

RPTS CALHOUNDCMN HERZFELD

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

Wednesday, November 4, 2009

House of Representatives,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to call, at 12:44 p.m., in Room
2141, Rayburn House Office Building, Hon. John Conyers, Jr.
[chairman of the committee] presiding.

Present: Representatives Conyers, Berman, Boucher, 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, King, 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; and Anita L. Johnson, Clerk.

Chairman Conyers. The full committee will come to order. We will begin with a quorum call. I will ask the clerk to call the roll.

The Clerk. Mr. Conyers?

Chairman Conyers. Present.

The Clerk. Mr. Berman?

[No response.]

The Clerk. Mr. Boucher?

[No response.]

The Clerk. Mr. Nadler?

[No response.]

The Clerk. Mr. Scott?

[No response.]

The Clerk. Mr. Watt?

[No response.]

The Clerk. Ms. Lofgren?

[No response.]

The Clerk. 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?

[No response.]

The Clerk. Mr. Quigley?

[No response.]

The Clerk. Ms. Chu?

[No response.]

The Clerk. Mr. Gutierrez?

[No response.]

The Clerk. Ms. Baldwin?

Ms. Baldwin. Present.

The Clerk. Mr. Gonzalez?

[No response.]

The Clerk. Mr. Weiner?

[No response.]

The Clerk. Mr. Schiff?

Mr. Schiff. Present.

The Clerk. Ms. Sanchez?

[No response.]

The Clerk. Ms. Wasserman Schultz?

[No response.]

The Clerk. Mr. Maffei?

[No response.]

The Clerk. Mr. Smith?

Mr. Smith. Present

The Clerk. Mr. Goodlatte?

Mr. Goodlatte. Present.

The Clerk. Mr. Sensenbrenner?

Mr. Sensenbrenner. Present.

The Clerk. Mr. Coble?

[No response.]

The Clerk. Mr. Gallegly?

[No response.]

The Clerk. Mr. Lungren?

[No response.]

The Clerk. Mr. Issa?

[No response.]

The Clerk. Mr. Forbes?

[No response.]

The Clerk. Mr. King?

[No response.]

The Clerk. Mr. Franks?

Mr. Franks. Here.

The Clerk. Mr. Gohmert?

[No response.]

The Clerk. Mr. Jordan?

Mr. Jordan. Here.

The Clerk. Mr. Poe?

[No response.]

The Clerk. Mr. Chaffetz?

Mr. Chaffetz. Present.

The Clerk. Mr. Rooney?

Mr. Rooney. Here.

The Clerk. Mr. Harper?

[No response.]

Chairman Conyers. Are there any Members that have not responded to the quorum call? A few in the back.

Mr. Scott?

Mr. Scott. Present.

The Clerk. Mr. Scott?

Mr. Nadler?

Mr. Nadler. Present.

The Clerk. Mr. Quigley?

Mr. Quigley. Here.

The Clerk. Mr. Watt?

Mr. Watt. Present.

Chairman Conyers. Are there any in the Republican cloakroom?

All right. The clerk will report.

The Clerk. Mr. Chairman, 16 Members responded to the quorum call.

Chairman Conyers. So we have a working quorum. We will proceed.

I am grateful that the ladies and gentlemen of this distinguished committee are here with us today as we begin to consider the USA PATRIOT amendments. As you know, the PATRIOT Act has now been law for 8 years. The record of government surveillance during the 8 years should give great pause to anyone who believes in our Bill of Rights. We have seen secret wiretaps of thousands of Americans, abuses so grave, at one point over 20 top officials of the Bush Justice Department threatened to resign.

We have seen hundreds of thousands of national security letters issued, many of them regarding law-abiding Americans with no connection whatsoever to foreign agents or terrorism. We have seen repeated inspector general reports criticizing the use and overuse of national security letters. We expect shortly a new report describing the extensive use of some of which are even more abusive procedures to collect information on Americans called exigent letters. And we have seen the executive shield actions behind a veil of secrecy and overclassification. While it is important to preserve the secrecy of sensitive operations, and nobody would be against that, it is equally important that the power to classify not be used to hide government abuses.

And so that is the fine lines that we are working between collectively as the Committee on the Judiciary.

