

REQUESTING THE PRESIDENT AND DIRECTING THE SECRETARY OF DEFENSE AND 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 RELATING TO THE TERMINATION OF THE DEPARTMENT OF JUSTICE'S OFFICE OF PROFESSIONAL RESPONSIBILITY'S INVESTIGATION OF THE INVOLVEMENT OF DEPARTMENT OF JUSTICE PERSONNEL IN THE CREATION AND ADMINISTRATION OF THE NATIONAL SECURITY AGENCY'S WARRANTLESS SURVEILLANCE PROGRAM, INCLUDING DOCUMENTS RELATING TO OFFICE OF PROFESSIONAL RESPONSIBILITY'S REQUEST FOR AND DENIAL OF SECURITY CLEARANCES

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JUNE 26, 2006.—Referred to the House Calendar and ordered to be printed

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

## ADVERSE REPORT

together with

## DISSENTING VIEWS

[To accompany H. Res. 845]

The Committee on the Judiciary, to whom was referred the resolution (H. Res. 845) requesting the President and directing the Secretary of Defense and 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 relating to the termination of the Department of Justice's Office of Professional Responsibility's investigation of the involvement of Department of Justice personnel in the creation and administration of the National Security Agency's warrantless surveillance program, including documents relating to Office of Professional Responsibility's request for and denial of security clearances, having considered the same, report unfavorably thereon without amendment and recommend that the resolution not be agreed to.

### PURPOSE AND SUMMARY

House Resolution 845, introduced by Representative Hinchey, on May 25, 2005, requests the President and directs the Secretary of Defense and the Attorney General to transmit to the House of Representatives documents relating to the termination of the Depart-

ment of Justice's Office of Professional Responsibility's investigation of the involvement of Department of Justice personnel in the creation and administration of the National Security Agency's (NSA) warrantless surveillance program, including documents relating to Office of Professional Responsibility's request for, and denial of, security clearances.

#### BACKGROUND

House Resolution 845 is a resolution of inquiry. Under the rules and precedents of the House of Representatives, a resolution of inquiry 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."<sup>1</sup>

A committee has a number of choices in considering 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.

On January 9, 2006, Representative Hinchey and three other Members sent a letter to the Department of Justice's Counsel for the Office of Professional Responsibility (OPR) to investigate how the Terrorist Surveillance Program was established and the involvement and objections of Department of Justice (DOJ) officials regarding the program, and the overall legality of the program. OPR is the office that investigates attorney misconduct. In February and March 2006, OPR informed Representative Hinchey that OPR was conducting an investigation of the role of the Department of Justice attorneys in the authorization and oversight of warrantless electronic surveillance by the NSA and to determine if DOJ was in compliance with the Foreign Intelligence Surveillance Act. On May 10, 2006, OPR informed Representative Hinchey that on May 9, 2006, OPR was informed that the request for the necessary clearances to investigate had been denied and thus the OPR investigation was closed.

A security clearance does not entitle someone to access all classified information, but rather only that information related to the work that individual performs and is on a "need-to-know" basis. It is arguable that OPR employees did not have a basis to investigate the NSA program, as OPR is charged with investigating professional misconduct and not the constitutionality of a Defense Department (DOD) program. The Attorney General has emphasized this point.<sup>2</sup>

This conclusion is supported by OPR's mission statement, which states, "OPR reviews allegations of attorney misconduct involving violation of any standard imposed by law, applicable rules of pro-

<sup>1</sup> 7 Deschler's Precedents of the House of Representatives, ch. 24, § 8.

<sup>2</sup> Linzer, Dafna, Charles Babington, Lawrence Reexamine Hayden; CIA Pick's Involvement in Wiretap Programs Raises Questions, Washington Times, May 18, 2006, at A05.

fessional conduct, or Departmental policy. When warranted, OPR conducts full investigations of such allegations, and reports its findings and conclusions to the Attorney General and other appropriate Departmental officials.”<sup>3</sup>

The Attorney General’s conclusion is further supported by the U.S. Department of Justice Office of Professional Responsibility, Fiscal Year 2003 Annual Report that explained:<sup>4</sup>

OPR has jurisdiction to investigate allegations of professional misconduct made against Department of Justice attorneys, investigators, or law enforcement personnel where the allegations relate to the exercise of an attorney’s authority to investigate, litigate, or provide legal advice. OPR also has authority to investigate other matters when requested or authorized to do so by the Attorney General or the Deputy Attorney General.

