RPTS JURA

DCMN HERZFELD

CONTINUED MARKUP OF H.R. 3845, USA PATRIOT AMENDMENTS ACT OF 2009; H.R. 984, STATE SECRET PROTECTION ACT OF 2009; AND H.RES. 871, DIRECTING THE ATTORNEY GENERAL TO TRANSMIT TO THE HOUSE OF REPRESENTATIVES CERTAIN DOCUMENTS, RECORDS, MEMOS, CORRESPONDENCE, AND OTHER COMMUNICATIONS REGARDING MEDICAL MALPRACTICE REFORM

Thursday, November 5, 2009

House of Representatives,

Committee on the Judiciary,

Washington, D.C.

The committee met, pursuant to call, at 11:03 a.m., in Room 2141, Rayburn House Office Building, Hon. John Conyers, Jr. [chairman of the committee] presiding.

Present: Representatives Conyers, Berman, Nadler, Scott,

Watt, Lofgren, Jackson Lee, Waters, Delahunt, Wexler, Cohen, Johnson, Pierluisi, Quigley, Chu, Gutierrez, Baldwin, Gonzalez, Weiner, Schiff, Wasserman Schultz, Maffei, Smith, Sensenbrenner, Coble, Gallegly, Goodlatte, Lungren, Issa, Forbes, Franks, Gohmert, Jordan, Poe, Chaffetz, Rooney, and Harper.

Staff Present: Perry Apelbaum, Staff Director/Chief Counsel; Ted Kalo, General Counsel/Deputy Staff Director; George Slover, Legislative Counsel/Parliamentarian; Sean McLaughlin, Minority Chief of Staff/General Counsel; Allison Halataei, Minority Deputy Chief of Staff/Parliamentarian; Anita L. Johnson, Clerk.

Chairman Conyers. The committee will come to order. The clerk will call the role.

The Clerk. Mr. Conyers?

Chairman Conyers. Present.

The Clerk. Mr. Berman?

Mr. Boucher?

Mr. Nadler?

Mr. Scott?

Mr. Scott. Present.

The Clerk. Mr. Watt?

Ms. Lofgren?

Ms. Jackson Lee?

Ms. Waters?

Mr. Delahunt?

Mr. Wexler?

Mr. Cohen?

Mr. Johnson?

Mr. Pierluisi?

Mr. Quigley?

Mr. Quigley. Here.

The Clerk. Ms. Chu?

Mr. Gutierrez?

Ms. Baldwin?

Mr. Gonzalez?

Mr. Weiner?

Mr. Schiff?

Mr. Schiff. Here.

The Clerk. Ms. Sanchez?

Ms. Wasserman Schultz?

Mr. Maffei?

Mr. Smith?

Mr. Goodlatte?

Mr. Sensenbrenner?

Mr. Coble?

Mr. Gallegly?

Mr. Lungren?

Mr. Issa?

Mr. Forbes?

Mr. King?

Mr. Franks?

Mr. Gohmert?

Mr. Johnson?

Mr. Poe?

Mr. Chaffetz?

Mr. Rooney?

Mr. Harper?

Ms. Lofgren?

Mr. Sensenbrenner?

Mr. Sensenbrenner. Here.

The Clerk. Ms. Baldwin?

Ms. Baldwin. Here.

The Clerk. Mr. Weiner?

Mr. Weiner. Present.

The Clerk. Mr. Smith?

Mr. Smith. Here.

The Clerk. Mr. Quigley?

Mr. Quigley. Here.

The Clerk. Mr. Watt?

Mr. Watt. Present.

The Clerk. Mr. Chaffetz?

Mr. Gonzalez?

Mr. Gonzalez. Present.

The Clerk. Mr. Maffei?

Mr. Maffei. Present.

The Clerk. Mr. Franks?

Chairman Conyers. A working quorum being present, the committee will come to order. And pursuant to notice, I call up H.R. 3845 for purposes of markup, and recognize the distinguished Ranking Member from Texas Lamar Smith.

Mr. Smith. Thank you, Mr. Chairman. I have an amendment at the desk.

Chairman Conyers. The clerk will report the amendment.

The Clerk. Amendment to H.R. 4845 offered by Mr. Smith. Strike section 104 and insert the following new section: Section

104, Extension of Sunset Relating to Individual Terrorists As Agents of Foreign Powers. Section 6001 --

Mr. Smith. Mr. Chairman, I ask unanimous consent that the amendment be considered as read.

Chairman Conyers. Without objection.

[The information follows:]

******** INSERT 1-1 ********

Chairman Conyers. The gentleman is recognized in support of his amendment.

Mr. Smith. Thank you, Mr. Chairman.

This amendment strikes the section of the bill that allows the Lone Wolf, or as I call it the Lone Terrorist, provision to expire at the end of this year. Under this authority, the government can track a foreign national who engages in acts to prepare for a terrorist attack against the U.S., but is not affiliated with a terrorist organization.

To date, the government has never acknowledged use of this provision. Critics use this as justification to let the provision expire. However, it would be shortsighted to limit the government's ability to monitor an individual foreign terrorist who is working alone within the country. It is not so hard to imagine a terrorist who might break away from al Qaeda for ideological reasons and set out to commit terrorist acts on their own.

These authorities were enacted after 9/11 to fill gaps in the law. The fact that this particular gap was closed may have deterred a lone terrorist from attacking within this country since the provision was enacted. We do not know, but if it is not extended, I would not like to have to explain to the American people or a family, especially the relatives of any victims of a lone terrorist attack, why Congress allowed this authority to

expire simply because it was previously not needed.

Some critics argue that the government can use Title III, criminal wiretaps, to monitor terrorists. However, criminal wiretaps are ill suited to use in intelligence operations. First, criminal wiretaps are authorized under the presumption that the information collected will be used as evidence in a trial and turned over to the target when they become a defendant in a criminal case. However, FISA wiretaps are used to collect foreign intelligence information that is highly classified and generally used for purposes other than a criminal trial and intended not to be given to the terrorist.

Further, FISA wiretaps protect the sources and methods of the government's surveillance. This is information that criminal wiretaps do not protect. Gathering intelligence through use of a criminal wiretap could tip off the terrorist to the strategies we use to track terrorists and intercept them before they strike.

Criminal wiretaps also require, quote, live minimization to ensure that the government does not gather intelligence on protected activities. However, live minimization is nearly impossible in foreign intelligence collection. That is because most of the information captured by FISA wiretaps is in a foreign language. It is recorded live, but later translated by linguists at intelligence agencies. Under this process there is no opportunity for the government to minimize information as it is collected.

Due to these realities, it is imperative that the committee support the request of the Justice Department and the judgment of many experts and extend, rather than repeal, the Lone Terrorist provision. I hope my colleagues will support this amendment.

And, Mr. Chairman, I yield back.

Chairman Conyers. I want to thank the gentleman for raising this discussion in terms of the PATRIOT Act sunsetting, because the so-called Lone Wolf provision has been given a great deal of examination not only in our own Judiciary Committee hearings, but outside of it as well.

I want to just cite three people. The first one -- well, I wanted to cite the Deputy Assistant Attorney General for the Justice Department's National Security Division, Todd Hennen; and then I want to quote from our colleague from Delaware, Tom Evans; and then I want to discuss with you the opinion and findings of Attorney Suzanne Spaulding. Let's start with Spaulding.

She is the former chief counsel of the House Permanent Select Committee on Intelligence. She is considered a leading expert on the whole subject, and it was her that observed that the Lone Wolf provision can be allowed to expire because the government could always seek a criminal warrant against anyone who fits the Lone Wolf definition. We have never had to do that, but she is pointing out that there isn't any harm being done by letting it expire.

And just a little bit of history. This provision for a lone

wolf -- and I really would like to find the person that created that term. But the Lone Wolf provision was not in the PATRIOT Act that we passed out; it wasn't in the PATRIOT Act that got substituted in the middle of the night in the Rules Committee. It was passed separately for reasons that aren't remembered by me now. Such traditional surveillance is, in fact, exactly what the government uses already in equally serious cases of domestic lone wolves, comparable to Timothy McVeigh, one of our infamous domestic terrorists. Then, our colleague Tom Evans explained that the Lone Wolf provision adversely affects the constitutionality of the FISA statute, and in so doing he included these points:

FISA was adopted to provide special powers to conduct intelligence against foreign agents. FISA's authorization of secret wiretaps and secret home searches is an exception to traditional Fourth Amendment standards, which has been justified on the grounds that these extraordinary surveillance powers are limited to investigation of foreign powers and their agents. Under FISA the government can obtain a warrant without the showing of probable cause that a crime is being committed or is about to be committed. So we don't need it. And that is why the bulk of authority upon which I rely have strongly recommended that we just let it expire. And I am sure that some think that this would be weakening our intelligence defenses under the PATRIOT Act, but I can assure you that it does not in fact.

All in favor of the --

Mr. Chaffetz. Mr. Chairman.

Chairman Conyers. Mr. Chaffetz.

Mr. Chaffetz. The compliment that I gave you yesterday will stand.

Chairman Conyers. Every day is a new day. I will re-earn the commendations of yesterday.

The gentleman is recognized.

Mr. Chaffetz. Thank you. I move to strike the last word.

Chairman Conyers. Without objection, the gentleman is recognized.

Mr. Chaffetz. One rhetorical question, and then I would like to yield time to Ranking Member Smith, if I could.

My understanding is the Justice Department is in favor of keeping this provision in place. And, with that, I would like to yield some time to Mr. Smith.

Mr. Smith. I thank the gentleman from Utah for yielding. Actually, I was going to make that point and a couple of others, Mr. Chairman.

On this particular issue, I agree with the President of the United States, I agree with the Department of Justice, and I agree with the FBI that this provision does need to be reauthorized. And let me address again those who might argue that we could simply substitute criminal wiretaps for this Lone Terrorist provision, and there are two points there.

First of all, in the case of criminal wiretaps, you conduct

those wiretaps with the expectation that the evidence you gain is going to be turned over to the defendant at the time or prior to the trial. In the case of this provision, it would be dangerous to turn over that kind of information because it might well reveal our sources and our methods of trying to track down terrorists.

The second reason why a criminal wiretap is not a good substitute is because, as I mentioned a while ago, the criminal wiretaps require live minimization. In this case, where you are having to translate oftentimes foreign languages, live minimization is simply impossible.

So those are two great disadvantages that criminal wiretaps would have compared to our being able to utilize this Lone Terrorist provision.

And I don't know if the gentleman from California Mr. Schiff would like for me to yield to him. Would the gentleman from California, Mr. Schiff, like me to yield to him at this time or not?

Chairman Conyers. The Chair recognizes the gentleman from --

Mr. Smith. Mr. Chairman, if not, I thank the gentleman from Utah for yielding me the time, and, Mr. Chairman, I will rest on those two points as well as the support of the administration, the FBI, and the Department of Justice to extend this provision.

I thank the gentleman from Utah for yielding.

Mr. Chaffetz. Thank you, Mr. Chairman. I yield back the balance of my time.

Chairman Conyers. The Chair recognizes the Chairman of the Constitution Subcommittee Mr. Nadler.

Mr. Nadler. Thank you, Mr. Chairman. I simply want to comment. I only heard one of Mr. Smith's two points in which he says that if you use the Lone Wolf -- if you don't use the Lone Wolf provision, if you use the normal Title III wiretapping provisions, that that is done with a view toward using the evidence in court, and you couldn't keep the evidence secret.

Well, the fact of the matter is if information was collected that was, in fact, secret, that would bring into play the CIPA, the Classified Intelligence Procedures Act, which is designed specifically for how to handle classified information in the context of a criminal trial. And this has been used since 1978 quite successfully. So that is not a valid reason for having an entirely new section of law.

The fundamental reasons for not extending the Lone Wolf provision is that if you don't show a connection with a foreign power, you do not have any justification for not adhering to the Fourth Amendment protections. FISA generally, and the Lone Wolf provision specifically, goes beyond the procedures allowed by the Fourth Amendment, and the justification for doing so is the Fourth Amendment is a protection in criminal law or applied to criminal law in the United States and does not have to apply necessarily to all provisions in foreign intelligence. But when you have a Lone Wolf who by definition is not foreign intelligence, because if he

were, you wouldn't need the Lone Wolf provision, you could use the other provisions of the law, then it seems to make this whole thing unconstitutional. So that is a fundamental problem.

And I heard Mr. Smith's objection about classified information. CIPA can handle that. And I am sorry I didn't hear --

Mr. Smith. If the gentleman will yield for the second point.

Mr. Nadler. Sure. I didn't get to the second point because I didn't hear it.

Mr. Smith. I will be happy to repeat the second point. Regardless of what the gentleman says, it still does add an additional burden to our law enforcement agencies. But in addition to that, this only applies to a non-U.S. citizen. I am not sure I agree with you that they are entitled to all these constitutional protections.

Mr. Nadler. Reclaiming my time for a moment. The Supreme Court -- and I can't cite chapter and verse off the top of my head right now, but the Supreme Court has made it clear many, many times that the Fourth Amendment and others and the Bill of Rights apply to all persons in the United States. It may not apply to persons abroad, but they most certainly apply whether you are a citizen or not in the United States.

I will yield.

Mr. Smith. And the second point was that the criminal wiretaps require live minimization. That is simply impossible

oftentimes when you are dealing with someone who is speaking a foreign language and that goes through a translation. So minimization is also impossible.

So you still have the two points that I made that I think are valid. But I thank the gentleman for yielding.

Mr. Nadler. I thank the gentleman. I yield back.

Chairman Conyers. Thank you, Mr. Nadler. Thank you.

Jim Sensenbrenner.

Mr. Sensenbrenner. Mr. Chairman, I support the amendment of the gentleman from Texas. And I was on the conference committee that ended up sending the Intelligence Reform Act of 2004 to the floor, and there was overwhelming evidence that the Lone Wolf provision plugged a hole in our ability to be able to find out what lone wolves are doing that existing title III criminal procedures do not.

And the problem with that is, is that with the criminal procedure you have got to show some kind of a nexus with a declared terrorist organization, and terrorist organizations are extremely nebulous. You know, you can be al Qaeda one day, and then you can say you quit al Qaeda and have gone into some other kind of organization that has not been placed on the terrorist list by any agency of government and be able to escape this. And the Lone Wolf terrorist provision was designed to plug that hole. And maybe because the hole is plugged is one reason why it has not been necessary to use the Lone Wolf terrorist provision in the

PATRIOT Act; but if we create the hole again, then we create a gap that terrorists will exploit.

Let me say that I reject emphatically the argument that I thought I heard from the gentleman from New York that the FISA Act was a way to get around the Fourth Amendment. If the Fourth Amendment ended up bringing people who are protected by the Constitution under the scope of the FISA Act, a court would have struck it down as unconstitutional a long time ago, and that hasn't happened.

The other concern that I have is that if we use the regular criminal wiretap orders that have been in the law since, I believe, 1968, there can be instances where the CIPA Act, referred to by the gentleman from New York, really doesn't apply or is not applied, and they are two very separate and distinct things.

And I just look at the criminal trial that resulted from the 1993 bombing of the World Trade Center where the prosecution was required to disclose in open court how al Qaeda phone conversations had been eavesdropped on, and these were conversations that were overseas, and also how the Twin Towers were constructed. And the result of those coming out in a public criminal trial indicated that we weren't able to use that type of surveillance method the day after it became evidence in a trial. And the testimony that was given by the architect of the Twin Towers that they were designed to withstand a direct hit from a 707, which was the largest airplane that was flying at the time

the towers were designed, certainly gave bin Laden and al Qaeda the information to use bigger airplanes to bring them down.

So we end up opening up this process, should the Smith amendment not be adopted, to be taken to the cleaners again and putting lives in jeopardy, and that is why the Smith amendment ought to be adopted.

Chairman Conyers. Would the gentleman yield? Because I don't want to get any more time.

Mr. Sensenbrenner. Of course.

Chairman Conyers. Thank you very much.

I am proud to say that the Lone Wolf provision never came before the Judiciary Committee. We never had any hearings on it. It was sent over from the Senate in that conference in which you so ably presented. I am proud to say that in all of the PATRIOT Act bills that we wrote together, there was never a Lone Wolf provision. And even in the one that the administration substituted that night in Rules Committee, there wasn't a Lone Wolf provision.

Mr. Sensenbrenner. Reclaiming my time, since I see the yellow light is on, there wasn't a Lone Wolf provision in the original PATRIOT Act. The Justice Department realized that it needed this in 2004, and that is why the Intelligence Reauthorization Act was used as a vehicle for it. The sunset of 2005 was put on the Lone Wolf provision after it had been effective, I think, for less than a year, and the PATRIOT

Reauthorization Act of 2006 ended up extending it.

So the answer is, yeah, the Lone Wolf provision did come before this committee during the PATRIOT Act reauthorization, and the Congress decided to reauthorize it.

Chairman Conyers. The question occurs on the amendment offered by Lamar Smith. All those in favor will say aye.

All those opposed will say no.

And a recorded will vote will settle the dispute.

The Clerk. Mr. Conyers?

Chairman Conyers. No.

The Clerk. Mr. Conyers votes no.

Mr. Berman?

[No response.]

The Clerk. Mr. Boucher?

[No response.]

The Clerk. Mr. Nadler?

Mr. Nadler. No.

The Clerk. Mr. Nadler votes no.

Mr. Scott?

[No response.]

The Clerk. Mr. Watt?

Mr. Watt. No.

The Clerk. Mr. Watt votes no.

Ms. Lofgren?

Ms. Lofgren. No.

The Clerk. Ms. Lofgren votes no.

Ms. Jackson Lee?

[No response.]

The Clerk. Ms. Waters?

[No response.]

The Clerk. Mr. Delahunt?

[No response.]

The Clerk. Mr. Wexler?

[No response.]

The Clerk. Mr. Cohen?

[No response.]

The Clerk. Mr. Johnson?

[No response.]

The Clerk. Mr. Pierluisi?

Mr. Pierluisi. No.

The Clerk. Mr. Pierluisi votes no.

Mr. Quigley?

Mr. Quigley. Yes.

The Clerk. Mr. Quigley votes yes.

Ms. Chu?

Ms. Chu. No.

The Clerk. Ms. Chu votes no.

Mr. Gutierrez?

[No response.]

The Clerk. Ms. Baldwin?

Ms. Baldwin. No.

The Clerk. Ms. Baldwin votes no.

Mr. Gonzalez?

Mr. Gonzalez. No.

The Clerk. Mr. Gonzalez votes no.

Mr. Weiner?

[No response.]

The Clerk. Mr. Schiff?

Mr. Schiff. Aye.

The Clerk. Mr. Schiff votes aye.

Ms. Sanchez?

[No response.]

The Clerk. Ms. Wasserman Schultz?

Ms. Wasserman Schultz. No.

The Clerk. Ms. Wasserman Schultz votes no.

Mr. Maffei?

[No response.]

The Clerk. Mr. Smith?

Mr. Smith. Aye.

The Clerk. Mr. Smith votes aye.

Mr. Goodlatte?

[No response.]

The Clerk. Mr. Sensenbrenner?

Mr. Sensenbrenner. Aye.

The Clerk. Mr. Sensenbrenner votes aye.

Mr. Coble?

Mr. Coble. Aye.

The Clerk. Mr. Coble votes aye.

Mr. Gallegly?

Mr. Gallegly. Aye.

The Clerk. Mr. Gallegly votes aye.

Mr. Lungren?

[No response.]

The Clerk. Mr. Issa?

Mr. Issa. Aye.

The Clerk. Mr. Issa votes aye.

Mr. Forbes?

[No response.]

The Clerk. Mr. King?

[No response.]

The Clerk. Mr. Franks?

Mr. Franks. Aye.

The Clerk. Mr. Franks votes aye.

Mr. Gohmert?

[No response.]

The Clerk. Mr. Jordan?

Mr. Jordan. Yes.

The Clerk. Mr. Jordan votes yes.

Mr. Poe?

Mr. Poe. Yes.

The Clerk. Mr. Poe votes yes.

Mr. Chaffetz?

Mr. Chaffetz. Aye.

The Clerk. Mr. Chaffetz votes aye.

Mr. Rooney?

Mr. Rooney. Aye.

The Clerk. Mr. Rooney votes aye.

Mr. Harper?

Mr. Harper. Aye.

The Clerk. Mr. Harper votes aye.

Mr. Maffei?

Mr. Maffei. No.

The Clerk. Mr. Maffei votes no.

Mr. Berman?

Mr. Berman. No.

The Clerk. Mr. Berman votes no.

Mr. Scott?

Mr. Scott. No.

The Clerk. Mr. Scott votes no.

Mr. Weiner?

Mr. Weiner. No.