Now, with several provisions of the PATRIOT Act expiring at the end of this year, we have a real opportunity before us to reexamine some of the most extreme provisions of the law and seek together collectively in a bipartisan way to bring about a better balance. And so the PATRIOT bill before us today, in my judgment, accomplishes that. It preserves government surveillance power where it is needed most, but reins in some of the most problematic aspects of existing law.

In particular, the bill makes three critical changes to the law. It fixes the overly broad standards that currently apply to national security letters and so-called business records orders from the FISA court. Now, under the bill that will shortly be before us, the government will no longer be able to demand the information merely by claiming it is relevant to national security. Instead, the government must have concrete facts showing that the information is connected to a terrorist or terrorist activity or a foreign agent before issuing a national security letter to get it. If the government lacks such concrete evidence, it can still seek a business records order for information needed to protect national security under a broader standard, but it would be under the supervision of a judge. These are critical changes that will protect the privacy and civil liberties of every American.

Now, also in our measure that will soon be before us, it allows the overbroad and unnecessary Lone Wolf provision to

expire. It is a provision that has never been used. We heard expert testimony from the bipartisan Constitutional Project and from a former staff director of our Intelligence Committee that it was not needed, and that anyone who could be targeted for surveillance as a Lone Wolf terrorist could also be surveilled just as easily under our regular criminal laws. These experts have warned that the Lone Wolf provision was so broad that a court might conclude that it could be unconstitutional and might call into question other aspects of our surveillance laws. So it is well time, in my view, to let it expire.

Finally, the bill includes important new reporting, audit, and oversight provisions that will ensure we continue to get the information we need for real congressional oversight of the executive's surveillance operations. While these provisions do not get as much attention as other provisions and changes in the bill, they are a major step forward in our ability to carry out our legislative responsibilities.

The bill before us may not be perfect, but then few bills are, but it greatly, to me, protects the privacy and freedom of Americans and preserves at the same time critical surveillance power and operations.

And so I want to retroactively, pursuant to notice, call up H.R. 3845, the USA PATRIOT Amendments Act, relinquish my time, and recognize the distinguished gentleman from Texas, Lamar Smith, for his opening comments.

[The information follows:]

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

Mr. Smith. Thank you, Mr. Chairman. Before I get to my opening statement, let me say I would be happy to take a vote on the bill right now with the Members present in this room. I make that offer to you.

Chairman Conyers. It is far too generous for me to accept. I would like to accommodate the gentleman. I only wish I could.

Mr. Smith. I understand, Mr. Chairman.

Mr. Chairman, at the end of this year, three important provisions of the PATRIOT Act will expire. Those provisions give investigators in national security cases the authority to conduct roving wiretaps, to seek certain business records, and to gather intelligence on lone terrorists who are not affiliated with a known terrorist group. Unfortunately, misguided criticisms of these important national security provisions have continued.

Two weeks ago, H.R. 3845, the innocently titled USA PATRIOT Amendments Act of 2009, was introduced. Unfortunately, rather than just reauthorizing the expiring provisions, as the Obama administration has requested, H.R. 3845 makes a number of changes that limit law enforcement efforts and expand terrorist rights.

I am disappointed we did not have a public hearing on this bill. The committee should not take up such important legislation without first examining the bill and receiving substantive input from the administration's own national security experts. That is why Republicans held a forum yesterday and invited national

security and legal experts to testify on the impact of H.R. 3845. Twelve Members attended that forum.

As one of our witnesses said, we cannot connect the dots unless we first collect the dots. That is what the PATRIOT Act is all about, collecting the dots so intelligence officials can connect the dots and prevent another terrorist attack.

Although members of the committee met with the administration in a classified setting, the Justice Department's concerns about this bill should be aired in a public setting. The American people have a right to know if Congress is considering legislation that will weaken our national security.

First, the bill repeals the lone terrorist provision. The omission of this authority prevents the government from using important intelligence-gathering tools against terrorists who are not specifically affiliated with a terrorist organization or foreign government. Once this provision expires, all al Qaeda will have to do is publicly disavow one of its members, claiming that the target of their investigation is not affiliated with the terrorist group, and intelligence officials may be prevented from conducting surveillance on that lone terrorist. This lone terrorist can then travel anywhere in the world, plot an attack against a U.S. Embassy, our soldiers in Iraq, or even civilians here at home, and our intelligence officials will have no idea because this bill prevents them from tracking a lone terrorist.

