for adversely reporting a resolution of inquiry.

Second, H. Res. 644 has the potential to jeopardize the ongoing criminal investigation of the leak. Due to the classified nature of the NSA program, the Department of Justice has opened a criminal investigation of the leak of the program to the New York Times. A competing investigation is a common reason that committees have opposed resolutions of inquiry in the past. This Committee

[30] WMD Commission p. 354 citing National Intelligence Council (NIC), Title Classified (NIE 98–04) (1998–99).

[31] Meet the Press Interview with Pete Hoekstra, House of Representatives Committee on Intelligence Chairman (Feb. 12, 2006), available at http://www.msnbc.msn.com/id/1127264/.

has previously reported resolutions of inquiry adversely for this very reason. On July 29, 2005, this Committee adversely reported House Resolution 420, in part, due to an ongoing grand jury investigation.[32] On September 7, 2004, the Committee adversely reported House Resolution 700, as this resolution of inquiry requested documents related to several ongoing investigations, among other things.[33] On February 27, 2004, this Committee adversely reported House Resolution 499,[34] a resolution of inquiry, due to an ongoing grand jury investigation and, on July 17, 2003, adversely reported House Resolution 287,[35] a resolution of inquiry, due to an ongoing competing investigation of the Inspector General of the Department of Justice. The Committee has also reported a resolution of inquiry adversely to avoid jeopardizing a competing investigation into the Abscam case.[36]

Finally, the Administration has substantially complied with information requested thereby diminishing the need to risk the disclosure of national security classified information. Congress has and continues to receive responsive information pertinent to the information requested in H. Res. 644. Prior to the New York Times article, the Administration had provided classified briefings to Members of Congress throughout the course of the program's implementation. After the leak of the program, the Department of Justice sent a white paper to Congress detailing the legal authority for the President to establish the program. Furthermore, the Administration has provided testimony in open and closed hearings to Congress explaining the legal authority for the program, as well as classified and unclassified briefings regarding the program, its scope, and the Administration's authority. In addition, the Administration has held public forums and press conferences to inform the public about the TSP. Finally, the Administration has answered and is still answering several letters sent by various Members of Congress. These documents, speeches, testimony, and press conferences have detailed the Administration's legal reasoning for the President to authorize the TSP.

Accordingly, because the resolution could jeopardize national security and an ongoing criminal investigation; and because the Administration has substantially complied with the intent of the resolution, the Committee reported H. Res. 644 adversely.

HEARINGS

No hearings were held in the Committee on the Judiciary on H. Res. 644.

COMMITTEE CONSIDERATION

On February 15, 2006, the Committee met in open session and adversely reported the resolution H. Res. 644 by voice vote, a quorum being present.

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[32] H.R. Rept. 109–230, 109th Cong., 1st Sess. (2005).
[33] H.R. Rept. 108–658, 108th Cong., 2nd Sess. (2004).
[34] H.R. Rept. 108–413, Part 3, 108th Cong., 2nd Sess. (2004).
[35] H.R. Rept. 108–215, 108th Cong., 1st Sess. (2004).
[36] H.R. Rept. 96–778, 96th Cong., 2nd Sess. (1980).

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that there were no recorded votes during the Committee consideration of H. Res. 644.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules 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 Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

COMMITTEE COST ESTIMATE

In compliance with clause 3(d)(2) of rule XIII of the Rules of the House of Representatives, the Committee estimates the costs of implementing the resolution would be minimal. The Congressional Budget Office did not provide a cost estimate for the resolution.

PERFORMANCE GOALS AND OBJECTIVES

H. Res. 644 does not authorize funding. Therefore, clause 3(c)(4) of rule XIII of the Rules of the House of Representatives is inapplicable.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the rule does not apply because H. Res. 644 is not a bill or joint resolution that may be enacted into law.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The Resolution requests the President and directs the Attorney General to transmit to the House of Representatives, not later than 14 days after the date of adoption of this resolution, documents in the possession of those officials relating to the authorization of electronic surveillance of citizens of the United States without court approved warrants. The resolution then sets forth a list of nine types of documents that are requested.