The Clerk. Mr. Weiner votes no.

Mr. Wexler?

Mr. Wexler. No.

The Clerk. Mr. Wexler votes no.

Mr. Goodlatte?

Mr. Goodlatte. Aye.

The Clerk. Mr. Goodlatte votes aye.

Mr. Forbes?

Mr. Forbes. Aye.

The Clerk. Mr. Forbes votes aye.

Ms. Waters?

Ms. Waters. No.

The Clerk. Ms. Waters votes no.

Chairman Conyers. Has there anyone not voted?

The clerk will report.

The Clerk. Mr. Chairman, 15 Members voted aye, 15 Members voted nay.

Chairman Conyers. And the amendment is unsuccessful.

We will stand in recess for the vote, and return directly thereafter.

[Recess.]

RPTS SMITH

DCMN HERZFELD

[12:34 p.m.]

Chairman Conyers. The committee will come to order. The clerk will call the roll.

The Clerk. Mr. Conyers?

Chairman Conyers. Present.

The Clerk. Mr. Berman?

Mr. Boucher?

Mr. Nadler?

Mr. Scott?

Mr. Watt?

Ms. Lofgren?

Ms. Jackson Lee?

Ms. Waters?

Mr. Delahunt?

Mr. Wexler?

Mr. Cohen?

Mr. Johnson?

Mr. Johnson. Present.

The Clerk. Mr. Pierluisi?

Mr. Quigley?

Mr. Quigley. Present.

The Clerk. Ms. Chu?

Ms. Chu. Here.

The Clerk. Mr. Gutierrez?

Ms. Baldwin?

Ms. Baldwin. Present.

The Clerk. Mr. Gonzalez?

Mr. Weiner?

Mr. Schiff?

Ms. Sanchez?

Ms. Wasserman Schultz?

Mr. Maffei?

Mr. Smith?

Mr. Smith. Present.

The Clerk. Mr. Sensenbrenner?

Mr. Coble?

Mr. Gallegly?

Mr. Goodlatte?

Mr. Lungren?

Mr. Issa?

Mr. Forbes?

Mr. King?

Mr. Franks?

Mr. Gohmert?

Mr. Jordan?

Mr. Poe?

Mr. Chaffetz?

Mr. Rooney?

Mr. Harper?

Mr. Coble?

Mr. Coble. Here.

The Clerk. Mr. Cohen?

Mr. Watt?

Mr. Watt. Present.

The Clerk. Mr. Scott?

Mr. Scott. Present.

The Clerk. Mr. Smith?

Mr. Schiff?

Mr. Schiff. Present.

Mr. Wexler?

Mr. Wexler. Present.

The Clerk. Ms. Jackson Lee?

Ms. Jackson Lee. Present.

The Clerk. Mr. Nadler?

Mr. Nadler. Present.

The Clerk. Ms. Wasserman Schultz?

Ms. Wasserman Schultz. Present.

Chairman Conyers. The clerk will report.

The Clerk. Mr. Chairman, 15 Members responded present to the quorum call.

Chairman Conyers. I am pleased to recognize Tammy Baldwin.

Ms. Baldwin. Thank you, Mr. Chairman.

I have an amendment at the desk. It is Baldwin 68.

Chairman Conyers. The clerk will report the amendment. Ranking Member Smith reserves a point of order.

The Clerk. Amendment to H.R. 3845 offered by Ms. Baldwin of Wisconsin.

Ms. Baldwin. Mr. Chairman, I ask unanimous consent that the amendment be considered as read.

Chairman Conyers. Without objection.

[The information follows:]

******** INSERT 2-1 ********

Chairman Conyers. And the gentlelady is recognized in support of her amendment.

Ms. Baldwin. Mr. Chairman, I want to begin by thanking you for drafting this underlying bill and the manager's amendment to limit some of the overly broad provisions of current law that, frankly, in some instances, has been employed in violation of Americans' civil liberties.

I voted against the PATRIOT Act when it passed Congress in 2001, and I remember well the history that our Chairman recited yesterday, when our committee's well-crafted bill was tossed aside in favor of an alternative version of the bill. I believe, therefore, that we must be vigilant in any reauthorization process to ensure that our efforts truly curb abuses and adequately restore checks and balances.

While the bill before us makes good progress in doing both of these things, I do have concerns about the classification of programs authorized by FISA and/or NSLs. Specifically, I question whether certain Top Secret programs really need to be classified as such and whether our current system for curbing the tendency toward blanket secrecy in our intelligence programs is effective.

The amendment that I am offering simply expresses the sense of Congress that the President should periodically review the level of classification and programs that make use of national security letters or the authorities under FISA to determine

whether these programs can be declassified. My amendment makes clear that this review should in no way interfere with or endanger an ongoing investigation or otherwise threaten national security.

As my colleagues know, our Nation's security classification and declassification policies and procedures have largely been prescribed in a series of Presidential Executive orders. These Executive orders and most recently Executive Order 13292, signed by President Bush in 2003, actually set out a structure for declassifying or downgrading Top Secret, Secret or classified materials. This includes a systematic declassification review to be conducted by each agency that has originated classified information.

My amendment is consistent with these Executive orders and reaffirms that the government should provide the American public with information about these programs as soon as possible, while safeguarding our country's legitimate security secrets.

I will note that the Obama administration has already taken positive steps to declassify materials that need not remain hidden from the American public. My colleagues certainly recall earlier this year when the administration declassified and released documents from the Department of Justice Office of Legal Counsel related to torture and interrogations under the Bush administration. And in July the Obama administration released spy satellite images representing some of the best documentation of the Arctic's annual sea ice melting and freezing cycles, pictures

that were classified under the Bush administration and thus kept from scientists studying climate change. Documents that do not endanger our national security do deserve public scrutiny.

Mr. Chairman, I firmly believe that whenever programs under FISA can be declassified, they should be. This amendment makes clear that Congress feels these programs should be debated in the light of day whenever possible. And I urge my colleagues to support this amendment.

I yield back my remaining time.

Chairman Conyers. Thank you for your explanation.

Lamar Smith.

Mr. Smith. Thank you, Mr. Chairman.

First of all, Mr. Chairman, I ask unanimous consent to withdraw my point of order.

Chairman Conyers. Without objection.

Mr. Smith. And then furthermore I would like to say that I don't object to this amendment, but I would like to say to the gentlewoman from Wisconsin that considering that the national security letter provisions have been so weakened by this bill, I am surprised she finds it necessary to have this review. But I don't object, and I think it will be a good part of the bill.

Chairman Conyers. That is the weakest endorsement I have ever heard this year. But nevertheless, it is an endorsement of support.

All in favor of the amendment, indicate by saying aye.

All opposed.

The ayes have it, and the amendment is agreed to.

Mr. Coble. Mr. Chairman, I have an amendment at the desk.

Chairman Conyers. The clerk will report Mr. Coble's amendment.

The Clerk. Amendment to H.R. 3845 offered by Mr. Coble. Strike section 109.

[The information follows:]

******** INSERT 2-2 ********

Mr. Coble. Mr. Chairman, I move to strike the last word.

Chairman Conyers. The gentleman is recognized in support of his amendment.

Mr. Coble. Mr. Chairman and Ranking Member, this amendment strikes section 109 of the bill which requires the public reporting of currently classified information.

Section 1871 of FISA requires biannual reporting by the Attorney General on electronic surveillance, physical searches, pen registers and other FISA provisions. This information is highly classified and is currently provided only to the House and Senate Intelligence and Judiciary Committees. Section 109 broadly directs the Attorney General to simply release this information publicly.

My initial concern with section 109, Mr. Chairman, is that the legislative branch, it seems to me, does not possess the authority to classify or declassify certain information. This authority lies squarely with the executive branch, so I don't believe we can legally statutorily direct the public release of the information contained in these reports.

Secondly, this section 109 is inflexible and would require all information to be made publicly available. A more reasonable approach, it seems to me, would be to review and carefully vet with the Justice Department what, if any, information from these reports could be released publicly, and then, if necessary,

propose statutory language.

Here, however, section 109 usurps authority that we don't possess, in my opinion, and directs the public release of all information included in these biennial reports. For these reasons, Mr. Chairman, I believe the right thing to do is to strike this provision and postpone inclusion of any public reporting until we have received the necessary input from the Justice Department about the national security implication of such reporting.

And I thank the Chairman, and I urge my colleagues to support the amendment, and yield back.

Chairman Conyers. Thank you.

Mr. Coble, could I make a suggestion, that perhaps if the gentleman would be kind enough to temporarily withdraw his amendment, we will get an immediate meeting with the Department of Justice and -- you and me and the Ranking Member -- to determine if your amendment is the only outcome, if there is no satisfaction to be had from the representatives of the Department of Justice.

Mr. Coble. Well, I have no problem with that. Let me look to the gentleman from Texas if he is comfortable with that.

Mr. Smith. Mr. Chairman, I would like to accept your offer, but I would also like to add some more items to that discussion that might take place, starting with the Lone Wolf provision. Could we open that up for a number of subjects of discussion?

Chairman Conyers. Well, yes, I would add the Lone Wolf

provision to it since it was defeated on a tie vote. I think that that means, to me, that there are a reasonable number of people that --

Mr. Smith. Then I thank the gentleman from North Carolina for yielding to me, and I would recommend we accept the Chairman's offer.

Mr. Coble. And I concur, Mr. Chairman, and yield back.

Chairman Conyers. Well, you withdraw the amendment.

Mr. Coble. Withdraw the amendment.

Chairman Conyers. Yes, sir. I thank you very much.

Could I recognize Sheila Jackson Lee?

Ms. Jackson Lee. Mr. Chairman, thank you.

I have an amendment at the desk.

Mr. Smith. Mr. Chairman, I reserve a point of order.

Ms. Jackson Lee. 761.

Chairman Conyers. The Clerk will report the amendment.

The Clerk. Amendment to H.R. 3845 offered by Ms. Jackson Lee of Texas. Add at the end the following: Section 209, Humanitarian Aid Exemptions from Criminal Material Support Statute. Section 2339A, subsection (b), paragraph (1) --

Chairman Conyers. Ask unanimous consent that the amendment be considered as read, and will note that Mr. Smith has reserved a point of order against the amendment.

[The information follows:]

******** INSERT 2-3 ********

Mr. Smith. Mr. Chairman, I would like to --

Chairman Conyers. The gentlelady is recognized in support of her amendment.

Ms. Jackson Lee. Thank you very much, Mr. Chairman.

I want to note for the record that the title of the reauthorization or the legislation, H.R. 3845, indicates this act may be cited as the USA PATRIOT Amendments Act of 2009, which, in essence, allows a consideration of a number of issues related or previously utilized under the PATRIOT Act, which include the issue of material support.

My amendment is an amendment that had previously been offered, and it responds to the legislation that seeks to limit some of the provisions that we have found that have diminished America's privacy and, I would like to say, American's goodheartedness.

The gentleman from Texas is a colleague of mine from Texas, and I am well aware of some of the issues of charitable foundations, and I want to assure him that this very limited amendment does not capture the prosecution that took place in Texas on charitable organizations that were using that status for untoward activity. I propose that we use this opportunity to address and to attend to the issue of material support for terrorism statute to address the question of providing humanitarian aid.

Currently charities and human rights organizations and their employees face severe legal sanctions, including prison time, for providing aid essential to saving lives. Such sanctions should be imposed only on those who mean to support terrorism, not on those who provide legitimate humanitarian aid.

In addition, the humanitarian exemption for medicine and religious materials could have been expanded to include medical services and equipment, water sanitation facilities, materials required for emergency response, education materials and activities, development activities that contribute to self-sufficiency, and conflict resolution and human rights-based programs aimed at reducing violent extremism. That was discussed by a number of our very, very supportive humanitarian organizations that I have a great deal of respect for.

But I want to narrow this so that my colleagues can see the narrow focus to ensure the security of Americans and also provide this provision. The previous intent might have included the items such as food, water, water sanitation materials, medical services, blankets, clothing and shelter, but I have narrowed it. And so my amendment only adds to the current material support exceptions for medicine and religious materials, such as Bibles; two other essential items, food and water only. Food and water only. Furthermore, my amendment limits the occasions when these items could be given to times of natural disasters.

My narrow approach was also influenced by a similar amendment

that was offered by my dear friend Mr. Scott during the 109th Congress. Then Mr. Scott's amendment included a broader provision for humanitarian aid and had the good support of a number of the Members, and I have taken his great leadership and narrowed that intent.

As a member of the Foreign Affairs Committee, which also has elements of the Nation's security under its jurisdiction, I believe that water and food are particularly important during disasters such as tsunamis, earthquakes and famines. In fact, I traveled to Pakistan in the mountains when the earthquake occurred a couple of years ago. I can assure you that there was enough military presence to thwart anyone attempting to do untoward activities, but we were bringing in blankets and water and food, obviously under the auspices of those who intend to do good and not to do harm.

Currently charities and human rights organizations and their employees again face severe legal sanctions, including prison time, for providing aid essential to saving lives. Items such as medical services and others are helpful, but we are narrowing it to this very narrow definition.

Some have argued that they fear that outlaw groups may unduly benefit from the humanitarian aid included in the legislation because it frees up money for those groups to spend on nonhumanitarian materials. In response I offer the following: First, it is important to note that the charitable sector has due

diligence procedures in place that can prevent humanitarian resources from freeing up resources to support violent activity. Next, in cases of natural disasters, terrorist groups or a group associated with them may be prohibited and barred, obviously, from the area. You are talking about the actual victims; you are not, in essence, speaking to those groups who may have previously been involved in activities that we are against. So I am looking for the expansion in a narrow way of food and security to provide the resources that are necessary for providing for the weak and the needy.

Furthermore, I would argue that the weakness of the fungibility argument is that it does not take public diplomacy into account. The United States' reputation has suffered by freezing millions of charitable dollars, but when U.S. charities provide aid, there is increased goodwill.

Chairman Conyers. The gentlelady's time has nearly expired.

Ms. Jackson Lee. I would ask that my colleagues consider this amendment, Mr. Chairman. Thank you.

Chairman Conyers. Thank you.

We recognize the gentlelady from Wisconsin.

Ms. Baldwin. Thank you, Mr. Chairman.

I was also planning on introducing a very similar amendment, which I will not, but want to just associate myself with the remarks of my colleague from Texas.

The problem with the underlying law is because we have a very

excessively narrow humanitarian exemption, the result is that people across the world do without essential aid necessary after a natural disaster or armed conflict because humanitarian groups are prohibited from providing these necessities under the material support provision.

We know from experiences on the ground just how devastating this prohibition has been, and one powerful example was the 2004 Sri Lanka tsunami. It was very, very difficult for aid organizations to reach refugees without some type of contact with a group called the Liberation Tigers of Tamil Eelam, LTTE, a group which controlled everything from borders to traffic. And the fact that humanitarian groups had to cooperate with this organization to get aid to Sri Lankans should not have prevented the delivery of needed goods like food and water.

The long-accepted standard for providing humanitarian aid is that it should be provided to people in need regardless of race, creed or nationality of the recipients and without adverse distinction of any kind. And so I do believe that ultimately we have to amend the underlying language in the PATRIOT Act that prevents these needed resources getting to people in crisis.

I yield back.

Mr. Scott. [Presiding.] The gentlelady's time has expired. Gentleman from New York.

Mr. Nadler. Thank you. I move to strike the last word.

Mr. Scott. The gentleman is recognized.

Mr. Nadler. Mr. Chairman, while I understand and respect the humanitarian concerns that motivate the gentlelady to offer this amendment, the effects of this amendment would be far from humanitarian, and I must therefore oppose it. The amendment would add food and water in the case of a natural disaster to the items excepted from definition of material support or resources in section 2339A of the Criminal Code. That list of exceptions is currently limited to medical supplies and religious materials.

The issue is not the definition, however, it is the prohibition to which the definition refers in the previous subsection. That prohibition prohibits providing "material support or resources or concealing or disguising the nature, location, source or ownership of material support or resources, quote, knowing or intending that they are to be used in preparation for or in carrying out, unquote, a variety of very serious terrorism-related offenses. This list includes murder; manslaughter; arson; use of biological weapons; hostage taking; conspiracy to kill, maim or injure persons or damage property.

This is not by any stretch of the imagination a humanitarian purpose, even if the nature of the items may have humanitarian uses. It is not even a matter of the nature of the recipient or whether that recipient has been engaged in terrorism or is on the list of designated terrorists. It is the purpose of the donation that controls. The donation is prohibited if it meets two criteria: One, it goes to a terrorist group; and two, it is done

with the intent on the part of the donor, knowing or intending that they are to be used in preparation for or carrying out the various terrorism or murderous offenses.

If this is given for a humanitarian purpose, it is already not prohibited by this section. So how could food and water possibly be used to advance terrorist crimes? Fair question. Under the express language of this amendment, someone could provide a year's supply of rations, of military rations, to al Qaeda terrorists fighting in the mountains of Pakistan and Afghanistan for the express purpose of aiding them in the preparation or carrying out of terrorist attacks in the aftermath of a natural disaster. Such aid could help the terrorist army weather the disaster. There is no requirement in the law or in the amendment that the food and water be used to aid actual victims of disaster, and no requirement that it not be given to be used in preparation for or in carrying out a terrorist act. So if it is not given under current law, if it is given with the proper purpose, if it is not given knowing you are intending that it should be used as a terrorist act, it is already not prohibited. So why are we adding to the list of things that are exempt from the prohibition, the prohibition being only for contributions to terrorist groups, knowing that it will used or intending that it will be used for terrorist acts? That makes no sense at all, no matter how well-intentioned the proposed change.

I know that that is not the intent of the gentlelady, but

that is what the amendment says and its clear impact, and therefore I must urge the defeat of the amendment.

And I yield back the balance of my time.

Mr. Scott. The gentleman's time has expired.

Does the gentleman from Texas insist on his point of order?

Mr. Smith. Yes, Mr. Chairman, I do insist on the point of order simply because the amendment is not germane. It does go beyond the scope and purpose of the bill under consideration. We are here to reauthorize the three expiring provisions of the PATRIOT Act, and this amendment intends to change the definition of material support in title 18, and that is outside the scope of this bill. So I do insist on my point of order.

Yield back.

Mr. Scott. The gentleman insists on his point of order.

The gentlelady from Texas, does the sponsor of the amendment wish to be heard to establish the amendment as in order?

Ms. Jackson Lee. Yes. Well, I saw Ms. Chu was trying to be recognized. But if I am being recognized, Ms. Chu, would you --

Mr. Scott. First of all, this is on the point of order.

Ms. Jackson Lee. Well, first of all, I vigorously disagree with the gentleman from New York and his interpretation because we are amending the definition of material support. And, frankly, this language was in the 2005 bill, so, therefore, it is language that has been accepted in the past.

It is ludicrous to suggest that we would be so unrestrained

that we would not be able to thwart the false transmitting of food and water. This is an issue that has confronted our charitable groups. It is unfortunate that some of them happen to have "Muslim" in their name, and I, frankly, am concerned that we are not looking at the broad spectrum of charitable aid.

But my comment on it being germane has to do with -- the title of this bill has to do with the PATRIOT Act amendments. We have amended the roving wiretap, we have amended the NSL letters, and this is just an additional aspect of amending amendments.

If the point of order is insisted on, I will probably ask for the withdrawal, but I would like to engage the Chairman on an idea of prospectively having a hearing on this question. I believe this is germane because this is a bill amending the PATRIOT Act, which had this language in it.

I don't think we can continue to ignore the need of separating our charitable organizations that are trying to get necessary aid to victims of natural disasters who happen to be living in countries of which we are trying to befriend. What sense does it make to have a bar on disallowing these individuals? So I would ask my colleagues and refer them to the material support definition which we are amending, and that is a legitimate amendment to be utilized.

So, Mr. Chairman, let me do this. I would like to ask unanimous consent to withdraw the amendment. I would like to engage the Chair, I know that -- just to put on the record --

Mr. Scott. Just one at a time. Unanimous consent to withdraw the amendment. Without objection, the amendment is withdrawn.

Ms. Jackson Lee. May I just engage the Chair just to put it on the record to -- and I thank my colleagues for listening. I would like to engage the Chair to at least indicate my interest in a hearing on this issue, and would like to add this issue to the discussion that Chairman Conyers mentioned on a number of issues that he would go to the Justice Department with.

Mr. Scott. In terms of the Crime Subcommittee, this would be under title 18, so it would be one of the things we would be having oversight hearings on from time to time.

Ms. Jackson Lee. Thank you, Mr. Chairman. And I would like to be on the record that we add this issue to the issues that others have asked when we have this meeting with the Justice Department.

Mr. Scott. Without objection.