It makes no sense to allow individual terrorists who seek to

kill Americans to avoid detection simply because they are not directly associated with al Qaeda or another terrorist organization or unfriendly foreign government.

The bill also prohibits obtaining records of the patrons of any library or book seller, creating a safe haven for terrorists to research and study bomb making or other dangerous topics. Several 9/11 terrorists frequented libraries both overseas and in the U.S. in the months leading up to the terrorist attacks. In fact, two hijackers of the plane that crashed into the Pentagon reportedly used a New Jersey college library computer to purchase their airline tickets.

The 2005 PATRIOT reauthorization already provides protections for library records. Business record orders which are issued by a court can only be used as part of a foreign intelligence, international terrorism, or clandestine intelligence investigation. So unless you are a suspected terrorist or a spy plotting against the U.S., you do not need to worry about your library records.

The bill also makes several changes to national security letter -- or NSL -- authority that will significantly hinder their use in intelligence investigations. Again, why weaken an important tool that is only used in national security investigations to protect American lives?

America is fortunate not to have experienced a terrorist attack on U.S. soil since 2001, but we should not be lulled into a

false sense of security. The threat from terrorists and others who wish to harm America continues. It is not a coincidence that we have not had another attack on U.S. soil since 9/11. It is the direct result of the Intelligence Community using the tools Congress provided in the USA PATRIOT Act to identify and apprehend terrorists before they strike.

Let us not turn out the lights on law enforcement efforts to prevent attacks. Rather than alter legislation that has proved successful at saving lives, Congress should quickly reauthorize the expiring provisions. That is what the President wants, that is what the Department of Justice wants, and that is what the FBI wants.

Mr. Chairman, I will yield back.

Chairman Conyers. Thank you very much, Mr. Smith.

[The information follows:]

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

Chairman Conyers. By agreement, we have determined that the Chairman of the Constitution Subcommittee and the distinguished Ranking Member would both get 4 minutes each. So I will start with Jerry Nadler, the Chairman of the Constitution Subcommittee.

Mr. Nadler. Thank you, Mr. Chairman.

Mr. Chairman, while I believe it is vital that law enforcement have the legal tools and resources it needs to prevent a World Trade Center attack from ever happening again, the PATRIOT Act went too far. As is often the case at the beginning of a conflict, passion got the better of Congress, and too much unchecked power was given to the executive branch.

The PATRIOT Act was then and is still today, in some ways, inconsistent with the idea that we should protect our privacy from unwarranted government intrusion, a basic American value. The bill in front of us will strengthen the PATRIOT Act, allowing us to protect both our civil liberties and our safety.

Among other provisions, H.R. 3845 would require the government have sufficient facts in applying for roving wiretaps, making clear the target is a single person. It would raise the evidentiary showing the government must meet before it can obtain records under section 215, protect the privacy of what people are reading, and reauthorize the authority for roving wiretaps in section 215 orders, period.

I want to highlight specifically the issue of national

security letters, or NSLs. NSLs existed before the PATRIOT Act, but it increased the unchecked ability of the Federal Government to use NSL authority to obtain people's personal records. As a result, the use of NSLs rose dramatically, as did misuse.

We now know the FBI improperly collected and retained personal information during this period, thanks to two reports from the Department of Justice's inspector general. It lost records that were collected, putting our privacy and security at risk.

Under the act, recipients are prevented from disclosing that they received these demands for information. These so-called gag orders as currently prescribed in statute violate people's rights and, not surprisingly, have been declared unconstitutional by several Federal courts.

For the last 4 years, I have introduced legislation to curb these abuses, to put some more controls on the use of NSLs and more judicial supervision on the gag orders to ensure people's constitutional rights. I want to thank Chairman Conyers for including these provisions in the bill we are considering today.