CHANGES IN EXISTING LAW MADE BY THE RESOLUTION, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, the Committee notes that H. Res. 644 makes no changes to existing law.

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, FEBRUARY 16, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:06 a.m., in Room 2141, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr., (Chairman of the Committee) presiding.

[Intervening business.]

Chairman SENSENBRENNER. Pursuant to notice, I now call up House Resolution 644, Requesting the President and directing the Attorney General to transmit to the House of Representatives not later than 14 days after the date of the adoption of this resolution documents in the possession of those officials relating to the authorization of electronic surveillance of citizens of the United States with court approved warrants, for purposes of markup and move that it be reported adversely to the House.

Without objection, the resolution will be considered as read and open for amendment at any point.

[The resolution, H. Res. 644, follows:]

IV

109TH CONGRESS
1ST SESSION

H. RES. 644

Requesting the President and directing the Attorney General to transmit to the House of Representatives not later than 14 days after the date of the adoption of this resolution documents in the possession of those officials relating to the authorization of electronic surveillance of citizens of the United States without court approved warrants.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 22, 2005

MS. SLAUGHTER submitted the following resolution; which was referred to the Committee on the Judiciary

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RESOLUTION

Requesting the President and directing the Attorney General to transmit to the House of Representatives not later than 14 days after the date of the adoption of this resolution documents in the possession of those officials relating to the authorization of electronic surveillance of citizens of the United States without court approved warrants.

1 *Resolved*, That the President is requested and the At-
2 torney General is directed to transmit to the House of
3 Representatives not later than 14 days after the date of
4 the adoption of this resolution all documents in the posses-
5 sion of the President and the Attorney General relating

to the authorization of electronic surveillance of United States persons (as such terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801)) conducted without warrants approved by a court of the United States and any instructions for handling such documents, including—

(1) all records setting forth or discussing policies, procedures, or guidelines regarding the authorization by the President or other officials of the Federal Government of electronic surveillance of United States persons without court approved warrants;

(2) all records pertaining to the Constitutional prohibition on unreasonable searches as it relates to the authority to conduct electronic surveillance of United States persons without a court approved warrant;

(3) all records pertaining to the authority to conduct electronic surveillance of United States persons without court approved warrants under the Foreign Intelligence Surveillance Act of 1978;

(4) all records relating to the authorization of electronic surveillance of United States persons by an official of the Federal Government other than the President without a court approved warrant;

(5) all records of communication between the President or other officials of the Federal Government and Congress, or a member or committee of Congress, pertaining to the authorization of electronic surveillance of United States persons without court approved warrants;

(6) all records indicating or discussing the number of United States persons for which electronic surveillance was authorized without a court approved warrant;

(7) all records indicating or discussing the number of citizens of the United States for which electronic surveillance was authorized without a court approved warrant;

(8) all records indicating or discussing the budget or cost of carrying out electronic surveillance of United States persons without court approved warrants; and

(9) all records indicating or discussing the number of staff involved in the authorization or execution of electronic surveillance of United States persons without court approved warrants.

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Chairman SENSENBRENNER. The Chair recognizes himself for a very quick 5 minutes to explain the resolution.

Many of the arguments that have been given both pro and con with the previous resolution apply to this resolution. However, I would note that unlike the previous resolution, that at least attempted to provide some protection for national security information, H. Res. 644 contains no safeguards that would protect the classified information requested. For that reason and for all of the other reasons, I would urge approval of the motion to report adversely.

I yield back the balance of my time and recognize the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Michigan.

Mr. CONYERS. Mr. Chairman, I concur that to go into hearings on this matter would be duplicative and, for reasons of my own, I urge that we set aside the discussion to the greatest extent possible. I call upon my colleagues to join with me in this consideration.

I yield back the balance of my time.

Chairman SENSENBRENNER. Are there any——

Mr. WATT. Would the gentleman yield? Ranking Member?

Mr. CONYERS. Of course.

Mr. WATT. Is the gentleman recommending one way or another on how we should vote on this, or is he just recommending that we not speak on it?