Ms. Wasserman Schultz. Mr. Chairman, I just wanted to be heard on the subject of the hearings that the gentlelady is requesting.

Mr. Scott. Gentlelady from Florida.

Ms. Wasserman Schultz. Thank you, Mr. Chairman.

I just want to express my grave concern and my own personal opposition that this is not something that we should be exploring, that this is a settled question. Money, when it comes to

organizations like these, is fungible. And I don't think that it would be appropriate or timely at this time to be considering expanding the definition of aid and providing that type of assistance to terrorist organizations. So as a member of the subcommittee, that is not something that I think that we should be exploring or pursuing.

Ms. Jackson Lee. Would the gentlelady yield for just a moment?

Ms. Wasserman Schultz. I would be happy to yield.

Ms. Jackson Lee. And I thank the gentlelady.

This, I think, is the basis for an opportunity to explore for factual information, though I respect very much the gentlelady's position. I would hope that if we did have the hearings, if it was the will of the Chairman and the full committee, that the information would be such that the gentlelady would find at least helpful, even if the gentlelady did not agree. And I do thank her for her comment on this, and I will look forward to talking with her more about these issues and her concerns.

Ms. Wasserman Schultz. I yield back.

Mr. Issa. Mr. Chairman, I just move to strike the last word before the unanimous consent.

Mr. Scott. There is no unanimous consent.

Mr. Issa. Okay. I would like to be heard on it the same as the gentlelady from Florida.

Mr. Scott. People were just making observations.

Gentleman from California.

Mr. Issa. Thank you, Mr. Chairman. I will be just as brief.

My observation is that if two distinguished Members disagree so much on a point, it makes the point for a hearing. And I would support the hearing based on what I have just observed.

And yield back.

Mr. Scott. Thank you.

Are there other amendments? Are there other amendments?

Gentleman from Florida. Does the gentleman from Florida have an amendment?

Mr. Rooney. Mr. Chairman, yes, I do. I have an amendment at the desk.

Mr. Scott. The clerk will report the amendment.

The Clerk. Amendment to H.R. 3845 offered by Mr. Rooney. Strike section 107.

[The information follows:]

******** INSERT 2-4 ********

Mr. Scott. A point of order has been reserved by the gentlelady from Wisconsin.

The gentleman from Florida is recognized in support of his amendment for 5 minutes.

Mr. Rooney. Thank you, Mr. Chairman.

I offer an amendment to strike the changes that H.R. 3845 and the manager's amendment make to the U.S. Code provisions that deal with criminal pen registers and trap-and-trace devices.

The Federal Criminal Code has provided pen registers and trap-and-trace authority since 1986. The pen register is an electronic device that records all telephone numbers dialed from a particular telephone line. A pen register can also be used to acquire outgoing Internet IP addresses and e-mail routing and addressing information. A trap and trace is similar to a pen register, but instead of providing the outgoing phone numbers dialed from a particular phone line, it provides the incoming phone numbers dialed to a particular telephone line.

Under current law, the law enforcement officials must show that the information captured by a pen register or trap-and-trace device is relevant to an ongoing criminal investigation. This standard has been in place since enactment of the provision in 1986. In contrast, H.R. 3845 unwisely elevates that standard to require government law enforcement officials to provide a statement of specific and articulable facts in its application to

the court. This statement is meant to justify the government's belief that the information to be obtained by the pen register or trap-and-trace device is relevant to an ongoing criminal investigation being conducted by that agency.

The manager's amendment takes the additional unwarranted step of requiring the reviewing court to specifically find that the government statement of articulable facts is sufficient in its order authorizing the use of the pen register or trap-and-trace device.

There is no justification for this elevation of the standard needed to obtain a pen register or trap-and-trace device. There is also no justification for the extra step that the court must take in issuing an order for a pen register or trap-and-trace device. There is no evidence of any abuse of this criminal authority. There is no reason to amend this provision at all, and certainly not in a U.S. PATRIOT Act reauthorization.

If adopted, this section would unduly burden the Federal, State and local law enforcement agencies that regularly use pen registers and trap-and-trace devices in criminal cases. Because of this fact, the National District Attorneys Association, the National Sheriffs Association, the Fraternal Order of Police all oppose this provision, proposed change in the standard.

I have also heard from the International Association of Chiefs of Police. They believe section 107 effectively erodes the value of the pen register and makes it more difficult for law

enforcement to access the ongoing call detail records of a subject while attempting to determine patterns and relationships demonstrated by the subject's communication records.

These are unwarranted and unnecessary changes in the law. The committee should strike section 107 and the additional changes that are in the manager's amendment from the bill. I urge my colleagues to support my amendment, and I yield back the balance of my time.

Mr. Scott. The gentleman's time has expired.

Gentleman from Illinois.

Mr. Quigley. Mr. Chairman, if I might ask the proponent of this, he makes reference to law enforcement agencies taking a stance on that particular issue. Have those been put in the form of written documents, and are they available to the committee?

Mr. Rooney. Because of the short notice of this markup, we have e-mails, you know, effectuating what was stated, but we would need more time to actually have an official document provided to the committee.

Mr. Quigley. And what were the groups again?

Mr. Rooney. The National District Attorneys Association, the National Sheriffs Association, the Fraternal Order of Police, the International Association of Chiefs of Police.

Mr. Quigley. Thank you. I yield back.

Mr. Scott. The Chair recognizes himself.

I would just point out that section 107 accomplishes many

important purposes that would be eliminated by this amendment. Although it is correct that a pen register or trap-and-trace device does not intercept the content of the communication, I believe that it does affect privacy by involuntarily and secretly providing the government with streaming lists of a person's phone calls or e-mails or visited Web sites. This is explained by a former FBI agent who testified on September 22. Under current law, there is not even a requirement that a law enforcement agent actually explain any facts to a court prior to a court's issuance of an order for a criminal pen register or trap-and-trace device. Current law only requires a certification of relevance to an ongoing criminal investigation by an agent of the government.

This bill sensibly requires the court to evaluate a statement of specific and articulable facts justifying an applicant's belief that the information likely to be obtained is relevant to an ongoing criminal investigation. The specific and articulable standard is present in other parts of the law. In the landmark Terry v. Ohio case, the Supreme Court found that in order for an officer to lawfully stop a suspect on the street and conduct a patdown or frisk for weapons, the officer must be able to articulate something more than a hunch or a suspicion. Rather, the officer must be able to point to specific and articulable facts which, taken together with reasonable inferences from those facts, warrant the intrusion.

Now, the Terry stop and placing pen register and

trap-and-trace devices on someone's phone are two different types of investigative actions, as the State courts have indicated, and that there is a greater risk of privacy interest at stake in a stop and frisk. But as a matter of policy, if we are going to prevent potential abuses of criminal investigative tools, we should at least require the government to simply explain to the court the specific and articulable facts supporting its belief that the tool should be used. This is not a high standard. So I would hope that the amendment would be defeated.

Are there other -- gentleman from Texas.

Mr. Smith. Thank you, Mr. Chairman.

I support the amendment offered by the gentleman from Florida Mr. Rooney. The amendment strikes the changes that H.R. 3845 and the manager's amendment make to the U.S. Code provisions that deal with criminal pen registers and trap-and-trace devices. If the amendment is not adopted, the committee will unduly burden the Federal, State and local law enforcement agencies that regularly use pen registers and trap-and-trace devices in criminal cases.

I yield now to the gentleman from Florida, who will point out that this committee accepted an amendment that did something very similar to this just yesterday.

Mr. Rooney. Mr. Chairman, just also, while it is fresh on my mind with what you were just saying, when you talk about standards of proof, and then you relate it to a Terry stop, but then say it is not the same thing, and that the fact that there has been no

misconduct with the existing standard that we have from 1986, but yet it still needs to be elevated despite the fact that there has been no misconduct, I am not quite sure what the justification is for needing such an elevation, when yesterday, as the Ranking Member alluded to, we sort of made the argument that that was correct.

I yield back.

Mr. Schiff. Will the gentleman from Texas yield or whoever controls the time?

Mr. Smith. I do have the time. And who asked for the time? Oh, the gentleman from California Mr. Schiff, yes.

Mr. Schiff. Would the author of the amendment be amenable to a secondary amendment that would conform to the change we made yesterday; in other words, that would not have the specific and articulable standard, but would do away with the presumption of relevance so that law enforcement would not enjoy the presumption that merely because it is asking for the information, it is relevant, but nor would it be required to demonstrate specific and articulable facts? Would that be an acceptable compromise?

Mr. Rooney. I certainly think that that would be something that we should consider. In light of what we talked about yesterday, you know, certainly that would, I think, help alleviate the disparity or at least the presumption that there is some problem with the existing law even though there hasn't been proof of anything.

Mr. Smith. Mr. Chairman, I will yield additional time to the gentleman from California Mr. Issa.

Mr. Issa. On this side, Mr. Schiff, we are having a hard time finding that there is actually a presumption in order to do the same thing as we did yesterday.

But I might say to the Chair, one of the strange things is the example of stopping somebody and searching them isn't the equivalent. In this case this is an example of writing down license plate numbers as vehicles go by a certain intersection, and I think that is a more appropriate equivalent. Granted they are not as visible from the roadside, but the technique of trapping, we are trapping relevant association numbers. And I think, in fairness, if we are going to have an example, I might suggest to the Chairman that we use the example of known mob locations and police writing down license plates and seeing who owns them as much closer, and, of course, as you know, that is done without a warrant. And that is really all we are getting at with this, and it is a tool that would be taken away without abuse.

And I yield back to my colleague from Texas.

Mr. Smith. And, Mr. Chairman, I will yield back.

Mr. Scott. Any other comments?

Mr. Lungren. Mr. Chairman.

Mr. Scott. The gentleman from California.

Mr. Lungren. Mr. Chairman, I am sorry I wasn't here for all

the debate, but could the Chair clarify, have we had hearings on this particular subject? I am talking about the criminal provisions, not the terrorist.

Mr. Scott. We had hearings on the PATRIOT Act generally.

Mr. Lungren. No, no. I am talking about --

Mr. Scott. I am not sure if this particular issue came up.

Mr. Lungren. Title 18.

Mr. Scott. Title 18 is not my subcommittee. The Constitution Subcommittee has been having jurisdiction over the PATRIOT Act itself, so most of the hearings have been in the Constitution not Crime Subcommittee.

Mr. Lungren. Well, okay. I am informed that there have been no hearings on this. This affects, unless I am mistaken, every single law enforcement agency in the country, if I understand correctly what this part of the bill does. And may I ask the Chair, do we have any position by the law enforcement organizations on this particular change?

Mr. Scott. I would refer to the testimony of a former FBI agent, Michael German, who testified. He was not representing law enforcement at the time. He is not a representative of law enforcement, and, in fact, I think he was actually representing the ACLU. But he is a former FBI agent. I appreciate that. And he said that some action of Congress is needed to ensure that, quote, government is not abusing this provision to collect lists of everything an innocent person reads on the Internet or, he

continues -- or every phone call he makes. That information ought to require at least some articulable -- specific and articulable standard. Otherwise there is just no standard.

Mr. Lungren. Reclaiming my time. I would just say we are talking about pen registers and trap and trace, unless I am --

Mr. Schiff. Would the gentleman yield?

Mr. Lungren. Yeah, I will be happy to yield.

Mr. Schiff. Just to clarify further what I was suggesting, in case the gentleman offering the amendment is amenable to it. We had inserted language in the context of 215 that replaced a statement of fact showing where the statement of facts are the facts and circumstances relied upon by the applicant to justify the belief of the applicant. Would that be acceptable as a secondary amendment?

Mr. Lungren. I don't have -- it is not my amendment.

Mr. Scott. Before the gentleman responds, the gentleman's time has expired. Without objection, he will be given 2 additional minutes.

Mr. Lungren. Well, thank you for the 2 additional minutes.

Again, as I understand, there is no presumption in these settings as there was in the 215 section, so I am not sure the gentleman's amendment with respect to eliminating the presumption is necessary. But again, I would go back to the question.

Mr. Schiff. If the gentleman would yield.

Mr. Lungren. No, I am not yielding now because I have only

got 2 minutes on this. This is a very important issue. We are talking about a law enforcement technique that has been used for years and years and years. We now have heard that we have had one-person evidence that in his opinion we need to do something.

I am informed that law enforcement organizations unanimously oppose any change in the law that is contained here. This has nothing to do with what we are talking about in terms of the PATRIOT Act; this has to do with the criminal codes specifically. I mean, this is a far-ranging change of the law that Mr. Rooney is attempting to try and readdress. And I just would just say, if we are going to do something as fundamental as this, at least we ought to have some hearings on the specific question. At least we ought to have representatives of law enforcement from all levels of government if this, in fact, is going to have that impact. And frankly, we ought to have a relevance standard or some sort of -- I don't know.

I am astounded that we would be dealing with this subject in this bill with as little attention to the enormous impact on investigations that go on in this country, specifically dealing with criminal enterprises, specifically dealing with gang enterprises, specifically dealing with organized crime. And if this isn't enough reason to vote against this bill, well, I am rarely speechless, but I am speechless at this moment.

Mr. Scott. The gentleman's time has expired.

Mr. Johnson. Mr. Chairman.

Mr. Scott. The gentleman from California has requested time first. The gentleman is recognized for 5 minutes.

Mr. Schiff. Thank you Mr. Chairman. Move to strike the last word.

My question is -- and I think the gentleman from California was correct. My question to the author of the amendment is would the gentleman from -- that is offering the amendment accept a secondary amendment that instead would replace the specific and articulable with language that requires a statement of facts and circumstances relied upon by the applicant to justify the belief of the applicant? That would be stronger than what is in existing law, but it would not go as far as specific and articulable. And I would yield to the gentleman.

Mr. Rooney. Thank you. And I appreciate your efforts to try to mitigate.

My problem is this, is that without any evidence or proof that the current standard in the 1986 standard is somehow broken or being abused, I don't, at this point, see the need to modify. And I would like this amendment to stand on its own for now because I think that if something isn't broken, and like the gentleman from California, we haven't heard of any evidence that it is, then why are we changing it under this reauthorization?

Mr. Schiff. I thank the gentleman, and I yield back the balance of my time.

Mr. Scott. The gentleman's time has expired.

Mr. Johnson. Mr. Chairman, I move to strike the last word.

Mr. Scott. Gentleman from Georgia.

Mr. Johnson. Yes, Mr. Chairman. Thank you.

I want to ask, insofar as State, local, Federal law enforcement here in America, and with respect to how this provision would hurt what they do in terms of obtaining this information, I want to ask a question, and anyone on the panel certainly can respond to it. Is it true that when there is an investigation which has not yet led to an indictment on cases that either are terrorist-related or nonterrorist-related investigations, is it true that law enforcement, in general, has a right to compile data without obtaining a warrant to do so, such as phone records?

Mr. Scott. If the gentleman would yield.

Mr. Johnson. I will.

Mr. Scott. The trap and trace is pursuant to a court order. But what we are talking about is the standard for the court order, the present -- with the specific and articulable standard is what is in the bill now, the amendment would take that out, and basically you could get the order simply on a certification that it is relevant.

Mr. Johnson. Thank you. I will yield back.

Mr. Scott. Gentlelady from Wisconsin.

Ms. Baldwin. I would withdraw my reservation.

Mr. Scott. Thank you.

Other comments?

The question is on the amendment. All in favor of the amendment will say aye.

All opposed, no.

Recorded vote has been requested. Those who are in favor will respond to their name by saying aye; all opposed, no.

The Clerk. Mr. Conyers?

[No response.]

The Clerk. Mr. Berman?

[No response.]

The Clerk. Mr. Boucher?

[No response.]

The Clerk. Mr. Nadler?

[No response.]

The Clerk. Mr. Scott?

Mr. Scott. No.

The Clerk. Mr. Scott votes no.

Mr. Watt?

[No response.]

The Clerk. Ms. Lofgren?

[No response.]

The Clerk. Ms. Jackson Lee?

Ms. Jackson Lee. No.

The Clerk. Ms. Jackson Lee votes no.

Ms. Waters?

[No response.]

The Clerk. Mr. Delahunt?

[No response.]

The Clerk. Mr. Wexler?

[No response.]

The Clerk. Mr. Cohen?

Mr. Cohen. No.

The Clerk. Mr. Cohen votes no.

Mr. Johnson?

Mr. Johnson. Present.

The Clerk. Mr. Johnson votes present.

Mr. Pierluisi?

Mr. Pierluisi. Aye.

The Clerk. Mr. Pierluisi votes aye.

Mr. Quigley?

Mr. Quigley. Aye.

The Clerk. Mr. Quigley votes aye.

Ms. Chu?

Ms. Chu. No.

The Clerk. Ms. Chu votes no.

Mr. Gutierrez?

Mr. Gutierrez. No.

The Clerk. Mr. Gutierrez votes no.

Ms. Baldwin?

Ms. Baldwin. No.

The Clerk. Ms. Baldwin votes no.

Mr. Gonzalez?

[No response.]

The Clerk. Mr. Weiner?

[No response.]

The Clerk. Mr. Schiff?

Mr. Schiff. Aye.

The Clerk. Mr. Schiff votes aye.

Ms. Sanchez?

[No response.]

The Clerk. Ms. Wasserman Schultz?

Ms. Wasserman Schultz. No.

The Clerk. Ms. Wasserman Schultz votes no.

Mr. Maffei?

Mr. Maffei. No.

The Clerk. Mr. Maffei votes no.

Mr. Smith?

Mr. Smith. Aye.

The Clerk. Mr. Smith votes aye.

Mr. Goodlatte?

[No response.]

The Clerk. Mr. Sensenbrenner?

[No response.]

The Clerk. Mr. Coble?

Mr. Coble. Aye.

The Clerk. Mr. Coble votes aye.

Mr. Gallegly?

[No response.]

The Clerk. Mr. Lungren?

Mr. Lungren. Aye.

The Clerk. Mr. Lungren votes aye.

Mr. Issa?

Mr. Issa. Aye.

The Clerk. Mr. Issa votes aye.

Mr. Forbes?

[No response.]

The Clerk. Mr. King?

[No response.]

The Clerk. Mr. Franks?

[No response.]

The Clerk. Mr. Gohmert?

[No response.]

The Clerk. Mr. Jordan?

[No response.]

The Clerk. Mr. Poe?

[No response.]

The Clerk. Mr. Chaffetz?

[No response.]

The Clerk. Mr. Rooney?

Mr. Rooney. Aye.

The Clerk. Mr. Rooney votes aye.

Mr. Harper?

[No response.]

The Clerk. Mr. Forbes?

Mr. Forbes. Aye.

The Clerk. Mr. Forbes votes aye.

Mr. Berman?

Mr. Berman. No.

The Clerk. Mr. Berman votes no.

Mr. Watt votes no.

Ms. Waters?

Ms. Waters. No.

The Clerk. Ms. Waters votes no.

Mr. Johnson. Mr. Chairman, how am I recorded?

The Clerk. Mr. Weiner?

Mr. Weiner. No.

The Clerk. Mr. Weiner votes no.

Mr. Scott. How is Mr. Johnson recorded?

The Clerk. Mr. Johnson voted present.

Mr. Johnson. I would like to change that to a "yes" vote.

The Clerk. Mr. Johnson votes yes.

Mr. Scott. The clerk will report.

The Clerk. Mr. Chairman, 10 Members voted aye; 12 Members voted nay.

Mr. Scott. The amendment is not adopted.

RPTS JURA

DCMN HOFSTAD

[1:30 p.m.]

Mr. Scott. Are there other amendments.

Mr. Rooney. Mr. Chairman, I have an amendment at the desk.

Mr. Scott. The gentleman from Florida. The clerk will report the amendment.

The Clerk. Amendment to H.R. 3845, offered by Mr. Rooney. Page 21, line 2, strike "specific and articulable."

[The information follows:]

******** INSERT 3-1 ********

Mr. Scott. The gentleman is recognized for 5 minutes in support of his amendment.

Mr. Rooney. Thank you, Mr. Chairman.

I offer an amendment to remove the new higher standard that H.R. 3845 creates to obtain data from pen registers and trap-and-trace devices, or PRTT, in foreign intelligence investigations.

A pen register is an electronic device that records all telephone numbers dialed from a particular telephone line. A pen register can also be used to acquire outgoing Internet IP addresses and e-mail routing and addressing information. The trap-and-trace device is similar but, instead of providing the outgoing phone numbers, it provides the incoming phone numbers dialed to a particular telephone line.

The current standard for authorizing PRTT use under FISA is that the information obtained is likely to be: one, foreign intelligence information not concerning a United States person; or, two, relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities. If an investigation involves a U.S. person, it cannot be conducted solely upon the basis of activities protected by the first amendment to the Constitution.