H.R. 3845 would raise the standard for the FBI to meet before it can issue an NSL by requiring that the FBI show specific and articulable facts showing that the information requested pertains to a foreign power or an agent of a foreign power. Under this standard, the FBI would be able to use NSLs only when seeking information pertaining to terrorists, not for fishing expeditions.

The bill would also modify the procedures surrounding the nondisclosure order, putting the burden on the government to justify coerced nondisclosure if a recipient wishes to make public receipt of an NSL. This would protect people's First Amendment rights, while still permitting the government, when necessary and appropriate, to keep an investigation and an NSL order secret.

Finally, this bill would require the development of minimization of destruction procedures so that information obtained by NSLs that exceed the scope of the letter or is no longer relevant is destroyed to protect the public's privacy. There is no reason for the Federal Government to amass and retain vast quantities of information about tens of thousands of innocent people when that information is not helpful in actually fighting or preventing terrorism.

These changes to the laws governing NSLs and the other provisions of this bill will help the government fight terrorism more efficiently and effectively, while improving the balance between liberty and security.

While some believe that H.R. 3845 should go even further to protect civil liberties, I believe the bill will take us in the right direction, and certainly strikes a better balance than the current law. I am confident that with its enactment, Americans will remain safe and at the same time have their freedom better protected. I encourage all Members to support this bill.

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

Chairman Conyers. Thank you for your appropriate use of time.

[The information follows:]

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

Chairman Conyers. I now turn to the Chairman Emeritus of Judiciary, the distinguished gentleman from Wisconsin, Jim Sensenbrenner, who is now the Ranking Member of the Constitution Subcommittee.

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

Well, here we go again. There is a lot of hyperbole and very little fact in this debate. I was the author of the PATRIOT Act in 2001. I was also the author of the PATRIOT Act reauthorization of 2005.

Let us get the record straight. In 2001, the PATRIOT Act gave law enforcement 16 expanded authorities, the intelligence bill added the Lone Wolf terrorism provision, and all 17 of them were sunsetted at the end of 2005.

I fulfilled a promise as the Chairman of the committee to have separate hearings on each of the 17 expiring provisions of the PATRIOT Act. Some of them were combined, but there were 13 separate hearings before the committee in 2005. Contrast it to none before this committee. A consensus existed that 14 of those 17 provisions were noncontroversial and made permanent. Now, this was the testimony that we had received even from groups such as the American Civil Liberties Union. And what this bill does is it reopens the 14 provisions that were made permanent as well as considering the three provisions that are sunsetted at the end of the year.

I would also point out that the national security letters have a lot of problems with them, and I will be the first to admit that, but they were not 1 of the 17 expanded law enforcement provisions contained in the PATRIOT Act and the intelligence bill. The national security letters provision was contained in the bill that was authored by Senator Leahy of Vermont in 1986, and the PATRIOT Act merely moved where it appeared in the U.S. Code book from one section to the other.

The PATRIOT Act reauthorization provided some essential civil liberties protections against people or for people who receive national security letters. Guess what? Many of my colleagues on the other side of the aisle voted against that legislation and voted against those protections.

So the argument about abuses of national security letters sounds very hollow to me simply because there was a chance to provide the additional civil liberties protections which were enacted into law, and many of those who are complaining loudly today voted against that amendment.

The fact of the matter remains is that the PATRIOT Act has been an essential law enforcement tool, and it needs to be extended. The White House and the Attorney General have called for the extension of the three expiring PATRIOT Act provisions. That is your administration, Mr. Chairman and Majority Democrats, not our administration, and they have recognized the reason for that.

Finally, I would point out that of the 16 expanded provisions given to law enforcement in the original PATRIOT Act, not one of them has been held unconstitutional. The unconstitutional holdings were in the national security letters issue, which has been around for a long period of time, and which we attempted to correct in 2005.

There was one minor provision that one Federal court struck down, but four courts on the other side upheld, and I guess the Supreme Court is going to have to resolve that difference of opinion.

But this has not been the gross assault on civil liberties that people have claimed it to be. There has been 8 years of people being able to litigate that issue. The PATRIOT Act has withstood the constitutional assaults, and we should not arrogate to ourselves the position of judges while imposing political decisions on whether or not to extend the current provisions of the PATRIOT Act that are expiring and reopen the ones that we thought we had resolved 4 years ago after extensive hearings.