Mr. CONYERS. I am recommending that we do not speak on this, but it is my intention to have—that this be disposed of by voice vote and therefore that there may not be a record therefrom.

Chairman SENSENBRENNER. Without objection, Members may place opening statements in the record at this point.

Are there amendments——

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina.

Mr. WATT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Just long enough to say that I liked the earlier resolution a lot better, but we've got to get these records. It seems to me that if we had passed the other resolution, there would be a whole different discussion. No discussion, perhaps, wouldn't even be any necessity to take this up. But it seems to me we need the records in the House of Representatives to do our responsibilities, and we can clean up this resolution after it passes out of here or amended it after it passes out of here. But we need a resolution that gets these documents to the House of Representatives for us to exercise our responsibility if we're going to do it. And for that reason, I intend to vote for this resolution despite its shortcomings.

Ms. JACKSON LEE. Would the gentleman yield?

Mr. WATT. Yes.

Ms. JACKSON LEE. May I just associate myself with the distinguished gentleman from North Carolina. I think all of us have focused on the importance of oversight. I, too, believe 643 stands as a very strong resolution, but 644 requires our attention, one, as I indicated before, and I hope subsequently to add these materials to

the record, but in any event, the question of inherent powers is so crucial as relates to domestic spying, which is the question that we're asking today, and the complete ignoring of FISA and established statutory law that's been reviewed by the Supreme Court, that I would also suggest that this is a resolution that deserves our consideration. I will be voting for it.

Mr. WATT. Reclaiming my time, let me just be clear. If we won't exercise the responsibility in this Committee, the Judiciary Committee, as the prior resolution says, I think that's the appropriate place to do it, and with the protections that were provided in the prior resolution. But in the absence of our willingness to do it responsibly in this Committee, where it should be done, these documents ought to come to the House of Representatives so somebody who has the guts will do it.

Mr. DELAHUNT. Would the gentleman yield?

Mr. WATT. Mr. Delahunt.

Mr. DELAHUNT. Yes, I just wanted to make an observation that I think it's remarkable that what we have seen here today occur. For conservatives to put their trust in the executive branch and not to verify is a remarkable watershed in the conservative movement. And I guess the last member of the genuine conservative movement in this country is sitting two down from my right. But I just find it absolutely incredible that we come down to this, where Republicans say, okay, to Big Government, we'll trust you, and we won't even verify.

And with that, I yield back.

Mr. WEINER. Mr. Chairman?

Mr. WATT. I yield to Mr. Weiner.

Mr. WEINER. Just to try to clarify the record here, if I can just ask the Chairman to yield to a question.

Is there a commitment on your part to have hearings on this particular issue, or only to have the Attorney General come in as part of the due course of oversight? Are we going to have hearings dedicated to this question, Mr. Chairman?

Chairman SENSENBRENNER. The time belongs to the gentleman from North Carolina.

Mr. WATT. I yield to the Chairman.

Chairman SENSENBRENNER. The Attorney General will come in and he will testify and answer questions on whatever he wishes to testify on and whichever questions the Members wish to ask him on. I would expect, if I'm listening properly, that most of the questions that will be directed to him will be on this issue.

Mr. WEINER. No, Mr. Chairman, I think you misunderstood my question. My question was, as the Chairman are you committed to convening a hearing on this particular subject? It does seem to be——

Chairman SENSENBRENNER. You know, the answer to the question is no because I don't know if I can get the Attorney General more than once.

Mr. WEINER. Well, let me ask you, if I can just continue. Is there a commitment to have a hearing on this subject, and if the Attorney General says to the Judiciary Committee take a hike, I'm not going to come and answer any more questions or I'm not going to come in on this subject, that we would then get some other views?

I mean, if our concern is we're not going to schedule a hearing because the agency that we oversee——

Chairman SENSENBRENNER. If the gentleman from North Carolina will yield——

Mr. WATT. I will.