Section 108 of the House Democrats' legislation amends the standard to require a statement of the specific and articulable

facts from the government to justify the belief that a PRTT will collect foreign intelligence information or is relevant to an investigation to protect against terrorism. This new standard is completely unnecessary and will be burdensome to government.

The government must already go through the arduous steps to obtain a FISA court order for a PRTT collection. Congress should not add to that burden by creating a higher standard for authorizing information collection using pen registers and trap-and-trace devices. I urge my colleagues to adopt the amendment.

And I yield back the balance of my time.

Mr. Scott. The Chair recognizes himself for the sake of argument.

I will just restate the argument I made on the last amendment and hope that the amendment is not adopted.

Are there other comments?

Mr. Smith. Mr. Chairman?

Mr. Scott. The gentleman from Texas, Mr. Smith.

Mr. Smith. Thank you, Mr. Chairman.

I do support this amendment because it will remove the new higher standard that H.R. 3845 creates to obtain data from pen registers and trap-and-trace devices in foreign intelligence investigations.

This new standard is completely unnecessary and will be burdensome to the government. The government must already go

through arduous steps to obtain a FISA court order for a pen register or trap-and-trace device.

So I urge my colleagues to adopt this amendment.

Mr. Scott. The gentleman's time has expired.

The gentlelady from Texas.

Ms. Jackson Lee. Let me try to redefine the language of "enhanced standard." I think that it is actually a clearer standard that does not bar the work of our very fine law enforcement. And I rise to oppose the language of the amendment because I think the standard can be equated to what, properly, was the opposition to the established Miranda law decades ago, that that would hinder enforcement, hinder the activities of our law enforcement in their pursuit of criminals. We have found that that has only given Americans a fairer chance.

In this instance, we are not suggesting that the language slow down. We are suggesting that it be clearer in detail as to the utilization of the technique. I, frankly, believe that the Constitution warrants specificity. And I believe that, in our actions, even though it may be in the pursuit of terrorists, we, too, are guided by the parameters that might impact negatively on citizens.

So I would hope that our colleagues would oppose the amendment, and I yield back.

Mr. Scott. The gentlelady's time has expired.

Other comments?

If not, the question is on the amendment.

All in favor of the amendment will say, "Aye."

All opposed, say, "No."

The ayes have it. So ordered.

Are there other amendments?

The gentlelady from Texas.

Ms. Jackson Lee. I have an amendment at the desk, and the amendment is to 3845.

The Clerk. Amendment to H.R. 3845, offered by Ms. Jackson Lee of Texas. At the appropriate place in the bill, insert the following new section: Section ___. Plan for public reporting on use of National Security Letters, criminal sneak-and-peak warrants, roving wiretaps, and access to certain business records.

Not later than 180 days after the date of the enactment of this act, the Attorney General shall submit to the Committee on the Judiciary and the Permanent Select Committee on Intelligence of the House of Representatives and the Committee on the Judiciary and the Select Committee on Intelligence of the Senate a plan that, to the maximum extent --

[The information follows:]

******** INSERT 3-2 ********

Ms. Jackson Lee. I ask unanimous consent that the amendment be considered as read.

Mr. Scott. The gentlelady from Texas.

Ms. Jackson Lee. Mr. Chairman, I have an amendment at the desk that reflects not only our concern for the national security of the American people but also public accountability, which is a hallmark of democracy.

My amendment calls for the Attorney General to submit to Congress not later than 180 days after the date of the enactment of this act a report describing a plan that, to the maximum extent consistent with national security, will provide periodic unclassified online reports on the activities of the Department of Justice under the specific NSL 215 orders, roving wiretaps, and sneak-and-peak.

Under the bill, the inspector general is required to provide audit reports and reports to Congress and to the public on the use of 215 orders through 2013. My amendment would enhance this public reporting requirement and further the President's goal of achieving transparency. Through Internet reporting, we assist the public in providing oversight of its government.

Mr. Chairman, such public accountability is particularly important in areas that could lead to any misuse of power. Rigorous public reporting requirements are essential to permit Congress and the public to access information pertaining to the

accuracy of the PATRIOT Act.

I believe that having full and public access to the activities within the guidelines of the Department of Justice, within the guidelines of the inspector general, is a continuing assurance of civil liberties, while also ensuring that law enforcement has the tools it needs to fight terrorists.

Mr. Chairman, today, many of our colleagues have indicated that there are no need for changes. I need only remind them of two facts, one from the past and one from the present.

First, as a student of history, we can recall that, before we had the challenges of the PATRIOT Act, we had the challenges that were misused under the McCarthy House Un-American Activities Committee. I believe, because of the bipartisan work that we did when this bill was first passed by this committee under the leadership of then-Chairman Sensenbrenner, we have thwarted that possibility.

But then, as well, we know that, in addition to that action, in the 1960s during the civil rights movement, we saw the efforts of the COINTELPRO. None of those individuals that were surveilled turned out to be terrorists, other than to ask for equality in this Nation. Both iterations of the PATRIOT Act were used to target political opponents of a party in power.

As a member of the Select Committee on Assassinations that reinvestigated the assassinations of Dr. King and John F. Kennedy, I saw firsthand how Dr. Martin Luther King, Jr., was targeted and

who, as it was revealed in the Church Commission of the 1970s, was given a handwritten note from an FBI agent urging Dr. King to do actions that none of us would want to discuss at this time.

I, therefore, believe that this is a reasonable amendment. A Supreme Court case that was recently discussed, the McGhee and Harrington case, that case asked an unusual question: Do Americans that have been framed by unscrupulous prosecutors for crimes they did not commit have a right to engage on their rights? According to this legislation, we do have that possibility. With this particular transparent amendment, we give the opportunity for security but, as well, transparency. I think that is in keeping with this administration and its goals to secure America.

I would ask my colleagues to support this amendment.

Mr. Scott. Would the gentlelady yield?

Ms. Jackson Lee. I would be happy to yield.

Mr. Scott. I would point out that the chairman has indicated his support for this amendment.

I yield back.

Ms. Jackson Lee. I thank the gentleman.

Mr. Scott. The gentlelady's time has expired.

The gentleman from Texas.

Mr. Smith. Thank you, Mr. Chairman.

Actually, I wish the gentleman from Michigan, Mr. Conyers, the chairman of the full committee, was here, because earlier today, when the gentleman from North Carolina, Mr. Coble, offered

an amendment to strike a section that required the public reporting on National Security Letters, the chairman asked him to withdraw that amendment so that there could be a further discussion as to whether that provision was actually needed in the bill.

And I think that this amendment, calling for a very similar public reporting, would fall under the same category. So it was my intent, and it is still my intent, to ask my colleague from Texas to consider withdrawing her amendment in the same way that Mr. Coble withdrew his amendment, so that she and Mr. Coble and I and the chairman could discuss whether these public reporting requirements would be too burdensome to the law enforcement agencies because it would require them to figure out a way to release what might be marginally classified information. And rather than put them through that struggle for no apparent reason, I think it might be good for us to discuss the subject out of the Judiciary Committee's public consideration of the bill today.

So, once again, just as Mr. Coble was asked to withdraw his amendment and he did so, I would hope that the gentlewoman from Texas would consider withdrawing her amendment so that we could have that discussion.

And I will yield to my colleague from Texas.

Ms. Jackson Lee. Well, Mr. Smith, certainly, in the spirit of collegiality, I will entertain it. I don't know if the debate has finished. If you would allow me -- I don't know if there are

any other comments to be made. If not --

Mr. Smith. I will yield you the balance of my time.

Mr. Scott. I would point out we have votes pending soon. It could be withdrawn without prejudice and resubmitted, if you would want to do that.

Ms. Jackson Lee. Well, let me to my colleagues, in concluding, indicate that we think the amendment is narrowly drawn. But I am willing to submit my amendment to the same discussion that Mr. Coble has submitted his, with members of the Justice Department, on what more we need to do to ensure both transparency and also our commitment to national security.

With that, I will ask unanimous consent to withdraw it without prejudice to be resubmitted. And I thank you.

Mr. Smith. I thank the gentlewoman from Texas, as well.

Mr. Scott. Without objection, so ordered.

Are there other amendments?

Mr. Lungren. Mr. Chairman?

Mr. Scott. The gentleman from California.

Mr. Lungren. Mr. Chairman, I have an amendment at the desk. I believe it is Amendment No. 2.

The Clerk. Amendment to H.R. 3845, offered by Mr. Lungren. Page 5, strike line 25 and all that follows through line --

[The information follows:]

******** INSERT 3-3 ********

Mr. Lungren. Mr. Chairman, I unanimous consent that the amendment be considered as read.

Mr. Scott. Without objection. The gentleman is recognized for 5 minutes in support of his amendment.

Mr. Lungren. Thank you very much, Mr. Chairman.

I hope that we can get support for this amendment. I am trying to establish a balance here in this section of the bill. This amendment revises the standard by which the FISA court will review the government's certification of nondisclosure for business records.

Under current law, if the recipient of a business records order challenges the accompanying nondisclosure requirement, the FISA court is instructed to treat as conclusive the government's certification that disclosure of a business records order may endanger the national security of the United States or interfere with diplomatic relations.

The legislation we are dealing with strikes the conclusive treatment provision, thus affording no weight to the government's certification. This, despite the fact that the courts have long held that the President and the executive branch, as recognized under the Constitution as experts on national security and foreign intelligence information, must be afforded deference in their determinations that disclosure of certain information may endanger America.

Courts traditionally have been reluctant to intrude upon the authority of the Executive in national security affairs, the Court told us in Navy v. Egan. And the Supreme Court has acknowledged that terrorism might provide the basis for arguments, quote, "for heightened deference to the judgments of the political branches, with respect to matters of national security" -- that in a more recent case by the U.S. Supreme Court.

Last December, the Second Circuit Court of Appeals issued a decision in Doe v. Mukasey relating to the nondisclosure provisions of certain NSLs. Like business records, NSLs afford conclusive treatment of the government's certification that disclosure may endanger the national security of the United States or interfere with diplomatic relations.

In Doe, the court held that conclusive treatment of NSL nondisclosure is unconstitutional because they found it inconsistent with strict scrutiny standards for content-based prior restraint on first-amendment-protected speech. However, the court did not find that in the absence of conclusive treatment there should be no weight afforded the government's certification. On the contrary, the court's opinion continued to acknowledge the precedence that a level of deference must be afforded the executive branch's assessment of dangers posed to national security by disclosure of a National Security Letter. I would argue that the same holds true for business record orders.

So I assume that the provision in the bill to strike the

conclusive treatment provision from the business records statute is based on the Doe case's holding regarding National Security Letters. But in keeping with the court's opinion in Doe, this provision should be construed to afford deference so long as it is not conclusive to the government's nondisclosure certification.

So my amendment would take out the removal of any deference whatsoever which is now conclusive and substitute language which says the judge shall give substantial weight to such certification in considering the petition under clause (i).

In other words, recognizing the Doe decision that conclusive deference under strict scrutiny, at least by that court's decision, is considered to be unconstitutional, but recognizing that some deference is not only constitutional but appropriate, I would offer this language of substantial weight to be given to the government's position rather than no weight at all.

And I hope that is clear, and I would hope that I could get support for this amendment.

And I yield back the balance of my time.

Mr. Scott. Thank you.

Comments?

I recognize myself for 5 minutes.

And I would say that, under current law, when a person receives a demand for records under section 215, he cannot challenge the secrecy requirement for a full year. Then, if he waits a year and brings a challenge, the court is required to

automatically reject the challenge if a senior DOJ official certifies that secrecy is still needed.

The bill is right to change that. Too many times during the last administration, we saw abuse of claims of secrecy and classification used to hide abuses, to stifle dissent, and to conceal crimes. Torture, warrantless surveillance of Americans, and even basic facts about key issues, such as whether or not Iraq possessed any weapons of mass destruction, were hidden behind improper claims of secrecy. So we are absolutely right to adjust the government's power to conclusively certify that secrecy is needed for business records under the bill.

Under the bill, the government still has ample opportunity to demonstrate to the FISA court that secrecy is needed. Our bill leaves alone the standard for the challenging of a business records gag order. Under this law, a judge may set aside an order only if the court finds that there is no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal or counterterrorism or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person.

The requirement that a judge find absolutely no risk of national harm before setting aside a gag order strongly tilts this provision in favor of the government. That is why this is a compromise measure already that balances civil liberties and national security.

This amendment would go even further, because it would require the judge to give substantial weight to DOJ's views in making the inquiry. The scale is already strongly tilted in favor of secrecy. If we add the substantial weight requirement, we will essentially be dictating the outcome of the proceedings.

DOJ has all of the facts at its disposal. These 215 orders are intended for use in serious national security cases. If the government cannot make the limited showing required for secrecy under the statute without the benefit of a substantial weight thumb on the scale, maybe it shouldn't get the secrecy order to begin with.

I would hope that we would oppose the amendment.

Other comments?

The gentleman from Texas.

Mr. Smith. Thank you, Mr. Chairman. I support the amendment.

This amendment incorporates a deferential standard for business record nondisclosure certifications that more accurately reflects the Second Circuit's decision in Doe v. Mukasey. Federal courts have consistently deferred to the executive branch on its assessment of national security and intelligence issues. This amendment maintains this longstanding practice.

And if the gentleman from California would like additional time, I will be happy to yield to Mr. Lungren.

Mr. Lungren. I thank you for yielding.

I am somewhat stunned that the Chair would talk about torture in reference to this amendment. This has nothing to do with torture, has nothing to do with authorization of activities of that. This is for nondisclosure of business records. Let's make that very clear.

Secondly, we use the exact language that the Senate adopted in dealing with the deference to be given the government in NSLs. The Senate bill did not deal with the business records standard because they did not remove the conclusive deference.

We, in keeping with the Doe v. Mukasey case, agree that the deference standard currently in the law may go a little too far. But, again, recognizing that from the beginning of this republic it has been acknowledged that the Executive, no matter who he or she may be, has special responsibility, as commander-in-chief and also as the person in charge of our dealings with foreign countries, is to be given deference in these matters. That is all we do here. What the underlying bill does is grant no deference whatsoever.

And I would just think that the argument made by the Chair that somehow we are involved with torture or that we ought to be doing this because of abuses of torture, on the one hand, and then suggesting that our position appears to be so outlandish as to draw the wrong balance, would be an indictment of the Senate's action in the area of NSLs.

Mr. Schiff. Would the gentleman from California yield?

Mr. Lungren. I would be happy to yield, sure.

Mr. Schiff. I just want to say I think that the gentleman from California strikes a good balance in going from existing law, which is conclusive, to giving the government substantial weight. And I think the government, given its better position to understand the totality of impacts on national security, should be given substantial weight. And so I concur with the gentleman.

Mr. Lungren. I thank the gentleman. I am always pleased when he and I can come to an accord. I hope that the Chair is now so informed.

And I would yield back to the gentleman from Texas.

Mr. Smith. Mr. Chairman, I will yield back.

Mr. Scott. The gentleman's time has expired.

Other comments?

Mr. Watt. Mr. Chairman, I move to strike the last word. Just ask a question that perhaps the Chair or Mr. Lungren or Mr. Schiff may be able to answer.

Mr. Scott. The gentleman is recognized for 5 minutes.

Mr. Watt. If we were just silent on this -- in the Doe case, they said the standard that was applied was unconstitutional, but what standard did they actually apply?

I will yield to Mr. Lungren or whoever.

Mr. Lungren. If the gentleman would yield, what the court found was that the conclusive deference was unconstitutional. They left it essentially open for the Congress to determine what

the appropriate deference would be. But they acknowledged in the opinion that deference is given to the executive branch in these matters.

So, if we were to be silent on here --

Mr. Watt. The court would give the deference anyway, would they not? I mean, so why do we even need to articulate here? In these cases, the court automatically gives a degree of deference to --

Mr. Schiff. If the gentleman would yield?

Mr. Lungren. Well, I would say that, while the court recognizes that deference is given to the executive branch, I believe, in the absence of us acting, they may not, of their own accord, grant that deference once they have determined that the deference we had granted in the past is unconstitutional.

Mr. Watt. I will yield to Mr. Schiff.

Mr. Schiff. I would say that I think where the Supreme Court has spoken on analogous questions of how much deference or weight should be given to the government's assertion that something would be adverse to the national security interest of the country, the court in U.S. v. Nixon used the word "utmost deference." The circuit court in Masri, which is another analogous case, made reference to the court in the Nixon case. And "substantial weight" is, I think, something less than "utmost."

Mr. Watt. Maybe, maybe not.

Mr. Schiff. If you go from a situation where the standard is

conclusive to having no standard, the court could infer that you are not to give any added weight, or you might have courts that continue to give complete deference. So if we set a standard, that may be better than having no standard at all. And, you know, I think substantial weight or due deference, I think these are in the right ballpark.

Mr. Watt. I will yield to Mr. Scott if he has an opinion on this.

I am just trying to get information. It seems to me, if we left this alone, there is a standard that is in place already, and we may be beating a horse that has already been established through judicial recognition anyway.

Mr. Lungren. Would the gentleman yield on that?

Mr. Watt. Yes, sir.

Mr. Lungren. Presumably, the standard that is currently given prior to the Second Circuit's decision still prevails in those other circuits, which would be conclusive. Except, in the Second Circuit, where it is something less than conclusive, we would at least be establishing a standard that would be nationwide.

Mr. Watt. What did they do with the Doe case? Did they send it back for another determination based on another deference standard? How did they rule, ultimately?

Mr. Lungren. I believe they remanded for that particular security letter for further consideration.

Mr. Watt. All right.

I yield back.

Mr. Scott. The gentleman's time has expired.

Are there other comments on the amendment?

The question is on the amendment.

All in favor of the amendment will say, "Aye."

All opposed, say, "No."

The noes have it.

Mr. Lungren. Mr. Chairman, on that I would ask for a recorded vote.

Mr. Scott. A recorded vote is ordered. The clerk will call the roll.

The Clerk. Mr. Conyers?

[No response.]

The Clerk. Mr. Berman?

[No response.]

The Clerk. Mr. Boucher?

[No response.]

The Clerk. Mr. Nadler?

[No response.]

The Clerk. Mr. Scott?

Mr. Scott. No.

The Clerk. Mr. Scott votes no.

Mr. Watt?

Mr. Watt. No.

The Clerk. Mr. Watt votes no.

Ms. Lofgren?

Ms. Lofgren. No.

The Clerk. Ms. Lofgren votes no.

Ms. Jackson Lee?

[No response.]

The Clerk. Ms. Waters?

[No response.]

The Clerk. Mr. Delahunt?

[No response.]

The Clerk. Mr. Wexler?

[No response.]

The Clerk. Mr. Cohen?

Mr. Cohen. No.

The Clerk. Mr. Cohen votes no.

Mr. Johnson?

Mr. Johnson. No.

The Clerk. Mr. Johnson votes no.

Mr. Pierluisi?

Mr. Pierluisi. Aye.

The Clerk. Mr. Pierluisi votes aye.

Mr. Quigley?

Mr. Quigley. Aye.

The Clerk. Mr. Quigley votes aye.

Ms. Chu?

Ms. Chu. No.

The Clerk. Ms. Chu votes no.

Mr. Gutierrez?

[No response.]

The Clerk. Ms. Baldwin?

Ms. Baldwin. No.

The Clerk. Ms. Baldwin votes no.

Mr. Gonzalez?

[No response.]

The Clerk. Mr. Weiner?

Mr. Weiner. No.

The Clerk. Mr. Weiner votes no.

Mr. Schiff?

Mr. Schiff. Aye.

The Clerk. Mr. Schiff votes aye.

Ms. Sanchez?

[No response.]

The Clerk. Ms. Wasserman Schultz?

Ms. Wasserman Schultz. No.

The Clerk. Ms. Wasserman Schultz votes no.

Mr. Maffei?

Mr. Maffei. No.

The Clerk. Mr. Maffei votes no.

Mr. Smith?

Mr. Smith. Aye.

The Clerk. Mr. Smith votes aye.

Mr. Goodlatte?

[No response.]

The Clerk. Mr. Sensenbrenner?

[No response.]

The Clerk. Mr. Coble?

[No response.]

The Clerk. Mr. Gallegly?

[No response.]

The Clerk. Mr. Lungren?

Mr. Lungren. Aye.

The Clerk. Mr. Lungren votes aye.

Mr. Issa?

[No response.]

The Clerk. Mr. Forbes?

[No response.]

The Clerk. Mr. King?

[No response.]

The Clerk. Mr. Franks?

Mr. Franks. Aye.

The Clerk. Mr. Franks votes aye.

Mr. Gohmert?

[No response.]

The Clerk. Mr. Jordan?

[No response.]

The Clerk. Mr. Poe?