I yield back the balance of my time.

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

[The information follows:]

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

Chairman Conyers. I will begin proceedings by asking the clerk to introduce a manager's amendment to H.R. 3845. I ask that it be distributed and that the Clerk report this measure.

The Clerk. Amendment to H.R. 3845, offered by Mr. Conyers of Michigan. Strike section 101, page 2, line 3 through line 7 on page 3, and insert the following: Section 101, Roving Wiretaps.

Chairman Conyers. Without objection, the amendment will be considered as read.

[The information follows:]

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

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Chairman Conyers. I would like to describe the manager's amendment.

And I begin with only one small piece of history that many who were not on the committee on October the 12th, 2001, may recall: that the PATRIOT Act that we passed out unanimously, thanks to Chairman Sensenbrenner and I, as Ranking Member, and Mr. Smith, who was very active in that, reported it out unanimously. It was in the early hours of the morning in the Rules Committee, October 12th, 2001, that the entire measure was substituted.

This piece of a -- while I can't say it is unprecedented, but of a measure of this importance, left us dumbfounded since there were only two copies of what was substituted for our work present when it was debated on the floor.

Now, in the present circumstance, more than 2 weeks have passed since the bill has been introduced. There have been discussions ad nauseam about it. We have talked with members of the committee. We have discussed this with the administration, Department of Justice, and other outside authorities.

Throughout this process, we have identified a small number of clarifications and adjustments that, in our judgment and based on the experience with the bill, that we think will improve it and make it more effective. This is not a repeal of the PATRIOT Act.

It is an adjustment and improvement of it. And several of these respond to issues identified by the administration and by others on this committee, of which I am grateful to them for their help.

And here are the three major considerations:

National Security Letters. Now, it is time that we think through this and tighten the standards for the issuance of National Security Letters, requiring for the first time a concrete connection to terrorist suspects or foreign agents. I don't think that is asking too much.

The amendment clarifies these standards and better specifies the types of connections that can justify a National Security Letter. It also includes a requirement for detailed annual reporting on the use of such National Security Letters.

The other large consideration deals with libraries and sellers of books -- booksellers. The bill ensures that the government cannot use the PATRIOT Act to merely fish through library accounts or bookseller accounts. And what we do is clarify how this exception operates in the case of companies that sell books and much more. Wal-Mart is the classic example. They sell books, other things, and guns as well. This amendment makes clear that only information related to book purchases is protected, in keeping with the intent of this manager's amendment.

And we address a concern that providing heightened protection for libraries does not inadvertently create a safe haven for those who would do harm to us. And so what we provide is an allowance

that the government can obtain even protected library or bookseller information if it can make the case for an especially heightened showing that the information is connected to terrorist activities or foreign agents. So this is not some backdoor way that terrorists can take advantage of the PATRIOT Act.

And there are, finally, a few technical changes, clarifications on the roving wiretaps, the pen register, National Security Letter provisions of the bill. And these include adjustments to the provision on minimizing information regarding United States persons collected under the FISA Act and the rules for using NSL information in criminal cases.

In other words, ladies and gentlemen, the manager's amendment is very narrowly drawn to cover only the considerations that I have explained before you and that are in the amendment itself.

I now turn to the distinguished Ranking Member. Yes, sir.

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

Chairman Conyers. I think I will recognize the Ranking Member, and then I will come right back to you, Mr. Chairman, and you, too, later, Mr. Quigley.

The Ranking Member, Mr. Smith, is recognized.

Mr. Smith. Thank you, Mr. Chairman.

For each problem this manager's amendment may solve, it unfortunately creates a new one.

First, the amendment corrects what I can only presume was a

significant drafting error in the roving wiretap provision. In an attempt to address a so-called John Doe roving wiretap, the underlying bill actually limits all FISA surveillance to a single, individual target. This is unworkable because FISA authorizes, among other things, their surveillance of, quote, "foreign powers," which presumably involve much more than a single individual.

The amendment now corrects just the roving wiretap provision and not all electronic surveillance. But even this language attempts to solve a problem that does not exist. As with so many other provisions, the roving wiretap provision is changed simply for change's sake.