Chairman SENSENBRENNER. The Chair is not in a position to answer that question until we see what response comes on or before the 2nd of March to the 51 questions that I have posed to the Attorney General. As the gentleman knows, when the former Attorney General tried to evade the oversight questions that Mr. Conyers and I asked on the PATRIOT Act——

Mr. WATT. I ask unanimous consent for 1 additional minute.

Chairman SENSENBRENNER. Without objection—you know, we told him to re-do it until the questions were answered, and we finally got the answer. Now, I did have to trip the subpoena in the interim. But I want to get the answers to these questions. You know I'm kind of a tiger on that, but give me a break.

Mr. WEINER. Mr. Chairman, yeah, but you're having a pussycat moment here. [Laughter.]

The question is——

Chairman SENSENBRENNER. If the gentleman will yield, tigers are pussycats, too.

Mr. WATT. I ask unanimous consent for 1 additional minute and yield to the Chairman and then to Mr. Weiner.

Mr. WEINER. No, what I'm trying to—first of all, I can't imagine that, just given what the Attorney General's answer has been to questions up to now, that we're going to be completely, 100 percent satisfied. I can't imagine he's going to solve, in the context of this, why not? What is the downside? And I haven't heard it from my colleagues there; maybe you can tell me. What is the downside of saying we're going to have a hearing in X amount of days, we're going to address these things, we're going to get the Attorney General, we're going to have a panel of people on all sides.

Chairman SENSENBRENNER. Will the gentleman from North Carolina yield?

Mr. WATT. Yes, sir, I will.

Chairman SENSENBRENNER. You know, I think that taking a case to trial without discovery might be malpractice, and we're going to be doing the discovery first.

Mr. WEINER. Mr. Chairman, I'm not saying don't do the discovery. I'm not saying don't get the answer to the 51 questions. I'm not saying don't do that. I'm saying that is there a commitment at the very least on your part to have hearings on——

Chairman SENSENBRENNER. Well, if the gentleman will yield——

Mr. WEINER. Sure.

Chairman SENSENBRENNER. —I've answered that question. And that is, is that the AG will be up here, it will not be a specified hearing. On the other hand, you know, I'm going to be pretty darned insistent that there be answers that are relevant, in point, and truthful to the 51 questions that have been posed. And if it takes the Justice Department several tries to get the answer down, we might not like what it is, but at least it will be responsive to the question. So be it. And that's what Mr. Conyers and I did on the PATRIOT Act and that's what I intend to do on this letter, too.

Mr. WEINER. Well, Mr. Chairman, as grateful as I am on behalf of the Committee for extending those 51 questions, that is simply not a substitute for good oversight hearings.

I yield back.

Mr. WATT. I ask unanimous consent for 1 additional minute and yield to Mr. Conyers.

Mr. CONYERS. Mr. Chairman, I just have to insist upon the point made by the gentleman from New York. This subject matter requires hearings on the subject matter. To bring the Attorney General to this Committee to talk about all of the matters under his jurisdiction would be absolutely insufficient.

And I thank the gentleman for yielding.

Mr. WATT. Can I just reclaim my time long enough to say that both of these resolutions, in my opinion, really deal with the discovery stage as much as the 51 questions deal with the discovery stage. We need the documents to have an informed hearing, in my opinion. That's part of the discovery phase, if you're putting it in trial-context terms. To be able to exercise our responsibility in a responsible way, we need to know what the Administration has done. And both of these resolutions, the earlier one really more than this one is directed at that.

I yield back.

Chairman SENSENBRENNER. The gentleman's time has expired. Are there amendments?

Ms. WATERS. Yes. Yes.

Chairman SENSENBRENNER. Does the gentlewoman from California have an amendment?

Ms. WATERS. No amendment. I move to strike the last word.

Chairman SENSENBRENNER. For what purpose——

Mr. GOHMERT. I was going to move to strike the last word also.

Chairman SENSENBRENNER. The gentleman from Texas, Mr. Gohmert, is recognized for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman.

With all the metaphorical speaking about trials, you're back in my bailiwick, my days as a judge and chief justice. And I want a hearing on this, but what we're talking about here in these two requests, a judge would look at these requests as discovery requests and say they're overly broad, and that would allow Respondent to object that they're overly broad, break it down more carefully.