[No response.]

The Clerk. Mr. Chaffetz?

[No response.]

The Clerk. Mr. Rooney?

Mr. Rooney. Aye.

The Clerk. Mr. Rooney votes aye.

Mr. Harper?

[No response.]

The Clerk. Ms. Jackson Lee?

Ms. Jackson Lee. No.

The Clerk. Ms. Jackson Lee votes no.

Mr. Issa. Aye.

The Clerk. Mr. Issa votes aye.

Ms. Jackson Lee. Mr. Chairman, how am I recorded?

The Clerk. Ms. Jackson Lee votes no.

Mr. Scott. The clerk will report.

The Clerk. Mr. Chairman, eight members voted aye, 11 members voted nay.

Mr. Scott. The amendment is not adopted.

The committee will be in recess, to return immediately after this series of votes. The committee is in recess.

[Recess.]

Chairman Conyers. [Presiding.] The committee will come to order.

I would like to invite the clerk to call a quorum.

The Clerk. Mr. Conyers?

Chairman Conyers. Present.

The Clerk. Mr. Berman?

Mr. Boucher?

Mr. Nadler?

Mr. Scott?

Mr. Watt?

Ms. Lofgren?

Ms. Jackson Lee?

Ms. Waters?

Mr. Delahunt?

Mr. Wexler?

Mr. Cohen?

Mr. Johnson?

Mr. Pierluisi?

Mr. Quigley?

Mr. Quigley. Present.

The Clerk. Ms. Chu?

Mr. Gutierrez?

Ms. Baldwin?

Mr. Gonzalez?

Mr. Weiner?

Mr. Schiff?

Ms. Sanchez?

Ms. Wasserman Schultz?

Mr. Maffei?

Mr. Smith?

Mr. Sensenbrenner?

Mr. Coble?

Mr. Gallegly?

Mr. Goodlatte?

Mr. Lungren?

Mr. Lungren. Present.

The Clerk. Mr. Lungren is present.

Mr. Issa?

Mr. Forbes?

Mr. King?

Mr. Franks?

Mr. Gohmert?

Mr. Jordan?

Mr. Poe?

Mr. Chaffetz?

Mr. Rooney?

Mr. Harper?

Mr. Wexler?

Mr. Wexler. Present.

The Clerk. Mr. Schiff?

Mr. Schiff. Present.

The Clerk. Mr. Smith?

Mr. Smith. Present.

The Clerk. Mr. Nadler?

Mr. Nadler. Here.

The Clerk. Mr. Pierluisi?

Mr. Pierluisi. Present.

The Clerk. Mr. Quigley?

Mr. Quigley. Still here.

The Clerk. Ms. Baldwin?

Ms. Baldwin. Present.

The Clerk. Mr. Watt?

Mr. Watt. Present.

The Clerk. Ms. Wasserman Schultz?

Ms. Wasserman Schultz. Present.

The Clerk. Mr. Jordan?

Mr. Jordan. Here.

The Clerk. Mr. Issa?

Mr. Issa. Here.

Chairman Conyers. Mr. Nadler.

The Clerk. Mr. Nadler is present.

Mr. Weiner?

Mr. Weiner. Present.

The Clerk. Mr. Maffei?

Mr. Maffei. Present.

Chairman Conyers. A working quorum being present, the Chair would like to proceed with the amendments of Darrell Issa -- oh,

Mr. Schiff, I am sorry.

Do you mind if I go to Mr. Schiff first?

Mr. Issa. If we are alternating Republican/Democrat, we should certainly alternate Republican/Democrat. So Mr. Schiff, happily.

Chairman Conyers. Thank you very much.

Mr. Issa. Of course, Mr. Chairman.

Chairman Conyers. The gentleman from California, Mr. Schiff, is recognized.

Mr. Schiff. Thank you, Mr. Chairman. I have an amendment at the desk.

Chairman Conyers. The clerk will report.

The Clerk. Amendment to H.R. 3845, offered by Mr. Schiff. Strike section 107, page 13, line 20, after "use" insert "by the Federal Government." Page 13, line 24, before "during" --

[The information follows:]

******** COMMITTEE INSERT ********

Mr. Schiff. Mr. Chairman, I request that the amendment be deemed as read.

Chairman Conyers. Without objection. And the gentleman is recognized.

Mr. Schiff. I thank the chairman.

And I thank my colleague from California for allowing me to go first on this amendment. I hope it is an amendment that my colleague from California will also support.

This amendment would strike the ordinary criminal pen register and trap-and-trace changes made in the underlying bill, while including this issue in the study the IG would already be planning to conduct concerning these issues.

This is a follow-up to the amendments offered by Mr. Rooney prior to the last set of votes and the concerns that he and members of both sides of the aisle expressed regarding the potential unintended consequences that changing criminal pen register and trap-and-trace on State and local law enforcement could have.

In addition, since the second Rooney amendment changed the standard for FISA pen register and trap-and-trace to the Senate bill, our bill now has a standard for trap-and-trace that is higher for FISA pen register/trap-and-trace than ordinary criminal pen register/trap-and-trace, and this strikes me as somewhat logical.

This amendment will allow us to avoid any unintended consequences while allowing the committee and Congress to obtain further information on this matter. And I would urge its support.

Chairman Conyers. Thank you for spotting that, Mr. Schiff.

I would yield to Lamar Smith.

Mr. Smith. Thank you, Mr. Chairman.

Mr. Chairman, my understanding, from what the gentleman said, is that this strikes the higher standard for the pen register and also adds an audit?

Mr. Schiff. If the gentleman would yield, yes, that is correct. It strikes the higher standard that was in the base bill.

Mr. Smith. Right.

Mr. Schiff. It also calls for the same audit that we have asked for in one context to be extended to both the FISA and criminal context.

Mr. Smith. Right. That is correct.

Mr. Chairman, I think this amendment greatly -- well, improves the bill, not to the extent that we can support the bill, but it is definitely an improvement. And I support the amendment, and I appreciate the gentleman's offering it.

Chairman Conyers. I thank Lamar Smith.

All in favor of the amendment, indicate by saying, "Aye."

All opposed, "No."

The ayes have it, and the amendment is agreed to.

We now turn to the distinguished gentleman from California, Darrell Issa.

Mr. Issa. Thank you, Mr. Chairman.

Mr. Chairman, I have an amendment at the desk.

Chairman Conyers. The clerk will report it.

The Clerk. Amendment to H.R. 3845, offered by Mr. Issa. Strike section 106. Redesignate succeeding sections accordingly. Make any cross-reference changes accordingly. Amend the table of contents accordingly.

[The information follows:]

******** INSERT 3-4 ********

Chairman Conyers. Without objection, the gentleman is recognized in support of his amendment.

Mr. Issa. Thank you, Mr. Chairman.

Mr. Chairman, I offer the amendment to strike the section of the bill because, clearly, we need to ensure that we are consistent with Supreme Court decisions and we need to insist that the PATRIOT Act have the ability to actually be used.

Mr. Chairman, in 1979, the U.S. Supreme Court expressly held that the fourth amendment does not require immediate notice of the execution of a search warrant. Since that time, three Federal appellate courts have considered and constitutionally upheld delayed-notice search warrants, and all have held them to be constitutional.

Under current law, the government can ask a Federal judge -- I repeat, a Federal judge -- for permission to delay notice to the target that a search has been conducted pursuant to warrant. This legislation unwisely limits the judge's -- I repeat, limits the judge's -- discretion in granting permission for delayed notice.

Mr. Chairman, by amending the standard of "may" to "will" in section 106, the bill imposes a standard which shall not be achieved. As the chairman wisely would note were the shoe on the other foot, the likelihood that a standard of "will," meaning by all reasonable accounts will happen, must happen, and shall happen, isn't going to happen. It is very clear that a standard

far less than "will" is the basis under which we would act were it us.

Mr. Chairman, I would ask, and I would ask all the members: Consider if, in fact, your child had been kidnapped. You wanted to have a warrant served on the likely kidnapper but did not want him to know that you were that close to him so that he would continue to keep your child alive in the hopes that you would deliver the ransom.

Mr. Chairman, would you have that delay based on a "will" standard, an absolute by the preponderance of the evidence that it would lead to your child's death? Or would you rather than the standard be "may" lead to your child's death, "may" adversely affect the ability to complete the rescue of your kidnapped child?

I use this example of a kidnap for a good reason. We have a hostage in terrorism every day. The hostage is the safety and security of the American people. Letting a terrorist know that we are close to him, on to him, or in fact have been able to secure a tap on their communications, whether a terrorist, a drug trafficker, or any other multi- or non-nation state actor, clearly is what this act was intended to do.

This sensible amendment is designed to treat that standard in a way that we would want to be treated if it were our child. I urge support of the amendment.

And I yield back the balance of my time, Mr. Chairman.

Chairman Conyers. Thank you for your explanation, Mr. Issa.

Is there any other further discussion on this amendment?

Mr. Issa. Mr. Chairman?

Chairman Conyers. The Chair recognizes the gentleman from California.

Mr. Issa. Thank you for your acceptance of my long delay.

Mr. Chairman, it appears as though we nearly have an agreement that we may -- may -- be able to find common language in a short period of time. And I would ask the chairman's indulgence to withdraw without prejudice at this time the amendment so that we could, on a bipartisan basis, perfect it and reintroduce it in a few minutes.

Chairman Conyers. I thank the gentleman for his careful scrutiny, and we will hold it without prejudice.

Mr. Issa. Thank you, Mr. Chairman. I withdraw.

Chairman Conyers. I think there is one other amendment, and if anyone seeks to -- what we want to do now, with the concurrence of the members, is that we want to hold the final disposition of this bill and begin the examination of the state secrets legislation.

And so I will ask that we bring forward the state secrets legislation until we have a reporting quorum.

The clerk will report the bill.

The Clerk. H.R. 984, a bill to provide safe, fair, and responsible procedures and standards for resolving claims of state secret privilege.

Chairman Conyers. I called up the state secrets. I apologize. Let's take the resolution of inquiry offered by Lamar Smith.

And, pursuant to notice, I call up House Resolution 871, directing the Attorney General to transmit to the House of Representatives certain documents, records, memos, correspondence, and other communications regarding medical malpractice reform, and move that it be reported adversely to the House.

[The information follows:]

******** INSERT 3-5 ********

Chairman Conyers. And I would now like to recognize the author of this resolution, the ranking member of Judiciary, at this point in time, to explain his resolution.

Mr. Smith. Thank you, Mr. Chairman.

Mr. Chairman, because the former chairman of the committee, the gentleman from Wisconsin, Mr. Sensenbrenner, has to leave in 5 minutes, I am going to yield to him and then make my statement after he finishes, if that is all right.

Chairman Conyers. Absolutely.

Mr. Smith. I will yield to the gentleman from Wisconsin.

Mr. Sensenbrenner. Well, I thank the gentleman from Texas for yielding. It is more like 30 minutes. But I do have an opening statement, which I will say now.

As I said at the hearing on this bill, the state secrets privilege is a longstanding legal doctrine that the Supreme Court most recently -- oh, okay. Sorry.

Mr. Smith. Mr. Chairman, I would like to go my House Resolution 871.

House Resolution 871, Mr. Chairman, is a resolution of inquiry requesting that the administration disclose to Congress all the communications it has received from trial lawyers on the subject to tort reform in health care lawsuits.

I introduced this resolution because the American people have a right to know why popular legal reforms are not in the

legislation the Democratic majorities are moving through Congress.

Unlimited lawsuits enrich trial lawyers while increasing the cost of health care for everyone, so it is no surprise that opposition by trial lawyers is the reason tort reform has been excluded from the Democrats' health care proposals. But it is a surprise that many are so bluntly admitting that.

Former Democratic National Committee Chairman Howard Dean said the following publicly at a recent town-hall meeting, quote: "The reason why tort reform is not in the bill is because the people who wrote it did not want to take on the trial lawyers, and that is the plain and simple truth," end quote.

The political opposition, which Mr. Dean admits is not based on the merits but on raw political opposition, flies in the face of the facts. The Congressional Budget Office estimates that enacting tort reforms nationwide would result in medical malpractice insurance rates falling 25 to 30 percent. And, according to the Government Accounting Office, rising litigation awards are responsible for skyrocketing medical professional liability premiums.

RPTS SMITH

DCMN SECKMAN

[3:20 p.m.]

Mr. Smith. Lower premiums mean Americans will pay less to have better health care. The President of the American Medical Association said, "if the health care bill doesn't have medical liability reform in it, then we don't see how it is going to be successful in controlling costs."

And the President's own doctor over two decades supports tort reform and has said, regretfully, that "I once briefly talked to the President about malpractice, and he took the lawyer's position."

In the handful of States that have enacted tort reform, health care costs have fallen, and the availability of medical care has expended. In my home State of Texas, premiums fell by 30 percent, and more than 14,000 doctors returned or set up new practices in the State as a result of tort reform.

To give just one example, a charitable hospital group in Texas that serves the poor and underserved reported that, since Texas enacted tort reform, its legal costs have gone from $153 million a year to $2.3 million last year.

Doctors are so concerned about frivolous lawsuits that they order unnecessary and expensive tests and procedures that are of no benefit to the patient. The Department of Health and Human

Services estimates the national cost of defensive medicine is more than $60 billion. The Congressional Budget Office just issued a report that concludes it costs $54 billion. The cost of litigation and defensive medicine are then passed on to the patient in the price of health care.

I introduced this resolution of inquiry because the American people deserve to know exactly what the trial lawyers have said to the administration that caused it to cast aside the one proposal we know and the CBO confirms will actually reduce health care costs. Tort reform has proved effective at reducing costs and increasing the quality of care. If tort reform were enacted, trial lawyers would stand to lose one of their primary sources of income, medical malpractice suits, which are often just a form of legalized extortion. But all Americans would gain and tens of billions of dollars would suddenly be freed up and could be used to help provide health care to the uninsured.

Favorably reporting out this resolution to the House floor is the only way we in Congress can expose the hidden barriers that now stand between real reform and the American people.

I thank the chairman, and yield back.

Chairman Conyers. Well, I thank the gentleman.

One of our trial lawyers on the committee will rise to the defense of those practitioners who are required to go regularly into court because I don't know if they think that they are legally extorting the opposite party whom they represent, but be

that as it may, could I inquire of the distinguished ranking member whether he has communicated any correspondence to the Department of Justice or the Attorney General in an effort to determine what the relationship of the Trial Lawyers Association is to the DOJ?

Mr. Smith. Mr. Chairman, thank you for that question. We could file a Freedom of Information request, but I think that that would take a lot longer than the consideration of this resolution on the House floor. We would be happy if you would join me in that, even though it would take longer, but I think the best way to proceed is with the resolution. But thank you for the question.

Chairman Conyers. Well, thank you. I appreciate being invited in to help you in your request for knowledge. Let me ask you this, have you sent a communication by regular mail?

Mr. Smith. Mr. Chairman, your inquiry was whether we had mailed them a letter yet. Based upon our track record with sending letters to the Department, I think we have sent a couple of dozen, and it has taken an average of 5 months to get a response, if we get a response at all. That was not exactly confidence-building as far as being able to expect them to respond to any letter on this particular subject, and, again, I think a resolution would get a response a lot more quickly.

Chairman Conyers. All right.

I thank the gentleman very much. Could I inquire further of

the gentleman if he has made a telephone call?

Mr. Smith. Mr. Chairman, I have not made a telephone call because I don't have a great deal of confidence that I would be able to get the information I requested. If you would join me on a conference call, that might be helpful though.

Chairman Conyers. All right. Well, finally, could I inquire of my dear friend -- yes, I would be happy to do that. But can I inquire of my dear friend, when we met with the Attorney General at lunch 3 weeks ago, did you raise the subject with him personally at the luncheon inside the Department of Justice?

Mr. Smith. Mr. Chairman, I don't remember being able to attend that luncheon. I am glad, if my presence is such that you felt that I was there, but I don't remember being there that recently. I remember being at a lunch several months ago, and I did not raise the subject at that luncheon. If I had met with him 3 weeks ago, I suspect that I would have.

Chairman Conyers. Well, if we employ any one of the four or five methods that have been suggested, would you, could you hold this resolution off until we've seen what, how much cooperation that you and I together can elicit from the Attorney General or his representative?

Mr. Smith. Well, Mr. Chairman, as I understand it, you have agreed to make a conference call with me so far.

Chairman Conyers. Yes, sir.

Mr. Smith. And would you be willing during that conference

call to request the information that I want and encourage them to give it to me?

Chairman Conyers. I would have to. I would not make, participate in a conference call in which I opposed the position that was being advanced by my friend, the ranking member.

Mr. Smith. And Mr. Chairman, would you request, as I would hope, that we would need to get the response from them before we vote on the health care bill Saturday at approximately 6:00 p.m.?

Chairman Conyers. Absolutely. I would insist upon those terms if that is what you want.

Mr. Smith. Let me ask my colleagues if there are any other requests we would like to make as long as the chairman is so agreeable.

Chairman Conyers. Could you hold off any other requests you would like to make? And let me yield to the gentleman from Illinois.

Mr. Quigley. Thank you, Mr. Chairman.

For some reason, my line of questioning has been thrown off, and I feel like I should be asking, if you asked him on a plane, if you asked him in the rain, if you asked him on a boat, did you ask him with a goat, but I will hold off on that.

As a point of clarification, and to clarify where I stand on things, I haven't yet been accused of being a trial attorney. I don't see it as a negative. While I probably have completed a couple hundred trials, they were always in criminal court, and I

don't see how that plays out in the health care debate.

But as long as we are talking about asking who has played a role in the health care debate, I think it is fair to go across the board, if we are going to do that, if we are going to look at our true intentions. Clearly, this is a comprehensive health care reform bill, or an attempt at such. But there is a lot not in the bill as well. And it goes well beyond the issue that was raised here, and I believe that there are probably hundreds of groups that are glad that they aren't involved with this at a greater level.

But I would suggest that if we are asking about motivations of why things were done, that it is not fair to just single out the American Association for Justice. I think it is fair to ask, and I could probably name 100 groups, but I will start with the American Medical Association, the American Hospital Association, the U.S. Chamber of Commerce, or any other entity associated with advocating for so-called medical malpractice reform, or any of the groups whose interest in health care is not involved in this bill who may be feeling happy today that that is not the case.

I yield back.

Chairman Conyers. Thank you very much.

In the interest of public disclosure, are you a trial lawyer?

Mr. Quigley. I am not a trial lawyer in the definition that you are using it. I was a criminal defense attorney who completed trials. Thank you.

Mr. Sensenbrenner. Mr. Chairman.

Chairman Conyers. I yield to the gentleman, the chairman emeritus.

Mr. Sensenbrenner. Well, Mr. Chairman, I have noted with interest that apparently both the chairman and the ranking member want to resolve this matter by getting in touch with the Attorney General, so at this time, I would ask unanimous consent that the committee recess subject to the call of the Chair so that the Chair and the ranking member can retire to the telephone and get this job done.

Chairman Conyers. Well, I would sure like to do that, except that there is a bill known as the State Secret Act that is pending on the agenda. I'd like -- can we work on that?

Mr. Sensenbrenner. Well, reclaiming my time from the distinguished Chair, we have got a time limit where we have to report this bill out so that Mr. Smith can't call it up on the floor as a privileged bill. So it seems to me that the urgency is not with the state secrets bill, but getting this resolution resolved. I would urge the Chair to put first things first, and I would renew my unanimous consent request.

Chairman Conyers. Well, let me see if this will accommodate the chairman emeritus. How about us making a direct call to the Attorney General of the United States as we proceed with the state secrets bill that is pending next?

Mr. Sensenbrenner. Well, I don't think -- reclaiming my

time, I don't think we should divide our attention. The Chair decided to bring up this resolution first instead of the state secrets rule, and if the ranking member and the Chair can reach an agreement, then we don't have to spend all of our time debating this. So I, once again, renew my unanimous consent request.

Chairman Conyers. Well --

Mr. Nadler. I object.

Mr. Sensenbrenner. Oh.

Chairman Conyers. Could I instruct the chief of staff of Judiciary to call the Attorney General? And I would now return the committee to the state secrets bill.

Pursuant to notice, I call up H.R. 984, the State Secret Protection Act, for purposes of mark up and ask the clerk to please report the bill.

The Clerk. H.R. 984, a bill to provide safe, fair and responsible procedures and standards for resolving claims of state secret privilege.

[The information follows:]

******** COMMITTEE INSERT ********

Chairman Conyers. Could I invite the chairman of the Constitution Subcommittee to describe on behalf of the majority the basic purposes of this bill?

Mr. Nadler. Thank you, Mr. Chairman.