Second, the bill, as introduced, contains an outright prohibition on applications for library and bookseller business records. The manager's amendment replaces this ban with a provision that returns us to the pre-9/11 standard of specific and articulable facts for library and bookseller records. It does so despite no evidence of abuse or misuse of business record authority for these types of records.

Neither the provision in the underlying bill nor the change in the manager's amendment are warranted or good policy. All al Qaeda needs to do now is simply open a bookstore.

Third, the manager's amendment actually expands the bill's provisions regarding criminal pen registers. In addition to the bill's heightened standard of specific and articulable facts, the

manager's amendment requires a court to make a specific finding to accept the government's justification in issuing an order.

For reasons beyond our understanding, the bill and the manager's amendment apply these proposed changes to all Federal, State, and local criminal investigations well beyond the limited scope of FISA. The bill's sponsors are ignoring the strong opposition of the National District Attorneys Association, the National Sheriffs' Association, the Fraternal Order of Police, and the International Association of Chiefs of Police, all of whom agree that the proposed changes to criminal pen registers and trap-and-trace devices unduly burden State and local law enforcement agencies that regularly use these tools in criminal cases.

The amendment also attempts to improve the bill's language requiring minimization of FISA pen registers, despite the fact that such a minimization requirement is unworkable and impractical. Unlike other tools which actually collect content, such as wiretaps, pen registers and trap-and-trace devices merely request outgoing and incoming phone numbers. Because the government cannot collect any content using pen registers, a minimization requirement makes no sense. What is there is there to minimize?

Because this amendment fails to correct all of the problems in the bill and actually does create some new ones, I hope my colleagues will oppose this manager's amendment.

And, Mr. Chairman, I will yield back.

Mr. Sensenbrenner. Mr. Chairman?

Chairman Conyers. Thank you very much.

You will be next if there are no Democrats on this side. We usually alternate, don't we?

Mr. Sensenbrenner. Go ahead.

Chairman Conyers. All right, thank you.

The gentleman from Illinois, Mr. Quigley, is now recognized.

Mr. Quigley. Mr. Chairman, I would also move to strike the last word, if I may.

Chairman Conyers. Without objection, so ordered. And the gentleman is recognize for his comments.

Mr. Quigley. Thank you, Mr. Chairman.

I guess what I would ask the members of this committee to consider for someone who is a freshman, like myself and my seatmate to my right, especially people who came in on a special election, we don't have the institutional memory that gentlemen such as the Ranking Member, Mr. Sensenbrenner, and Mr. Nadler have.

So now we are making issues of critical importance, which is our job, but you compound that with the fact that the Justice Department has, besides references of their concerns about this measure, really haven't spoken specifically about how they would support this or not support this. Specifically, what are the problems they have, besides the general sense of a fear of

litigation? What exactly would they change with this bill? What exactly do they like in this bill? And that makes a reasonable decision about this difficult.

I compared this with my staff earlier to an agriculture bill, a farm bill, in which the Department of Agriculture says, "We are going to wait until you vote on it to tell you what we think." It makes it a little more difficult, again, especially if you are new at this sort of thing.

On the other hand -- and I don't want to paraphrase you, Mr. Sensenbrenner, at all incorrectly -- you expressed that there were some concerns that you had or problems with National Security Letters. Again, as the new person here, I would love to hear exactly what you perceive that those problems were and how you would imagine this bill would go about changing those. That makes the decisions we make today all the more difficult.

The final point that makes this difficult is the fact that much of what we are briefed in some meetings has been in executive session. So, to be quite honest, I am not even sure at some point what I can share with my staff to discuss, what I can share with anyone on this floor, or what questions I can ask without violating some of those issues.

So, in addition to flying blind, we are not being informed by the Department and all the other agencies that would have to implement this exactly how they feel about that.

Thank you, Mr. Chairman.

Mr. Smith. Would the gentleman yield?

Mr. Quigley. Certainly.

Mr. Smith. Let me respond very briefly to what you said about the problem of flying blind, that you don't have sufficient information, the decision is difficult, and acknowledge that you raised a number of good questions.

I think a lot of those questions could have been answered and many of your concerns and our concerns might have been resolved had we had one or more hearings on this bill. And that is another reason I regret that we didn't have an open forum to discuss some of those good questions that you raised.