So the way I'm viewing this and the reason I voted aye on the first one and will vote with the Chairman on this is that those 51 answers will allow us to determine more succinctly what exactly we want to request. Because I think the Administration could object this is covering areas you may not have a right to get into. And once it's broken down and we see what they have, we get the answers to the 51, then we can go back and make additional requests, refine those requests more directly so that we don't get bogged down in a year or two of litigation or dispute between us and the Administration over what we have a right to see.

Mr. WATT. Would the gentleman yield just for a second?

Mr. GOHMERT. We do want a trial, and this judge is going to support getting to the metaphorical trial, but first we do need to do proper discovery in proper form so we don't shoot for the end result.

Yes, I will yield.

Mr. WATT. I thank the gentleman for yielding. I think we've taken this metaphorical trial further than it really needs to be and further than is appropriate. The great thing about the legislative body is that in a trial i never asked a question that I didn't already know the answer to. This time, I need the facts regardless of what the answer is, regardless of how it cuts, whose ox it gores—I don't care. It's our responsibility to the public to ask the questions regardless of whether they are objected to or not. So our responsibility is really way beyond a trial. We're not trying anybody. We're just trying to get the facts.

Mr. GOHMERT. Would the gentleman yield back? I agree with you, but by asking first questions first, then we can refine our questions and hopefully avoid any kind of dispute over what is reachable by this body in its oversight obligations.

Mr. DELAHUNT. Would my friend yield for a minute.

Mr. GOHMERT. Yes, I yield to the gentleman from Massachusetts.

Mr. DELAHUNT. You know, I think what the gentleman from New York was driving towards as far as multiple hearings are concerned, let's not just focus in on the response of the Attorney General, but there should be a full exposition, if you will, of all of the potential constitutionals that could be implicated in this issue. We hear from Mr. Lungren about inherent powers of the executive. We talk about FISA. We talk about these relationships. We can have hearings on that and listen to experts while we are waiting, if you will, for the conclusion of the discovery phase. I just think this is too important an issue constitutionally to not address it aggressively.

Mr. GOHMERT. Reclaiming my time. I agree with you, but if you have the hearings before you get the initial answers, then you're not going to be able to key in and ask the right questions in sufficient specificity. So for that reason, I will support the Chairman——

Mr. DELAHUNT. Could I ask the gentleman to yield on that point?

Mr. GOHMERT. Yes.

Mr. DELAHUNT. I'm not even saying we should not wait for this. I don't think anyone is suggesting don't get all the information we can. But it seems to me I can't think of an issue that has presented itself in recent memory that hasn't more lent itself to classic oversight of this Committee, whether you're conservative on this issue, like I am, or a raving liberal, like many of you guys apparently are, trusting Government at every turn.

All I'm asking from the Chairman is say the easiest thing, say Of course we're going to have hearings on this, we're the Judiciary Committee. This is an issue that people are talking about in coffee shops all around the country, that talks about the very questions of balance of power that many of you have said you're concerned about. Just say yes—I mean, sometimes I think you're just reflexively saying no to us just because we raise it. But this is an example of what we should be doing here, is saying Of course, Congressmen, we're going to have hearings on this. This is such an important issue. So many people care about it.

And I disagree with some of my colleagues. As I said in my remarks earlier, I want to do more spying, I want to increase our intelligence budget, I want to have the ability to track these things

as best we can. And if FISA is somehow falling down, I'm going to be one of the people who's going to vote to fix it up.

Why not have the hearings? And no one, not a single person has said on that side why not have hearings. Even you seem to imply you want to have hearings.

Mr. GOHMERT. I just want to do it in the proper order, and I think——

Chairman SENSENBRENNER. The time of the gentleman has expired. Are there amendments?

Ms. WATERS. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman from California is recognized for 5 minutes.

Ms. WATERS. Thank you very much.