Today the committee considers H.R. 984, the State Secret Protection Act of 2009. This bill codifies uniform standards for dealing with the government's claims of a state secrets privilege in civil litigation. In order for the rule of law to have any meaning, individual liberties and rights must be enforceable in our courts. There is an ancient maxim in law that there is no right without a remedy. And if the government violates your rights, it if wiretaps your phone without a warrant, if it steals your guns or your papers, if it invades and ransacks your house, if it kidnaps and tortures you, your only remedy, the only way you have to make the rights guaranteed you in the Bill of Rights, in the Second Or Fourth Or Fifth Amendments, real is to sue the government for damages or for an injunction to order a halt to the government's improper or illegal invasion of your rights.

But if the executive can have any case dismissed on the mere incantation of the magic phrase, state secrets, without having to prove to a court that the concerns about revelation of sensitive national security information are real and not simply an excuse to shield embarrassing or illegal acts or information, then you have no remedy and no rights, and the executive can get away with

anything, regardless of anything the laws of the Constitution may say, and no one will ever be the wiser.

There can be no law, no rights and no liberty if the executive can do anything it wants behind an impenetrable wall of secrecy. The state secrets doctrine as it has been reinvented in the last few years is the greatest threat to liberty in this country at present. It must be limited and controlled, and the appropriate balance between our three branches of government must be restored.

That is what this bill seeks to do. Separation of powers concerns are at their highest with regard to secret executive branch conduct, and the government cannot be allowed to hide behind unexamined claims of secrecy. President Obama has acknowledged that the state secret privilege is overused and needs reform. In late September, Attorney General Holder issued new policies and procedures for invoking the privilege.

That policy is a welcome step in the right direction, but it is not enough. While it sets up some internal policing of the privilege by the executive branch, it still permits the executive to be its own judge. This policy does not provide for a judicial review of assertions of the state secrets privilege.

Congress must do so. Congress has already provided guidance to the courts for handling sensitive information in other contexts, through FOIA, the Freedom of Information Act; the CIPA, the Classified Information Procedures Act; and FISA. It is time

that we provided similar guidance for handling claims of secrecy in civil cases.

Several of the witnesses who submitted testimony to the Subcommittee on Constitution, Civil Rights, and Civil Liberties, including Federal judges, the former directors of the FBI and the CIA, and our former colleague, Congressman Asa Hutchinson, argued persuasively that the courts have proven themselves fully competent to safeguard sensitive information, and that it is the courts, not the executive branch, that are best qualified to balance the risks of disclosing evidence with the interest of justice. And in any event, they are the branch entrusted by our system of government and by our Constitution with making such balances.

This bill has been studied extensively by the Constitution Subcommittee, whose members reported the bill favorably by voice vote with an amendment to clarify the right of interlocutory appeal contained in Section 8. That amendment replaced overbroad language that would have allowed immediate appeal of any orders by any party and made clear that only the government has the right to the emergency appeal of orders that risk disclosure of information that the government seeks to protect.

H.R. 984, as amended by the subcommittee, and along with some additional clarifying changes that I will offer today, provides much needed guidance to courts when handling state secret privilege claims in the following key ways:

First, H.R. 983 prohibits dismissal of a case at the very outset on the government's unsupported assertion that the case cannot be considered because its entire subject matter is a state secret. H.R. 984 would require a court to examine and rule on actual, not hypothetical, claims of harm that would be caused by disclosure of the particular information that the government seeks to withhold.

Second, H.R. 984 requires that all judges using secure proceedings and other safeguards review the information that the government seeks to withhold to determine whether the harm identified by the government is likely to occur. Currently, each individual judge must decide whether to review the information at issue or whether instead to accept the government's assertions as dispositive on their face. This has resulted in inconsistent and unfair results.

Third, if the judge determines that the privilege has been validly asserted, that the revelation of this information would indeed constitute a threat to national security, H.R. 984 requires that judges prohibit harmful disclosure of that information and consider whether a nonprivileged substitute can be created, allowing cases to go forward whenever possible while protecting valid state secrets. Where there is no possible substitute, the bill allows the judge to issue appropriate orders including dismissing a claim or finding for or against the party on a factual or legal issue. This provision is modeled on the interest

of justice language contained in CIPA, the Classified Information Procedures Act, and provides judges the same type of flexibility in civil cases as they now have in criminal cases.

We all understand the need to protect national security, but both individual justice and national security can and must be protected at the same time. This bill ensures that when the government raises a state secret privilege in civil litigation, the courts can strike the correct balance. I urge all of the members of the committee to support the bill.

The bill, in essence, says that the executive may assert state secrets claims; the courts must judge the validity of those claims in the context of the litigation as they normally do, because no executive, not a Democratic executive, not a Republican executive, can be trusted to decide to simply dismiss cases on the unsupported assertion that or the unexamined assumption/assertion of the necessity of secrecy. The courts must judge this in civil cases as they do now in criminal cases.

I thank you, and I yield back the balance of my time.

Chairman Conyers. I thank the gentleman for a thorough explanation.

I would turn now to the chairman emeritus, Jim Sensenbrenner.

Mr. Sensenbrenner. Thank you very much, Mr. Chairman.

I appreciate the ranking member yielding to me since I have a 4:00 meeting that I can't break up.

As I said at the hearing on this bill, the state secrets

privilege is a longstanding legal doctrine the Supreme Court most recently described in the case called U.S. v. Reynolds. In that case, the Supreme Court made it clear that if the court, after giving appropriate deference to the executive branch determines that public disclosure of information would harm the national security, the court is obliged to either dismiss the case or limit the public disclosure of national security information as necessary. While this doctrine may occasionally disadvantage someone suing in court, it is vital to protecting the safety of all Americans.

The root of the state secrets privilege extends all the way back to Chief Justice Marshall, the author of Marbury v. Madison, who held that the government need not produce any information that would endanger the public safety. In the modern era, Congress debated the issue of a state secrets privilege under Federal law in the 1970s but ultimately choose to maintain the status quo.

The state secrets doctrine remains strongly supported by today's Supreme Court. Even in its Boumediene decision granting habeas litigation rights to terrorists, Justice Kennedy in his majority opinion acknowledged the government's legitimate interest in protecting sources and methods of intelligence gathering and stated, We expect that the district court will use its discretion to accommodate this interest to the greatest extent possible, while citing the Reynolds state secrets case I mentioned earlier in doing so.

I oppose any efforts, including this bill, that invite the courts to deviate from the sound procedures they currently follow to protect vital national security information. In particular, H.R. 984 would preclude judges from giving due weight to the executive branch's assessment of national security.

On that point, I want to note that at the hearing on this bill, I asked the Democrats' invited witness, former Judge Patricia Wald, whether she was concerned that this bill would prohibit judges from giving substantial weight to the executive branch's determination regarding national security when that same substantial weight is required to be given in lawsuits seeking information under FOIA. Judge Wald replied that the term substantial weight isn't even in the FOIA text; it's only in the conference committee report.

But that is clearly incorrect. The statutory text of 5 United States Code Section 552 (a) (4) (b), which is a part of the Freedom of Information Act statute, provides that a court shall accord substantial weight to an affidavit of an agency concerning that agency's determination under subsection (b). That subsection is a provision of FOIA that provides a blanket exception for information specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy.

I would also like to submit for the record this list of Federal court cases that support the proposition that substantial

weight must be accorded to an agency's affidavit concerning withheld material that is claimed to be exempt from FOIA disclosure on national security grounds.

[The information follows:]

******** INSERT 4-1 ********

Mr. Sensenbrenner. In any case, the Obama administration is clearly not enamored with the approach of this legislation, and as it is adhered to in court, the doctrine asserted by the previous administration in at least three cases already. According to the Washington Post editorial page, the Obama administration's position on state secrets makes it "hard to distinguish it from its predecessor." And Anthony Romero, the executive director of the ACLU has written that the new administration has embraced policies held over from the Bush era, including the use of the state secrets claim.

Last Congress, legislation essentially the same as this bill was cosponsored in the other body by Senators Joe Biden and Hillary Clinton, who now have been promoted. But this year, President Obama, Vice President Biden and Secretary of State Clinton have gone silent on the bill. When asked about it recently, the Vice President's communications director said, no comment on this from here.

Indeed, the Obama administration filed a brief in the Supreme Court in July that clearly stated the state secrets privilege is rooted in the Constitution, which would make efforts to amend it through legislation unconstitutional. This legislation goes exactly in the wrong direction, so much so that even President Obama, Vice President Biden and Secretary of State Clinton are running away from it. We should, too.

Chairman Conyers. I want to thank the gentleman for his thorough research in which he has now effectively linked the current President and the past President on his side as allied with him. I thank him very much for that.

Does anyone else seek time?

I will strike the last word and yield to Jerry Nadler, the Constitution Subcommittee Chair.

Mr. Nadler. I thank the chairman.

I think Mr. Sensenbrenner helped make the case for this bill a moment ago. He quoted the Boumediene decision of the Supreme Court, Justice Kennedy's quote, and he said, we expect the district court will use its discretion -- that is the quote. The rest of it I will have to paraphrase: We expect the district court will use its discretion to protect valid state secrets.

Yes, that is the point of this bill. Many courts, some courts, will in fact use their discretion under current law to examine the validity of the assertion of the state secrets. But many courts have said, we won't look at it. If the executive asserts the state secrets, we will take that assertion as dispositive and won't look at it.

What this bill says is, you have to look at it. The court should do exactly what Justice Kennedy said, and the court should use its discretion, after examining it, to judge the validity of the executive's claim of state secrets in a given case.

So we are in agreement with judge -- Justice Kennedy in

Boumediene. Now, the distinguished gentleman also said that we use the disclosure of a standard, rather, of deference, due deference, although this is really going to come up later in the bill on FOIA. But in FOIA, the sole goal of the suit is to obtain public disclosure, and there this standard has resulted in abject deference. It is hard to find a single case where the court orders disclosure where the government raises this question.

In civil cases, the subject of this bill, the goal of the suit isn't public disclosure, but instead somebody, the plaintiff, comes to court alleging that he has been injured, and he is seeking redress. This is a greater constitutional concern, and the bill should not require undue deference to the government that will foil the ability of someone to get proper redress when redress is, in fact, just.

Third, yes, we must protect state secrets when they are validly asserted. But the key is that it is up to the courts to determine, as Justice Kennedy said, when the state secret is validly asserted and when it is not. We know that the government, for instance, in the Pentagon papers case said that the sky would fall if the Pentagon papers were revealed, and of course, they weren't telling the truth. We know that in the Reynolds case, which is the original Supreme Court case in 1953 establishing the state secrets doctrine, the government lied to the court. There was a fraud in the court; it said that you can't reveal this report because it would show the secret -- very secret things, and

in fact, when that became public 50 years later, it had nothing to do with that. It simply showed Air Force negligence and carelessness. It had nothing do with any secret information.

And finally, there is a new -- yes, the state secrets doctrine, some scholars say it has constitutional origins. Some say not. Even if it has constitutional origins, we can still regulate it. There is no question of that. But there is a new use the state secrets doctrine. Until the Bush administration, the state secrets doctrine was used only -- only -- to say you can't see that document in the court suit because we claim that is a state secret. And we are saying, that may be, but the court should judge that.

Under the Bush administration, sadly, supported by the Obama administration in court so far, though they have never justified it publicly, but their briefs have gone in the same direction, there is a new use and that use is saying, move to dismiss the case right after the plea, first pleading, on the grounds that consideration of the case will result in revelation of state secrets. In other words, not a protection, not an evidentiary privilege to protect a document or some evidence which is a state secret, but the use of the doctrine to preclude consideration of the case at all, which means -- and that is the most pernicious development, and this bill says essentially you can't do that, because if you allow the government to do that, what that means is they are not protecting a state secret necessarily, but they are

saying you can't hear the case at all.

So the government can do anything to you. They can kidnap you. They can torture you. They can steal your guns. They can violate the Second Amendment or any other amendment or anything we may pass here, and when you sue them to say stop, to ask for an injunction, or when you sue them for damages because they have done terrible things to you, or you allege that they have done terrible things to you, they say to the court, you can't consider the case, so you can't get into court. That we are saying you can't do.

And it may be that the Supreme Court will say you can't do that. But this bill says you can't do that. And it is unfortunate that the Obama administration, in court at least, has taken the same position, at least in court, though they haven't taken it publicly, that is they haven't justified it in any way. So for those reasons, I urge members that this bill is necessary.

I yield back.

Chairman Conyers. Thank you for your rebuttal.

The Chair recognizes Lamar Smith.

Mr. Smith. Thank you, Mr. Chairman.

Mr. Chairman, I join the Obama administration in opposing H.R. 984's misguided approach to the state secrets doctrine. This bill would weaken procedures approved by the Supreme Court, Presidents of both parties and Congresses controlled by both Republicans and Democrats.

We know the Obama administration opposes the bill because it has reaffirmed the previous administration's position on the state secrets doctrine in court four times, every time it had the opportunity to do so, and even stated in court that the doctrine is based on the Constitution's provisions defining the President's executive power.

The state secrets doctrine serves the essential purpose of protecting from disclosure in lawsuits sensitive national security information which, if disclosed, would allow terrorists and other foreign enemies to evade detection, train to successfully resist interrogation, and otherwise counter America's antiterrorism policies.

The rules that govern the state secrets doctrine as it exists today were approved by the Supreme Court in the case of the United States v. Reynolds. The Court held that judges must give deference to the executive branch's assessment of the sensitivity of national security information before deciding whether such information should be disclosed in a civil lawsuit.

Congress previously considered amending the state secrets privilege by statute in the 1970s but ultimately concluded that after careful analysis, the existing privilege provided the appropriate balance to maintain national security.

The doctrine has subsequently held by courts to "have a firm foundation in the Constitution." And it continues to have the strong support of today's Supreme Court, which approvingly cited

the Reynolds decision in the same case in which it granted habeas litigation rights to terrorists. In that case, Justice Kennedy, writing for the majority, stated, We expect that the district court will use its discretion to accommodate the protection of national security information to the greatest extent possible.

In his May 21 speech on national security, President Obama said the administration "will not assert the privilege in court without first following a formal process including review by Justice Department committee and the personal approval of the Attorney General. Finally, each year we will voluntarily report to Congress when we have invoked the privilege and why because there must be proper oversight of our actions."

That policy was formally adopted by the Justice Department on September 23, and Senate Judiciary Committee Chairman Patrick Leahy has stopped pursuing his own legislation on this subject in favor of simply monitoring the implementation of the Justice Department's policy. That measured approach stands in stark contrast to the bill before us today.

It would require a court to give testimony provided by partisan advocates handpicked by trial lawyers the same weight as testimony provided by national security experts in the executive branch who have a global perspective on the international threats we face as a Nation.

The Supreme Court has consistently reaffirmed the current state secrets doctrine. Congresses controlled by both political

parties have endorsed it, and Presidents of both political parties have agreed that the current approach strikes the right balance.

We should not deviate from the approach that has been accepted over the many years on a bipartisan basis and has served our Nation so well. This bill endangers our national security and makes it harder to protect American lives.

I hope there is bipartisan opposition to it.

I now yield back, Mr. Chairman.

Chairman Conyers. Thank you, Mr. Smith.

We will now suspend consideration of H.R. 984 and return to the PATRIOT Act, H.R. 3845, for which I will recognize Mr. Darrell Issa for an amendment.

The Clerk will report the Issa amendment.

The Clerk. Amendment to H.R. 3845, offered by Mr. Issa. On page 19, line 11, strike "will" and insert "may." On page 19, line 16, after "witness," insert "or is likely to otherwise seriously jeopardize an investigation or unduly delay a trial."

[The information follows:]

******** INSERT 4-2 ********

Chairman <u>Conyers.</u> The gentleman from California is recognized on behalf of his amendment.

Mr. <u>Issa.</u> Thank you, Mr. Chairman.

And I can no longer call it my amendment. I truly have to call it our amendment. And I appreciate your staff's efforts on this.

Although we quickly agreed that, on the first four items, that "will" would easily and appropriately be replaced back with "may," it took a little finessing to determine how to best send the judges issuing these warrants a clear understanding that "may" was not likely, that was not enough for the catch-all as it is often called, and instead, we looked at, for the seriously jeopardizing, we looked at inserting the word "or is likely," and likely being a standard that we believe says that it is not just it may happen because of course may might be 1 in 100, 2 in 100, but that in fact you had to make a finding that, convince the judge that this was likely to happen, and as a result, he would use something not contained in the first four.

I am not sure that all of my colleagues are delighted with this. Perhaps not all of yours will, but as we try to make sure that these warrants do get proper scrutiny, I believe your staff and my staff have worked out a compromise we will all be for, even if we cannot always be for some elements of the bill.

And I thank the chairman for his indulgence and effort in

making this happen, and yield back the balance of my time.

Chairman Conyers. I thank the gentleman from California, Mr. Issa, for the compromise that he has worked out.

If there is no further discussions, all in favor of the Issa amendment, say aye.

All opposed, say no.

The ayes have it. And so ordered.

A reporting quorum being present, the question on reporting H.R. 3845, as amended, favorably to the House is in order.

All those in favor of reporting the bill, as amended, 3845, please say aye.

All those opposed, please say no.

Then a recorded vote will be required in that case.

The clerk will call the roll.

The Clerk. Mr. Conyers?

Mr. Conyers. Aye.

The Clerk. Mr. Conyers votes aye.

Mr. Berman?

[No response.]

The Clerk. Mr. Boucher?

[No response.]

The Clerk. Mr. Nadler?

Mr. Nadler. Aye.

The Clerk. Mr. Nadler votes aye.

Mr. Scott?

[No response.]

The Clerk. Mr. Watt?

[No response.]

The Clerk. Ms. Lofgren?

Ms. Lofgren. Aye.

The Clerk. Ms. Lofgren votes aye.

Ms. Jackson Lee?

[No response.]

The Clerk. Ms. Waters?

[No response.]

The Clerk. Mr. Delahunt?

Mr. Delahunt. Aye.

The Clerk. Mr. Delahunt votes aye.

Mr. Wexler?

[No response.]

The Clerk. Mr. Cohen?

[No response.]

The Clerk. Mr. Johnson?

Mr. Johnson. Aye.

The Clerk. Mr. Johnson votes aye.

Mr. Pierluisi?

Mr. Pierluisi. Aye.

The Clerk. Mr. Pierluisi votes aye.

Mr. Quigley?

Mr. Quigley. Aye.

The Clerk. Mr. Quigley votes aye.

Ms. Chu?

Ms. Chu. Aye.

The Clerk. Ms. Chu votes aye.

Mr. Gutierrez?

[No response.]

The Clerk. Ms. Baldwin?

Ms. Baldwin. Aye.

The Clerk. Ms. Baldwin votes aye.

Mr. Gonzalez?

[No response.]

The Clerk. Mr. Weiner?

[No response.]

The Clerk. Mr. Schiff?

Mr. Schiff. Aye.

The Clerk. Mr. Schiff votes aye.

Ms. Sanchez?

[No response.]

The Clerk. Ms. Wasserman Schultz?

Ms. Wasserman Schultz. Aye.

The Clerk. Ms. Wasserman Schultz votes aye.

Mr. Maffei?

Mr. Maffei. Aye.

The Clerk. Mr. Maffei votes aye.

Mr. Smith?

Mr. Smith. No.

The Clerk. Mr. Smith votes no.

Mr. Goodlatte?

[No response.]

The Clerk. Mr. Sensenbrenner?

[No response.]

The Clerk. Mr. Coble?

[No response.]

The Clerk. Mr. Gallegly?

Mr. Gallegly. No.

The Clerk. Mr. Gallegly votes no.

Mr. Lungren?

Mr. Lungren. No.

The Clerk. Mr. Lungren votes no.

Mr. Issa?

Mr. Issa. No.

The Clerk. Mr. Issa votes no.

Mr. Forbes?

[No response.]

The Clerk. Mr. King?

[No response.]

The Clerk. Mr. Franks?

Mr. Franks. No.

The Clerk. Mr. Franks votes no.

Mr. Gohmert?

[No response.]

The Clerk. Mr. Jordan?

Mr. Jordan. No.

The Clerk. Mr. Jordan votes no.

Mr. Poe?

[No response.]

The Clerk. Mr. Chaffetz?

[No response.]

The Clerk. Mr. Rooney?

[No response.]

The Clerk. Mr. Harper?

Mr. Harper. No.

The Clerk. Mr. Harper votes no.

Mr. Nadler. Mr. Chairman?

Chairman Conyers. Yes.

Mr. Nadler. How am I recorded, please?

Chairman Conyers. That's a good question.

Mr. Nadler. Do you think it possible the clerk could, after diligent examination, ascertain the answer to that question?

Chairman Conyers. Yes.