Mr. Quigley. Well, if I could recapture my time.

Mr. Smith. I would be happy to yield back.

Mr. Quigley. I am not here casting aspersions on how this process has gone forward. What I was alluding to, in that respect, was the fact that Justice and others have said -- and the agencies that they are, sort of, channeling all their concerns through -- we haven't had that ability to exchange information. I know there have been discussions, but when it becomes something, as every member here says is so critical, that give and take is all the more important.

And so, I am not casting aspersions on anyone, in terms of how they have handled this. That is clearly your choice to do, if you would like. I am just expressing my concern that it is going to be after the fact that we get the review of what we have done

here.

Mr. Sensenbrenner. Would the gentleman yield?

Mr. Quigley. I would yield back all my time.

Mr. Sensenbrenner. Mr. Chairman?

Chairman Conyers. The Chair recognizes the Ranking Member of the Constitution Subcommittee, Jim Sensenbrenner.

Mr. Sensenbrenner. Well, thank you very much, Mr. Chairman.

Now, the chairman, in his argument in favor of this amendment, gave us kind of a history lesson. Here is the rest of the story.

The chairman is right in that there was a substitute amendment that was presented to the Rules Committee before the PATRIOT Act hit the floor. However, the substitute amendment was as a result of negotiations with the other body.

At that time, the other body was controlled by the Democrats, following Senator Jeffords's switch, and this House was controlled by the Republicans. And I think it is some what of an anomaly and not a part of the conventional wisdom that the Republican-controlled House passed out a PATRIOT Act that was more sympathetic to civil-liberties concerns than the then-Democratic-controlled Senate. And I am proud of the fact that we were able to get a unanimous vote out of this committee for the PATRIOT Act.

Let me make a couple of points.

First of all, this amendment ends up hamstringing local law

enforcement and using pen register and trap-and-trace-type devices to be able to figure out who is using telephones and other communications devices, both inwards and outwards, to promote either a criminal enterprise or a terrorist enterprise.

So this isn't something that impacts only Federal law enforcement. It impacts State and local law enforcement, as well. And we ought to think, really, twice about doing that simply because we don't like the words "USA PATRIOT Act" and we think it has done all kinds of terrible things.

Secondly, with the so-called business records provisions, or the library provisions, if you will, there has been not one finding of unconstitutionality on what the Justice Department has done with section 215 since it was enacted into law in October of 2001.

And, furthermore, the PATRIOT Act reauthorization, which most of the people on this side of the aisle supported and most of the people on the other side of the aisle opposed, had some provisions in where a library or a bookseller could end up going to court and attempting to quash the order or dismiss the order if they felt that privacy or civil-liberty concerns were being violated. To my knowledge, no library has done that. So we are making a mountain out of a molehill.

Now, with this mountain that is being created in the manager's amendment, as the Ranking Member from Texas, Mr. Smith, has correctly stated, all al Qaeda needs to do is to open up a

bookstore and they are essentially exempt from having any type of law enforcement inquiry of somebody who goes into the bookstore and buys a book on how to make a dirty bomb or, if there is a computer with an Internet connection in the bookstore, getting on the computer and communicating with handlers overseas. So this loophole is big enough to drive an 18-wheeler truck through -- yes, with explosives, as the gentleman from California has said.

You know, let me say that we are dealing with the safety and lives of maybe thousands of Americans as we are dealing with this issue. And I am proud of the fact that the original PATRIOT Act, none of the provisions have been struck down as unconstitutional, and what we are doing here is not a legal change covered in fourth amendment arguments, but a policy change. And this is a policy change where we are making a step backwards and we are placing our fellow citizens and those who visit this country legally at risk. We should not do so, and this amendment should be opposed.

Chairman Conyers. Thank you very much.

The Chair recognizes the chairman of the Constitutional Subcommittee, Jerry Nadler of New York.

Mr. Nadler. Thank you. I wanted to make a couple of comments.

I don't want to trace the whole history of the PATRIOT Act and who did what when. It is not particularly relevant now. Suffice it to say that there were people, certainly on this side of the aisle, who were never happy with what we did.