Typical misconduct allegations that OPR investigates include Brady, Giglio,<sup>5</sup> and Federal Rule of Criminal Procedure 16 discovery violations; improper conduct before a grand jury; improper coercion or intimidation of witnesses; improper use of peremptory strikes during jury selection; improper questioning of witnesses; improper introduction of evidence; misrepresentations to the court and/or opposing counsel; improper closing arguments; failure to diligently represent the interests of the government; failure to comply with court orders, including scheduling orders; and unauthorized disclosure of information. In addition, OPR examines cases in which courts have awarded Hyde Amendment fees to the defendant based on a finding that the government’s conduct was frivolous, vexatious, or in bad faith.

The Inspector General for the Department of Defense (DOD IG) directed Members of Congress to the NSA’s own Inspector General for such review, rather than the Department of Justice’s Office of Professional Responsibility. The DOD IG explained in a letter to Representative Lofgren that “the Inspector General of NSA is already actively reviewing aspects of that program.”<sup>6</sup> The Committee is reporting this resolution adversely because it requests documents that may contain highly sensitive national security and employee personnel information. In addition, the request is misdirected as clearances may not have been granted due to the fact that DOJ’s Office of Professional Responsibility is not charged with examining DOD programs, or with assessing the legal validity of this program.

<sup>3</sup> U.S. Department of Justice, Office of Professional Responsibility Process, (2006), available at <http://www.usdoj.gov/opr/proc-hdl.htm>.

<sup>4</sup> U.S. Department of Justice, Office of Professional Responsibility, Fiscal Year 2003, available at <http://www.usdoj.gov/opr/annualreport2003.htm>.

<sup>5</sup> As a result of Brady and Giglio Supreme Court cases, the government must disclose any evidence favorable to the defendant that is material. Furthermore, the defendant’s failure to request favorable evidence does not leave the government free of this obligation.

<sup>6</sup> Letter from Thomas F. Gimble, Acting Inspector General, United States Department of Defense to Zoe Lofgren, Representative, United States House of Representatives (Jan. 10, 2006) (available at [http://www.house.gov/list/press/ca16\\_lofgren/pr\\_060111\\_DOJ\\_and\\_DOD\\_Respond.html](http://www.house.gov/list/press/ca16_lofgren/pr_060111_DOJ_and_DOD_Respond.html)).

## HEARINGS

No hearings were held in the Committee on the Judiciary on H. Res. 845.

## COMMITTEE CONSIDERATION

On June 21, 2006, the Committee met in open session and adversely reported the resolution H. Res. 845 by a voice vote, a quorum being present.

## 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. 845.

## 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. 845 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. 845 is not a bill or joint resolution that may be enacted into law.

## SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The House Resolution requests the President and directs the Secretary of Defense and the Attorney General to transmit to the House of Representatives not later than 14 days after the date of adoption of this resolution documents relating to the termination of the Department of Justice's Office of Professional Responsibility's investigation of the involvement of Department of Justice personnel in the creation and administration of the NSA's warrantless surveillance program, including documents relating to Office of

Professional Responsibility's request for and denial of security clearances.

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. 845 makes no changes to existing law.

## DISSENTING VIEWS

We dissent from the adverse reporting of H. Res. 845.

After 9/11, the Nation's highest lawyers authorized warrantless wiretapping on American soil, now unanimously condemned by constitutional scholars and intelligence professionals alike.

Repeatedly, the President and the Attorney General have refused to say which lawyers actually approved the program and through which process they did so. There are also reports that officials as high as then-Acting Attorney General James Comey refused to sanction the program due to constitutional and legal concerns.