The Clerk. Mr. Nadler voted aye.

The Clerk. Mr. Goodlatte?

Mr. Goodlatte. No.

The Clerk. Mr. Goodlatte votes no.

Mr. Poe?

Mr. Poe. No.

The Clerk. Mr. Poe votes no.

Mr. Watt?

Mr. Watt. Aye.

The Clerk. Mr. Watt votes aye.

Mr. Weiner?

Mr. Weiner. Aye.

The Clerk. Mr. Weiner votes aye.

Mr. Cohen?

Mr. Cohen. Aye.

The Clerk. Mr. Cohen votes aye.

Mr. Rooney?

Mr. Rooney. No.

The Clerk. Mr. Rooney votes no.

Mr. Gutierrez?

Mr. Gutierrez. Pass.

The Clerk. Mr. Gutierrez passes.

Chairman Conyers. Ask him again.

The Clerk. Mr. Gutierrez?

Mr. Gutierrez. Aye.

The Clerk. Mr. Gutierrez votes aye.

Chairman Conyers. The Clerk will report.

The Clerk. Mr. Chairman, 16 members voted aye and 10 members voted nay.

Chairman Conyers. H.R. 3845, as amended, is ordered reported

favorably.

Without objection, the bill will be reported as a single amendment in the nature of a substitute incorporating amendments adopted. Staff is authorized to make technical changes. Members will have 2 days to submit additional views.

Mr. Quigley. Mr. Chairman.

Chairman Conyers. Who seeks recognition?

Mr. Quigley.

Mr. Quigley. Thank you, Mr. Chairman.

I appreciate your efforts on this measure. Not to belabor the point, but between today and the time that this measure receives full consideration on the House floor, I still hope that we have an opportunity for a meaningful discussion with the Department of Justice.

Chairman Conyers. That is precisely what we intend to do, sir. I am glad you reminded us of this.

We now return to House Resolution 871, the resolution of inquiry offered by the ranking member.

And we recognize the ranking member.

Mr. Smith. Thank you, Mr. Chairman.

I understand that our staffs have made an effort to contact the Attorney General but that he is on a plane and unreachable at this point.

I know that we have talked to his staff, and with the understanding that we will be able to get an official response by

Saturday afternoon, I would be willing to suspend the motion -- I mean the resolution of inquiry.

But let me add, Mr. Chairman, that our initial indications were unofficially that no such correspondence or communication that I requested existed. That is simply not credible. The White House just in its partial released records of individuals who have visited at the White House and in the Executive Office Building showed that the head of the American Association of Justice, formerly known as the Association of Trial Lawyers of America, Linda Lipson, has actually met at the White House and with White House officials five times just in the months of May and June, and again, that was just a partial list of meetings that occurred.

So I hope the White House understands that it is not credible for them to say there have been no communication and no exchanges of information on this subject of the resolution of inquiry, and that when we get our response, it will be a serious effort to respond to the inquiry.

Chairman Conyers. Thank you.

Would the gentleman yield?

Mr. Smith. Yes, sir, I would be happy to yield.

Chairman Conyers. We had previously been talking about communications with the Department of Justice. Is it the gentleman's desire to add the White House? Well, even if it is, we can refer it to another committee.

Mr. Smith. Mr. Chairman, let's assume that when the head of

the American Association of Justice meets with White House officials and others, that there has been some correspondence with the Department of Justice, and the inquiry is limited to those exchange of communications, but, again, it is simply not credible for the White House or the Department of Justice to say that no such communication exists.

Chairman Conyers. Well, I thank you.

I will be willing to go along with that assumption if you make it in total confidence of its accuracy.

Now, let's -- just so our colleagues will be advised, the ranking member and I have agreed to withdraw the motion to report the resolution adversely but to report it instead, because of our outstanding agreements, to report it without a recommendation. It means that it is reported with -- not favorably and not unfavorably. That is what "report without recommendation" means.

All those in favor of reporting the resolution without recommendation, the question is in favor of reporting without reservation -- without recommendation, please say aye.

All those opposed, say no.

The ayes have it. And the resolution is ordered reported without recommendation.

Mr. Johnson. Mr. Chairman, I would ask for a recorded vote.

Chairman Conyers. I would ask the distinguished gentleman if he would withdraw the request for the recorded vote.

Mr. Johnson. I will withdraw my request for a recorded vote,

but I would say, if I may, that, you know, this whole issue revolves around trial lawyers and medical malpractice cases. And it is an attempt to demonize, it is one more step to demonize the trial lawyers of this great country. And I don't think that it is a worthwhile inquiry that will lead to anything positive.

And I don't want to see another ACORN situation or any of the other groups that have been known as helpful to Democrats, and then they come under attack by the Republicans. I don't want to even crack that door open with this group, the American Association for Justice.

Chairman Conyers. Well, I thank the chairman for his comments, and they will be duly noted.

Ms. Wasserman Schultz. Mr. Chairman.

Chairman Conyers. Who seeks recognition?

Ms. Wasserman Schultz. From Florida. Down here at the end.

Chairman Conyers. Oh, yes, Ms. Wasserman Schultz.

Ms. Wasserman Schultz. Mr. Chairman, I am wondering whether the ranking member would yield for a question about the resolution.

Mr. Smith. Yes, be happy to yield.

Ms. Wasserman Schultz. Thank you, Mr. Smith.

I am wondering if, beyond the Association of Justice, if your resolution asks for any other communication from any other organization other than the Association of Justice. And if the gentleman --

Mr. Smith. I will be happy to respond. I am not sure I actually had the time to begin with. But no, it does not. It is limited to the American Association of Justice, just because it was based in part on what the former Democratic county -- National Chairman, the former Governor of Vermont and a physician, Howard Dean, himself said about why tort reform was not in the health care bill. And that is the reason we wanted to seek that information from that particular organization.

Ms. Wasserman Schultz. Okay.

Well, reclaiming my time. If this was a genuine inquiry as to what kinds of communication exists between the Department of Justice and the different organizations as it relates to the subject of tort reform, it would seem to make more sense for the gentleman's resolution to be asking for communication not just from the American Association of Justice but also from the AMA, from the U.S. Chamber of Commerce, but instead, it appears as though this is a transparent attempt to malign one particular organization and only --

Mr. Smith. Would the gentlewoman yield just for a second?

Ms. Wasserman Schultz. I will in a minute -- and distract from the focus that we are trying to keep voters -- I mean Americans' attention on, which is health care reform. So I would think if this were a genuine attempt to collect information, then asking for a communication from more than just one organization would have been more appropriate.

And I am sorry. Who asked me to yield?

Mr. Smith. If the gentlewoman would yield, again, the reason it is not necessary to request information from some of the organizations she mentions, such as the American Medical Association, Chamber of Commerce, and others is because it is quite easy to get information from them, and in fact, we already have.

Ms. Wasserman Schultz. Okay.

Reclaiming my time, Mr. Chairman. I just, I understand that we are going to move forward with this with no recommendation. I just wanted to express my concerns.

Chairman Conyers. I thank the gentlelady.

Members of the committee, we are now, pursuant to notice, back on H.R. 984, State Secret Protection Act.

And are there any amendments?

Mr. Nadler. Mr. Chairman.

Chairman Conyers. Are there any amendments?

Mr. Nadler. Yes.

Chairman Conyers. The gentleman from New York is recognized.

Mr. Nadler. I have an amendment at the desk.

Chairman Conyers. The clerk will report the amendment.

The Clerk. Amendment to H.R. 984, offered by Mr. Nadler of New York. Page 6, beginning at line 5 --

Mr. Nadler. Mr. Chairman, I move the amendment be considered as read.

Chairman Conyers. Without objection, so ordered.

And the gentleman is recognized in support of his amendment.

[The information follows:]

******** INSERT 4-3 ********

Mr. Nadler. Thank you.

Mr. Chairman, I have three technical changes that I am offering in this amendment. The first streamlines the process for appointment of attorneys with appropriate security clearances. The other two changes clarify aspects of Section 7 of the bill, which sets out what happens after a court determines whether the government's privilege claim is or is not valid. All three are clarifying changes that do not alter the substantive requirements of the bill.

The first change clarifies the process contained in Section 5(e) of the bill for the appointment of cleared counsel to represent nongovernmental parties in proceedings under the act. Under Section 5(e), the court directs counsel to seek a security clearance from the government. If that counsel is not approved, the party can propose alternate counsel. And if that counsel also is not approved for security clearance, the court must appoint an attorney "who can obtain the necessary clearances --

Chairman Conyers. Will the gentleman yield? Are these technical changes or substantive changes?

Mr. Nadler. As I said, they are technical, nonsubstantive.

Chairman Conyers. All right. Can you briefly recite them, because our colleague from California may have an amendment? Or maybe --

Mr. Nadler. Well, I'm trying to cite them. I am outlining

what they do. The amendment substitutes the appointment of an attorney who already has the requisite security clearance for an attorney who can but still needs to obtain such clearance. This change will avoid the delay and uncertainty that would occur if another attorney had to go through the entire clearance process.

The executive branch retains authority to decide whether or not to clear a particular attorney. But this change streamlines the process by, when necessary, requiring a resort to counsel who has already been cleared by the government.

The second change clarifies the court's obligation to issue orders when the court determines that the state secret privilege does not apply to information the government seeks to protect. Currently Section 7(a) of the bill provides that information may be disclosed or used at trial if the court finds that the privilege does not apply.

During markup in subcommittee, Mr. Sensenbrenner expressed some concern that, unless Section 7(a) affirmatively requires the court to issue an order requiring disclosure, the interlocutory appeal right contained in Section 8 might not be triggered, and the government might be deprived of its right to an immediate appeal.

Chairman Conyers. Would the distinguished gentleman yield?

Mr. Nadler. Yes.

Chairman Conyers. Would you yield to the gentleman from Virginia, Mr. Goodlatte?

Mr. Nadler. Sure. Yes, sir.

Mr. Goodlatte. I thank the gentleman for yielding. And I understand this amendment makes clarifying changes described by the chairman of the Constitution Subcommittee.

Clarity is superior to vagueness, and so I support this amendment. However, the provisions of the bill this amendment leaves intact are to my mind clearly bad policy. So I and the ranking member do not support the base bill, even as amended.

Mr. Nadler. But that is a separate question.

But you do support the amendment?

Mr. Goodlatte. We do, indeed.

Mr. Nadler. Okay. Then I will yield back.

Chairman Conyers. And we will accept into the record the rest of your statement.

[The information follows:]

******** COMMITTEE INSERT ********

Mr. Nadler. I appreciate that.

Chairman Conyers. Are there any other amendments?

All those in support of the Nadler technical amendments, say aye.

All those opposed, say no.

The ayes have it, and so ordered.

If there are no further amendments --

Mr. Schiff. Mr. Chairman?

Chairman Conyers. Mr. Schiff.

Mr. Schiff. Mr. Chairman, I have an amendment at the desk.

Chairman Conyers. The clerk will report the amendment.

Mr. Schiff. This amendment is number one.

The Clerk. Amendment to H.R. 984, offered by Mr. Schiff of California. At page 2, line 12, strike "requiring security clearances for parties or counsel." At page 2, line 20 --

Mr. Schiff. This is amendment number two. But the order doesn't make that much difference so --

The Clerk. Amendment to H.R. 984, offered by Mr. Schiff of California. At page 8, strike line three through line 9.

Mr. Schiff. Okay. I am sorry. Could we go to amendment number one?

The Clerk. Amendment number one is the one with "at page 8," correct?

Mr. Schiff. Correct.

The Clerk. Amendment to H.R. 984, offered by Mr. Schiff of California, at page 8, strike line 3 through line 9, subsection (c), and insert, (c) Standard. In ruling on the validity of the privilege --

Mr. Schiff. Mr. Chairman, we request that the amendment be deemed as read.

Chairman Conyers. Without objection. So ordered. And the gentleman will be recognized in support of his amendment.

[The information follows:]

******** INSERT 4-4 ********

Mr. Schiff. Thank you, Mr. Chairman.

This amendment goes to a similar issue that Mr. Lungren and I discussed in connection with the prior legislation. It would specify the weight that courts should give government claims of harm to national security that would occur if evidence was disclosed.

In the bill as it is currently drafted, courts are given no real guidance in this respect but are simply ordered to evaluate the testimony of a government witness the same way they would any other witness, any other expert witness.

I am not sure that this is the correct standard or it is desirable for the Congress to be silent on this point. In the Senate legislation sponsored by Senators Leahy and Spector, they would include a substantial weight standard. This legislation offers something somewhat different that would provide that the government's assertion of harm should be given due deference. I think this is -- will facilitate the court in understanding that, whether the government expert is the Director of National Intelligence or the director of the CIA, that they do possess the broadest possible range of information on the impact on national security of the disclosure of a potential state secret.

So what this amendment would do is it would remove the language in the underlying bill that says you give the government expert the same weight as any expert, and it says, instead, that

the court shall give due deference to the assertion of harm by the government.

And I would urge my colleagues to support the amendment.

Chairman Conyers. Thank you very much.

The Chair recognizes Mr. Nadler.

Mr. Nadler. Mr. Chairman, first of all, we are preparing a secondary amendment. It is being typed right now.

I would urge, if the secondary amendment which I am going to offer is not approved, the defeat of this amendment.

This is very key because if you say -- the whole point here is that we are asking the court to judge whether the government's assertion that certain evidence must be kept secret is valid or not. And we are saying that there has to be a hearing, a secret in camera hearing, on that question in front of the judge.

And we are saying, and if you say that the government, that the government witness must be given due deference, what you are saying is, your putting your thumb on the scale and saying the executive should be given deference, and you are practically telling the judge, and many judges will read this as telling them, you have got to agree with the government.

Now, in the FOIA cases where that is done, you rarely find the judge disagree with the government. But that is different. It is different in the sense that the government here is not a disinterested party, as it is in FOIA. The government here is a party who has allegedly, that is the accusation, wronged somebody.

This is a suit against the government. The government allegedly has gone into somebody's house and stolen his guns or ransacked his papers or kidnapped him or tortured him or whatever, and someone is seeking redress in court. And when he seeks redress in court, the government is now saying, you can't see the documents, which may be necessary to prove the case.

So we are saying that, well, the judge has to decide. The courts and the government gets an interlocutory appeal if he doesn't like the decision -- the plaintiff does not, but the government does -- has got to have the opportunity to make that case. And what the bill says is, the court shall give the same weight to the government witnesses as it would to any other expert witness, depending on the facts, depending on the familiarity of the government witness, depending on his expertise.

But it is not saying, as the gentleman's amendment would say, put the thumb on the scale. Now, we know the government doesn't always tell the truth. In the Reynolds case, which was cited before, the Supreme Court case, it came out 50 years later that the government was simply lying to the court, which relied on the government's representation and kept secret what would have proved a case of negligence and wrongful death. And it was kept secret because the government lied to the court and said it involved state secrets, whereas, in fact, it did not.

In the Pentagon papers case, we saw similar. And so --

Chairman Conyers. Does the gentleman have the secondary

amendment?

Mr. Nadler. We are waiting for it to come back.

Chairman Conyers. So this is just --

Mr. Nadler. This is talking against the amendment, but I am waiting for the secondary amendment. The secondary amendment goes somewhere in the middle.

Chairman Conyers. If the gentleman would suspend, let me recognize the gentleman from California, Dan Lungren.

Mr. Lungren. Thank you very much, Mr. Speaker.

I rise in support of the gentleman from California's amendment, unamended, because I think it does put us closer to where we ought to be.

And the arguments made by the gentleman from New York are consistent with his earlier arguments that constitutional scholars are on both sides of this issue. Well, in fact, the constitutional scholar that seems to matter the most is the Supreme Court, and the Supreme Court has said very, very clearly that a claim of privilege on the ground that the information constitutes military or diplomatic secrets necessarily involves "areas of Article II duties."

What they are saying is, the Constitution itself gives deference in this situation to these matters. And that is why the gentleman from California's amendment makes so much sense.

Is there a placing of the thumb on one side of the scale? Yes, there is. But we don't do that. The United States

Constitution does that, and the Supreme Court has recognized that the Constitution does that by the Article II powers given to the executive branch.

Now, we may not like this. We may wish that we were supreme, or in this case, as the gentleman from New York suggests, the court is supreme in this regard. But, in fact, the Constitution has given it, under Article II, to the executive branch. That is why deference is properly, appropriately, and constitutionally given to the executive branch in this instance. And that is why the gentleman from California's amendment is preferable to the underlying bill that we have.

The gentleman should look at what the U.S. Supreme Court said in the Department of the Navy v. Egan, the authority to protect such information falls on the President as head of the executive branch and as commander in chief. It doesn't matter whether the President is George W. Bush or Barack Obama. It is, in fact, given institutionally to the President of the United States. It is for that reason that the gentleman's amendment is not only appropriate but essential if we are going to deal with legislation of this type.

And I thank the gentleman.

Mr. Nadler. Will the gentleman yield?

Mr. Lungren. I will be happy to yield.

Mr. Nadler. The Reynolds case said that judicial control over the evidence in a case cannot be abdicated to the caprice of

executive officers, unquote, and that the government therefore had to satisfy the court that disclosure of evidence would harm national security.

The Egan case that the gentleman just quoted recognized that the President has broad authority in military and national security affairs and then said, unless Congress specifically has provided otherwise.

There is no question that the executive has a lot of authority here. There is also no question that Congress can regulate and limit that authority. And simply by saying that the President, that the privilege has constitutional origins, which it may or may not, doesn't address that question because even if it did, there is also no question that Congress can limit that and can regulate it.

So saying those things is irrelevant.

Mr. Lungren. Reclaiming my time, Congress cannot limit it in such a way that it abrogates the responsibility and the deference given to the executive branch.

The practice currently in the Federal courts allows for in camera ex parte review. It does allow the judge to review these things in very much detail. But it does, and as we would continue here or at least as the practice has developed under common law and we would put it in statute form here, it does involve giving deference to the executive branch in these matters.

And the gentleman's amendment would or the gentleman's

underlying bill would essentially change in substantial order what has been the practice and what is the majority interpretation of the Constitution. The gentleman would put on a similar plane experts brought by the other parties, as are the experts brought by the government. And that just is not the way military secrets, national security, terrorist threat issues are perceived, at least by my interpretation of the Constitution.

And I would be happy to yield to Mr. Gohmert.

Mr. Gohmert, do you want your own time?

Oh, my time has expired.

Mr. Nadler. Mr. Chairman, I have the secondary amendment now.

Chairman Conyers. The gentleman is recognized to offer his amendment. Then we will come to Judge Gohmert.

Mr. Nadler. There is a secondary amendment at the desk, an amendment to Mr. Schiff's amendment.

Chairman Conyers. The clerk will report the amendment, please.

The Clerk. Amendment to the Schiff amendment, offered by Mr. Nadler. On line 11, after the period, insert "the court shall weigh testimony from government experts in the same manner as it does along with --

Mr. Nadler. Mr. Chairman, I move that the amendment be accepted as read -- be considered as read.

Chairman Conyers. Without objection. The gentleman is

recognized in support of his amendment.

[The information follows:]

******** INSERT 4-5 ********

Mr. Nadler. Thank you.

Mr. Chairman, the bill says the court shall weigh testimony from government experts in the same manner as it does and along with any other expert testimony.

Mr. Schiff's amendment says, the court substitutes, in making such an assessment -- I am sorry. The Schiff amendment takes out that sentence I just read and substitutes, in making such an assessment, the court shall give due deference to the assertion of harm by the government, due deference.

The secondary amendment would put the sentence back in and add language, so it would read as follows: The court shall weight testimony from government experts in the same manner as it does and along with any other expert testimony; and then would say, in making such an assessment, the government shall give due deference to the assertion of harm by the government, Mr. Schiff's language; and then would add, as supported by the material reviewed by the court under subsection (b)(1).

In other words, what this amendment would do is say, you start by saying you give weight, equal weight, to expert testimony by either side; but then would say, Mr. Schiff's language, the courts would give due deference to the assertion of harm by the government, due deference to the government, so long as it is supported by something in the record. It has got to be tethered, as supported by material reviewed by the court under

subsection(b)(1), so you are no longer simply saying due deference. You are saying due deference if there is something in the record to support it.

Chairman Conyers. Would the gentleman yield?

Mr. Nadler. Yes, I will.

Chairman Conyers. Would Mr. Schiff accept the secondary amendment?

Mr. Schiff. If the gentleman would yield, Mr. Nadler and I had a chance to discuss this before. And the amendment that I offered really was a compromise amendment from, frankly, what I would have offered otherwise.