Now, first of all, I understand that most of the Members of this Committee have not seen the 51 questions. They just put them before me and I tried to scan them, as they scan our conversations that we're having all over the country, and I note that those things that I'm interested in are not even covered in the 51 questions.

For example, I talked about this Echelon Program. Do you realize, Members, that not only is your country spying on you in this program, they allow Canada, Great Britain, Australia, and New Zealand to spy on you in this program. When they scan and they hear the key words, the system enables one country to eavesdrop on communications within another country without, they say, violating its privacy laws and, at the same time, transmit to that country's intelligence agencies messages that are of interest to them. One does not have to speculate long or engage in much imagination to see how synergistic FISA and Echelon can be. This document says.

So I want to know more about this program, where we're being spied on not only by our own country but by other countries, and I want to know about these telecommunications companies who get a call from God knows who and then they allow this technology to be used to spy and place citizens under surveillance without any warrants, without anything. All of these companies—AT&T, MCI, Sprint, all of them cooperate with warrantless surveillance, the executives say. You've seen this information. My God, how scared can you be? How can anybody whip you in line to such a degree that you would not want to protect the Constitution of the United States?

I want to tell you, the President of the United States, my mother and nobody else could put the fear of God in me to the point where I wouldn't do my job on this issue. My God, how can you look yourselves in the eye at night knowing that it has been exposed that the Constitution is being violated, that the President is breaking the law, that the FISA Court is being ignored, and not do something about it? I mean, what do you come to work for? Why are you elected to office?

This is outrageous and ridiculous, and I know that you don't want to hear it, but we're going to have to talk about it. I hope that every Member on this side of the aisle will go to the floor ad nauseam until we force you to get the courage to do what you need to be doing and not allow anybody to make you shut up on this issue. This is outrageous.

And Mr. Chairman, no, your 51 questions are not good enough. We did not participate at all in helping to organize these. You disrespected us totally. You not only did not ask us to participate—and I don't know about the Members who are sitting over there with those stupid grins on their faces; you look absolutely spineless on this issue and you ought to be ashamed.

I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Michigan.

Mr. CONYERS. Mr. Chairman, I would like to recommend that unless there are other speakers, that we move to a final vote on this. I will indicate that I am going to support the gentlewoman from New York's resolution and that we end our debate on this matter.

Chairman SENSENBRENNER. Are there amendments? If there are no amendments, a reporting quorum is present. The question occurs on the motion to report H. Res. 644 adversely. All in favor of reporting adversely, say aye? Opposed, no?

The ayes appear to have it.

Mr. CONYERS. Mr. Chairman, I ask for a record vote.

Chairman SENSENBRENNER. A record vote is requested. Those in favor of reporting the resolution adversely will as your names are called answer aye, opposed, no. The clerk will call the roll.

Before the clerk calls the roll, we have one more bill which I believe is noncontroversial, the Financial Services Regulatory Relief Act, where the sequential expires during the recess. We need to have a reporting quorum here to report that out. The Chair knows of no amendments.

The clerk will now call the roll on——

Mr. CONYERS. Mr. Chairman, I ask unanimous consent to withdraw my request for a record vote.

Chairman SENSENBRENNER. The request is withdrawn. Does anybody else wish a recorded vote?

Hearing none, the ayes have it. Without objection, the staff is directed to make technical and conforming changes, and all Members will be given 2 days as provided by the House rules in which to submit additional, dissenting, supplemental, or minority views.

[Intervening business.]

The business before the Committee having been completed for today, without objection the Committee stands adjourned.

[Whereupon, at 12:25 p.m., the Committee was adjourned.]

DISSENTING VIEWS

I dissent from the negative reporting of H. Res. 644, that would have simply requested that the President and the Attorney General provide Congress with documents that relate to warrantless wiretapping. This Committee should have exercised its constitutionally mandated oversight role and examined the original legal theories behind this unprecedented wiretapping program, the scope of program, and how it was approved. As more fully discussed in the dissenting views of H. Res. 643, I believe the Judiciary Committee is abdicating its role to ensure that the executive acts within the constitution.

JOHN CONYERS, JR.

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