Shortly after the New York Times first reported on the program, Representatives Hinchey, Lewis, Waxman and Woolsey, requested the Justice Department's Office of Professional Responsibility (OPR) conduct an investigation into who approved warrantless wiretapping on American soil and why.

The Office of Professional Responsibility "is responsible for investigating allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when they are related to allegations of attorney misconduct within the jurisdiction of OPR."<sup>1</sup> With the objective of "ensur[ing] that Department of Justice attorneys continue to perform their duties in accordance with the high professional standards expected of the Nation's principal law enforcement agency."<sup>2</sup>

Pursuant to the Congresspersons' request, the OPR began an investigation into the Department of Justice's role in "authorizing, approving and auditing certain surveillance activities of the National Security Agency."<sup>3</sup>

Regretfully, OPR was unable to complete its task when either the NSA or the Justice Department—it is still unclear—denied its investigators access to the necessary information. On May 10, 2006, the Office of Professional Responsibility again wrote Congressman Hinchey stating, "We have been unable to make any meaningful progress in our investigation because OPR has been denied security clearances for access to information about the NSA program . . . without these clearances, we cannot investigate this matter and therefore have closed our investigation."

The denial of OPR access to any documents related to the Justice Department's approval of NSA wiretapping is a move which, according to Michael Shaheen who headed the OPR from 1975 to

<sup>1</sup> Office of Professional Responsibility, <http://www.usdoj.gov/opr>.

<sup>2</sup> Id.

<sup>3</sup> Letter from H. Marshall Jarrett, Counsel, Office of Professional Responsibility, to Maurice D. Hinchey, et. al, regarding the termination of the investigation of warrantless wiretapping by the NSA (Feb. 2, 2006).

1997, simply did not occur for any reason in his time at the Office. He stated, “[my staff] never, ever was denied a clearance.”<sup>4</sup>

For decades, the determination of security clearance has turned on whether the applicant was “reliable, trustworthy, of good conduct and character and of unswerving loyalty to the United States.” Clearly, there is no evidence that OPR attorneys do not meet this standard. It appears that access may have been denied for purely political purposes. That is why H. Res. 845, which merely asks for documents relating to OPR’s denial is so important.

There are several levels of clearance, which have increasing standards of eligibility corresponding with increasing levels of sensitive information. The four main types of security clearance are confidential, secret, top secret, and sensitive compartmented information. It is also possible to be granted security clearance information related to one subject and denied certain information related to another subject, all within the same department or agency.<sup>5</sup>

Currently, it remains unclear whether the attorneys were denied the level of clearance required to investigate the DOJ’s participation in the NSA data-mining and wiretapping programs or whether the attorneys were granted security clearance and then denied access to this specific information.

Either way, it is difficult to understand why these attorneys have been denied access to the information necessary to effectively do their job. The Office of Professional Responsibility is the branch of the Department of Justice that is responsible for ensuring that its attorneys maintain the high ethical and professional standards set forth by the Nation’s primary law enforcement agency.<sup>6</sup> It is only natural to assume that attorneys entrusted to preserve the integrity of such an important Government agency and given the authority to fully investigate allegations of misconduct<sup>7</sup> would be highly trustworthy, reliable and undoubtedly loyal to the United States Government; and therefore worthy of this level of clearance.

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<sup>4</sup>Shane Harris & Murray Waas, Justice Department Probe Foiled, NATIONAL JOURNAL, May 27, 2006, at 53.

<sup>5</sup>Derrick Dortch, Getting a Security Clearance, WASH. POST, June 25, 2004.

<sup>6</sup>Office of Professional Responsibility, available at <http://www.usdoj.gov/opr/index.html>.

<sup>7</sup>Id.

Regardless of one's position with respect to the NSA's eavesdropping program, we cannot understand how anyone could support the Justice Department's refusal to be investigated by a duly appointed and authorized office who is charged with monitoring the ethics of the Nation's top lawyers. It is our firm belief that the Justice Department shouldn't be permitted to arbitrarily pick and choose which ethics investigations it will decide to cooperate with.

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