The concern I have about the language about the court shall weigh testimony from government experts in the same manner as it does along with any other expert, is it seems to be at odds with giving the government deference. And I think it will cause confusion for the court to say, well, am I supposed to give the government due deference and at the same time give it no more deference than any other expert? So I find it confusing to suggest both at the same time, which is why I thought it was cleaner if the goal is to say that the government is not an equal party here. Because the government has the whole array of intelligence information about what the national security interests are, then they are not in the same shoes as every other witness.

So, reluctantly, Mr. Chairman, I can't accept it.

Mr. Delahunt. Mr. Chairman, I move to strike the last word.

Chairman Conyers. Mr. Delahunt. The gentleman is recognized.

Mr. Delahunt. I thank the chairman.

And I would recommend to Mr. Nadler that he withdraw the secondary motion. I have concerns and I stand in opposition to the Schiff amendment, because I think the reality is that with the term due deference, what is implicated is a presumption, a presumption that would exist in the minds of jurors that due deference means more. It would border on being a irrebuttable presumption. I think the language of the base bill is preferable.

I understand the good motives of the gentleman from California. But due deference, I think, sends a message to the courts that there exists a presumption, not just simply due deference, but a presumption that the government is correct.

Mr. Nadler. Would the gentleman yield?

Mr. Delahunt. I yield.

Mr. Nadler. Thank you.

I will accede to Mr. Delahunt's recommendation, but I want to point out that leaving the language as we have it, because I would still urge the defeat of the Schiff amendment, does not say that the government, that all the witnesses should be given equal weight. It says that the court shall look at the balance, at the expertise, at the expertise of the witnesses, at the availability to them of secret and other information, and very often the

government will get extra weight because of that, but not automatically and not with the presumption that, as Mr. Delahunt says, is an almost irrebuttable presumption, which is the problem with Mr. Schiff's amendment.

Therefore, I withdraw. I ask unanimous consent to withdraw the secondary amendment.

Chairman Conyers. All right.

Mr. Delahunt. Reclaiming my time, Mr. Chairman.

Chairman Conyers. I thank the chairman for withdrawing his amendment.

Mr. Delahunt. Reclaiming my time.

Chairman Conyers. Without objection, he withdraws.

Mr. Delahunt. And I listened, and I have got respect for both gentleman from California. But the arguments that are made by Mr. Lungren in terms of commander in chief, Article II powers are reminiscent of the debate that we have in terms of war powers. This is a mixed bag.

. It states clearly in the United States Constitution that Congress shall have the power to declare war, and practices that are different doesn't necessarily mean that Article II powers cannot be limited. And I dare say, this is a situation where I think we have learned over the course of the past decade that executive power should be limited.

RPTS JURA

DCMN HOFSTAD

[4:34 p.m.]

Mr. Delahunt. President Obama indicates that he recognizes congressional oversight, and that is fine and well, but there will be Presidents far into the future that might not follow that practice.

We have had significant difficulty receiving from the executive branch the kind of cooperation and collaboration that is necessary, in terms of effective oversight. And that is not meant to be a partisan issue, but we have had it during the Clinton era, we had it during President George W. Bush, and it would appear that we are having some disagreements now with this administration.

It is time to reassert the constitutional authority of the United States Congress. It is time to task the judiciary with its obligations under the Constitution and not continue this almost abject deference to the executive branch.

Clearly, they will make the case in terms of an in-camera hearing as to the need for the assertion of the privilege. I trust that a competent judge, an Article III judge, will make the right decision. I do not want to continue to see the trend toward unfettered executive power. I think it is a mistake.

And, with that, I yield back.

Chairman Conyers. Thank you.

The Chair recognizes Judge Gohmert before we take a vote on the Schiff amendment.

Mr. Gohmert. Thank you, Mr. Chairman.

And I find myself in great agreement with the gentleman from Massachusetts to this extent: He said he had great respect for the two gentlemen from California; I agree with that part.

But regarding the part where he said that due deference borders on being irrefutable, due deference means due deference. I mean, it is not that difficult. It doesn't mean irrefutable. Hopefully, the judges in whom my friend from Massachusetts has such great faith will realize that.

Mr. Delahunt. If my friend from Texas would just yield for a moment?

Mr. Gohmert. Well, those judges, if they are smart enough, are going to realize due diligence does not mean irrefutable; it means due deference.

And so, yes, I will yield to my friend from Massachusetts.

Mr. Delahunt. There are judges, in my opinion, that will interpret the phrase "due deference" as guidance, if you will, to give a level of credence to the assertion that amounts to an irrebuttable, or maybe irrebuttable, presumption.

I don't want to go that far. I think we should tell the courts that they have an obligation, as a separate branch of government. If we are going to continue to have a system of

checks and balances, everybody has to play their role.

Mr. Gohmert. And I appreciate that. And, reclaiming my time, the problem is we know we have judges, like in the Ninth Circuit, who feel like, "Gee, we know that what we are doing is against what the Supreme Court says. But If we do enough of it, they can't send back all of the cases." We know we have judges that think that way.

And so, I think to have an amendment like Mr. Schiff has is very important, because on the one side you have people who took an oath to uphold the Constitution, and then you have other experts who didn't. And some of those, we know, feel like the Constitution needs to be scrapped and we need to transform America into something else.

So there ought to be due deference to those whose jobs involve protecting the Constitution against all enemies, foreign and domestic.

And I would yield to my friend from California.

Mr. Schiff. I thank the gentleman for yielding. I will be very brief.

You know, we are not approaching this issue in a vacuum. The Supreme Court has stated that, really, the government in representations, assertions of national harm should be given utmost deference. We are trying to give some level of content to the level of deference the government should be given.

There is, I think, a constitutional core that we are talking

about here. The government does have, I think, some Article II power to say that the revelation of certain state secrets would be so injurious to the country that the Executive has the ability to preclude that.

It is not an unlimited constitutional right, and the common law around that constitutional core, as scholars have written, has the ability to legislate. And that is what we are trying to do here.

We are not suggesting, with respect to my colleague from Massachusetts, that it should be conclusive, but that there should be some deference, due deference, given to the evidence and the assertion by the government that the revelation of some state secret or program would be injurious to national security.

And I yield back.

Mr. Gohmert. Reclaiming my time, let me just comment to this extent.

We know that both sides of the aisle, at some point, have had trouble and concerns, legitimately, with administrations from both parties which have claimed privileges they shouldn't have, and that is a problem. And that is why, as my friend from Massachusetts says, he is right, it should not be irrefutable. It should be refutable.

But I appreciate my friend from California making the amendment.

Ms. Jackson Lee. Would the gentleman yield?

Mr. Gohmert. I will yield to --

Ms. Jackson Lee. I think both of you have very reasonable arguments, but this amendment skews the balance. I already think the Article III courts give deference, and I think there is an imbalance in the amendment.

I yield back. I oppose the amendment.

Mr. Gohmert. Reclaiming my time, since this is going to be voted on, if we vote it down, then the courts can look at the legislative history and say, "Well, if they meant for us to give due deference to the government's position, then they would have voted for it. Since they didn't, there is no due deference." And that is my concern about voting down our friend from California's amendment, and I encourage support.

Thank you.

Chairman Conyers. Thank you very much.

The Chair will call for a record vote on the Schiff amendment. The clerk will call the roll.

The Clerk. Mr. Conyers?

Chairman Conyers. No.

The Clerk. Mr. Conyers votes no.

Mr. Berman?

[No response.]

The Clerk. Mr. Boucher?

[No response.]

The Clerk. Mr. Nadler?

Mr. Nadler. No.

The Clerk. Mr. Nadler votes no.

Mr. Scott?

[No response.]

The Clerk. Mr. Watt?

[No response.]

The Clerk. Ms. Lofgren?

Ms. Lofgren. No.

The Clerk. Ms. Lofgren votes no.

Ms. Jackson Lee?

Ms. Jackson Lee. No.

The Clerk. Ms. Jackson Lee votes no.

Ms. Waters?

Ms. Waters. No.

The Clerk. Ms. Waters votes no.

Mr. Delahunt?

Mr. Delahunt. No.

The Clerk. Mr. Delahunt votes no.

Mr. Wexler?

[No response.]

The Clerk. Mr. Cohen?

Mr. Cohen. No.

The Clerk. Mr. Cohen votes no.

Mr. Johnson?

Mr. Johnson. No.

The Clerk. Mr. Johnson votes no.

Mr. Pierluisi?

Mr. Pierluisi. No.

The Clerk. Mr. Pierluisi votes no.

Mr. Quigley?

Mr. Quigley. Aye.

The Clerk. Mr. Quigley votes aye.

Ms. Chu?

Ms. Chu. No.

The Clerk. Ms. Chu votes no.

Mr. Gutierrez?

[No response.]

The Clerk. Ms. Baldwin?

Ms. Baldwin. No.

The Clerk. Ms. Baldwin votes no.

Mr. Gonzalez?

[No response.]

The Clerk. Mr. Weiner?

[No response.]

The Clerk. Mr. Schiff?

Mr. Schiff. Aye.

The Clerk. Mr. Schiff votes aye.

Ms. Sanchez?

[No response.]

The Clerk. Ms. Wasserman Schultz?

[No response.]

The Clerk. Mr. Maffei?

Mr. Maffei. Pass.

The Clerk. Mr. Maffei passes.

Mr. Smith?

[No response.]

The Clerk. Mr. Goodlatte?

[No response.]

The Clerk. Mr. Sensenbrenner?

[No response.]

The Clerk. Mr. Coble?

[No response.]

The Clerk. Mr. Gallegly?

Mr. Gallegly. Aye.

The Clerk. Mr. Gallegly votes aye.

Mr. Lungren?

Mr. Lungren. Aye.

The Clerk. Mr. Lungren votes aye.

Mr. Issa?

[No response.]

The Clerk. Mr. Forbes?

[No response.]

The Clerk. Mr. King?

[No response.]

The Clerk. Mr. Franks?

Mr. Franks. Aye.

The Clerk. Mr. Franks votes aye.

Mr. Gohmert?

Mr. Gohmert. Aye.

The Clerk. Mr. Gohmert votes aye.

Mr. Jordan?

Mr. Jordan. Yes.

The Clerk. Mr. Jordan votes yes.

Mr. Poe?

Mr. Poe. Aye.

The Clerk. Mr. Poe votes aye.

Mr. Chaffetz?

[No response.]

The Clerk. Mr. Rooney?

[No response.]

The Clerk. Mr. Harper?

Mr. Harper. Aye.

The Clerk. Mr. Harper votes aye.

Mr. Issa. Mr. Chairman, how am I recorded?

The Clerk. Mr. Issa has not been recorded.

Mr. Issa. Aye.

The Clerk. Mr. Issa votes aye.

Mr. Smith. And, Mr. Chairman, I vote no.

The Clerk. Mr. Smith votes no.

Mr. Gutierrez. No.

The Clerk. Mr. Gutierrez votes no.

Mr. Berman. No.

The Clerk. Mr. Berman votes no.

Mr. Weiner. No.

The Clerk. Mr. Weiner votes no.

Mr. Wexler. No.

The Clerk. Mr. Wexler votes no.

Mr. Watt. No.

The Clerk. Mr. Watt votes no.

Mr. Smith. Mr. Chairman, how many I recorded?

The Clerk. Mr. Smith voted no.

Mr. Smith. Mr. Chairman, I vote aye.

The Clerk. Mr. Smith votes aye.

Mr. Coble. Mr. Chairman, how am I recorded?

The Clerk. Mr. Coble, not voting.

Mr. Coble. Aye.

The Clerk. Mr. Coble votes aye.

Chairman Conyers. The clerk will report -- wait a minute. Okay, Maffei.

The Clerk. Mr. Maffei passed.

Mr. Maffei. No.

The Clerk. Mr. Maffei votes no.

Chairman Conyers. The clerk will report.

The Clerk. Mr. Chairman, 12 members voted aye, 17 members voted nay.

Chairman Conyers. The amendment is unsuccessful.

Pursuant to notice, I call up --

Mr. Schiff. Mr. Chairman?

Chairman Conyers. Mr. Schiff.

Mr. Schiff. Mr. Chairman, I have one last amendment at the desk.

Chairman Conyers. The clerk will report the amendment.

The Clerk. Amendment to H.R. 984, offered by Mr. Schiff of California. At page 2, line 12, strike "requiring security clearances for parties or counsel." At page 2, line 20, strike all --

[The information follows:]

******** INSERT 5-1 ********

Chairman Conyers. I ask unanimous consent the amendment be considered as read, and recognize the gentleman in pursuit of his amendment.

Mr. Schiff. I thank the chairman.

One of, perhaps, the most dramatic changes in the bill --

Mr. Nadler. Would the gentleman yield?

Mr. Schiff. Yes.

Mr. Nadler. If the gentleman would make a minor change in the amendment, by unanimous consent, I think we are prepared to accept the amendment.

Mr. Schiff. Can you tell me what the amendment is?

Mr. Nadler. Yes. Instead of saying that the courts will have discretion to appoint the guardian ad litem drawing at random from a previously generated list of attorneys, saying, "drawing from previously generated list of attorneys in consultation with the excluded nongovernmental party" to choose someone from the list for --

Mr. Schiff. I would be happy to accept that amendment.

Mr. Nadler. I ask unanimous consent that the change proposed by Mr. Schiff be accepted.

Chairman Conyers. Without objection, so ordered.

Mr. Nadler. And I would accept the amendment.

Chairman Conyers. All right.

Is there any further discussion on this amendment?

All in favor of the Schiff amendment, say, "Aye."

All opposed, say, "No."

The ayes have it, and so ordered.

A reporting quorum being present, the question is on reporting the bill, H.R. 984, as amended, favorably to the House.

All in favor, say, "Aye."

All opposed, say, "No."

The ayes have it, but a recorded vote will be followed up by the voice vote. The clerk will call the roll.

The Clerk. Mr. Conyers?

Chairman Conyers. Aye.

The Clerk. Mr. Conyers votes aye.

Mr. Berman?

[No response.]

The Clerk. Mr. Boucher?

[No response.]

The Clerk. Mr. Nadler?

Mr. Nadler. Aye.

The Clerk. Mr. Nadler votes aye.

Mr. Scott?

[No response.]

The Clerk. Mr. Watt?

Mr. Watt. Aye.

The Clerk. Mr. Watt votes aye.

Ms. Lofgren?

Ms. Lofgren. Aye.

The Clerk. Ms. Lofgren votes aye.

Ms. Jackson Lee?

[No response.]

The Clerk. Ms. Waters?

[No response.]

The Clerk. Mr. Delahunt?

Mr. Delahunt. Aye.

The Clerk. Mr. Delahunt votes aye.

Mr. Wexler?

[No response.]

The Clerk. Mr. Cohen?

Mr. Cohen. Aye.

The Clerk. Mr. Cohen votes aye.

Mr. Johnson?

Mr. Johnson. Aye.

The Clerk. Mr. Johnson votes aye.

Mr. Pierluisi?

Mr. Pierluisi. Aye.

The Clerk. Mr. Pierluisi votes aye.

Mr. Quigley?

Mr. Quigley. Aye.

The Clerk. Mr. Quigley votes aye.

Ms. Chu?

Ms. Chu. Aye.

The <u>Clerk.</u> Ms. Chu votes aye.

Mr. Gutierrez?

Mr. <u>Gutierrez.</u> Aye.

The <u>Clerk.</u> Mr. Gutierrez votes aye.

Ms. Baldwin?

Ms. <u>Baldwin.</u> Aye.

The <u>Clerk.</u> Ms. Baldwin votes aye.

Mr. Gonzalez?

[No response.]

The <u>Clerk.</u> Mr. Weiner?

Mr. <u>Weiner.</u> Aye.

The <u>Clerk.</u> Mr. Weiner votes aye.

Mr. Schiff?

Mr. <u>Schiff.</u> Pass.

The <u>Clerk.</u> Mr. Schiff passes.

Ms. Sanchez?

[No response.]

The <u>Clerk.</u> Ms. Wasserman Schultz?

[No response.]

The <u>Clerk.</u> Mr. Maffei?

Mr. <u>Maffei.</u> Aye.

The <u>Clerk.</u> Mr. Maffei votes aye.

Mr. Smith?

Mr. <u>Smith.</u> No.

The <u>Clerk.</u> Mr. Smith votes no.

Mr. Goodlatte?

[No response.]

The Clerk. Mr. Sensenbrenner?

[No response.]

The Clerk. Mr. Coble?

[No response.]

The Clerk. Mr. Gallegly?

Mr. Gallegly. No.

The Clerk. Mr. Gallegly votes no.

Mr. Lungren?

Mr. Lungren. No.

The Clerk. Mr. Lungren votes no.

Mr. Issa?

Mr. Issa. No.

The Clerk. Mr. Issa votes no.

Mr. Forbes?

[No response.]

The Clerk. Mr. King?

[No response.]

The Clerk. Mr. Franks?

Mr. Franks. No.

The Clerk. Mr. Franks votes no.

Mr. Gohmert?

Mr. Gohmert. No.

The Clerk. Mr. Gohmert votes no.

Mr. Jordan?

Mr. Jordan. No.

The Clerk. Mr. Jordan votes no.

Mr. Poe?

[No response.]

The Clerk. Mr. Chaffetz?

[No response.]

The Clerk. Mr. Rooney?

[No response.]

The Clerk. Mr. Harper?

Mr. Harper. No.

The Clerk. Mr. Harper votes no.

Mr. Sensenbrenner. Madam --

The Clerk. Mr. Sensenbrenner?

Mr. Sensenbrenner. No.

The Clerk. Mr. Sensenbrenner votes no.

Mr. Wexler?

Mr. Wexler. Aye.

The Clerk. Mr. Wexler votes aye.

Mr. Berman. Aye.

The Clerk. Mr. Berman votes aye.

Ms. Waters?

Ms. Waters. Waters, aye.

The Clerk. Ms. Waters votes aye.

Ms. Jackson Lee?

Ms. Jackson Lee. Jackson Lee, aye.

The Clerk. Ms. Jackson Lee, aye.

Mr. Coble?

Mr. Coble. No.

The Clerk. Mr. Coble votes no.

Mr. Poe?

Mr. Poe. No.

The Clerk. Mr. Poe votes no.

Mr. Schiff passed.

Mr. Schiff. No.

The Clerk. Mr. Schiff votes no.

Chairman Conyers. The clerk will -- Mr. Jordan? He has voted.

The clerk will report.

The Clerk. Mr. Chairman, 18 members voted aye, 12 members voted nay.

Chairman Conyers. And H.R. 984, as amended, is reported favorably.

Without objection, the bill will be reported as a single amendment in the nature of a substitute incorporating amendments.

Staff is authorized to make changes.

Members have 2 days to submit views.

Ms. Jackson Lee. Mr. Chairman?

Chairman Conyers. I want to thank --

Ms. Jackson Lee. Mr. Chairman?

Chairman Conyers. I want to thank everyone on the committee for all their steadfastness in getting these very time-sensitive measures out of the committee.

I yield to the gentlelady from Texas.

Ms. Jackson Lee. Thank you, Mr. Chairman.

I would like to strike the last word and indicate on several bills how I would have voted.

I was on the floor with the chemical security bill and was not here for a final passage of the reauthorization, or the amendments to the PATRIOT Act of H.R. 3845. If I had been present, I would have voted aye.

With respect to H.Res. 871, which was the unfavorable issuance of the legislation of Mr. Smith, dealing with trial lawyers and the request of the Department of Justice, I would have joined -- or I believe I did walk into the room as the unfavorable submission was being made.

But I would also like to indicate, with respect to that request, it does seem that it is posed at a time that we are debating a very serious health care bill. And I do know that medical malpractice --

Chairman Conyers. I would have to ask the gentlelady to indicate how she would have voted. I would like to adjourn this committee hearing.

Ms. Jackson Lee. Thank you.

Ms. Waters. Mr. Chairman? I know you want to adjourn, but

I, too, would like to register.

Chairman Conyers. All right. I will recognize you as soon as the gentlelady from Texas has concluded.

Ms. Waters. All right. Thank you.

Ms. Jackson Lee. Thank you.

I do know that -- and I will finish on this sentence -- that medical malpractice does not equate to lower premiums or better health care. And so I am expressing my support of an unfavorable recommendation for 871.

And I was here for the state secrets bill, which I just voted on. I ask unanimous consent that this be placed appropriately in the record at the appropriate place.

Chairman Conyers. The gentlelady from California, Maxine Waters.

Ms. Waters. Mr. Chairman, just quickly, I was not here to vote on final passage on H.R. 3845, the "USA PATRIOT Amendments Act of 2009." Had I been present, I would have voted aye. My absence was unavoidable.

Thank you very much. I yield back.

Chairman Conyers. Thank you very much.

The committee stands adjourned.

[Whereupon, at 4:53 p.m., the committee was adjourned.]