And, certainly, I will concede -- I won't concede; I said it at the time -- the 2005 amendments improve the bill somewhat from the 2001 version, but did not improve it sufficiently. And there were reasons for people voting against it or for it, depending on the balance they saw between those two problems.

I will say that the Judiciary Committee has followed a thorough process for consideration of this bill. The current bill has been filed and available to the public for over 2 weeks before today. We held two hearings on reauthorizing the expiring provisions of the PATRIOT Act. In September, we held a public hearing with a senior Department of Justice official and a bipartisan array of experts. Last week, we held a classified full committee hearing. During the last Congress, the Judiciary Committee held eight hearings on surveillance, National Security Letters, and related issues. This summer, Members and staff have had at least four bipartisan briefings from the administration on uses and misuses of the expiring provision. And in the years since we last considered the PATRIOT Act in 2005, we have received 13 highly detailed -- 13, not two -- inspector general reports on the uses and misuses of the expiring provisions. So I think we have had a number of hearings.

Let me just say that the amendments that the bill and the manager's amendment seeks to make to the PATRIOT Act are, in the view of Mr. Conyers and myself and others who have worked on this, balanced amendments. They don't open up the libraries to say that

al Qaeda can do anything it wants; all they need to do is open up a library or a bookstore, as someone just said.

The manager's amendment provides a careful, narrow protection for two things: one, for the right of people to be private in what they read. It is none of anybody's business what you read. But, second of all, it provides an exception to that when national security really needs it.

All it says is that you are secure in the privacy of what you read in the library, or in any bookseller for that matter, Wal-Mart, but if the government can show specific and articulable facts to show that what you read or what you took out from the library or whatever is relevant to an authorized investigation and is relevant to a terrorist or a suspected terrorist or agent of a foreign power, then it can get all that information. So those are the two questions.

Now, obviously, if you think that it is too great a burden on the government, they ought to be able to read and know what books you read, what articles you read, what you went to on the computer, without showing specific and articulable facts why that information is relevant to an authorized investigation and why it is relevant to a suspected agent of a foreign power, which means a terrorist under the law, or a suspected terrorist, then this is too restrictive for you and you shouldn't vote for it.

But that is what this does; it establishes that level. And that is the highest level. There are different levels in this

manager's amendment for different uses: for National Security Letters; for section 215 business orders; and the highest is the one I just quoted, for library information, because it should be the most protected.

What the bill does, essentially, is to say that the government has to make these two showings: that the information sought is relevant to an authorized investigation, it is not simply a fishing expedition; and it is relevant to a suspected terrorist or agent of a foreign power. If it can show that, it can get any of that information it wants. If it can't, in my opinion, it shouldn't be able to know what you read.

But that is the question before us. It is a careful balance, and we think it is the appropriate balance.

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

Chairman Conyers. Would the gentleman yield to me if he has any time left?

You know, I have heard at least two members here talk about al Qaeda buying a bookstore, then be exempt from the PATRIOT Act. How amusing.

It is against the law, Mr. Sensenbrenner and Mr. Smith, for any al Qaeda person to engage in any activity, period -- not just buying a bookstore, but opening up a fruit market. They can't do it. You go to the FISA Court and bust them immediately. You don't have to buy a bookstore for them to operate openly.

So I would like you to be relaxed in this, and let's have a

serious, not a comic description of people buying bookstores that are illegal terrorists operating in this country. If you know an illegal terrorist, let's turn him in. We don't have to wait for him to buy a bookstore. That is illegal activity, per se, not only in the PATRIOT Act itself but throughout many of the Federal laws that exist already on the books.

So I would hope that nobody else -- well, maybe somebody else will -- tell me that a bookstore purchased by a terrorist exempts him from the law.

Mr. Smith. Would the chairman yield briefly?

Chairman Conyers. Of course I would yield.

Mr. Smith. Thank you, Mr. Chairman.

Mr. Nadler. I will yield.

Mr. Smith. Oh, I am sorry. I thank the gentleman from New York.

Mr. Chairman, our point was not that somehow the bookstore was not illegal. It is also illegal to fly planes into tall buildings. It is illegal for terrorists to operate -- and you are exactly right -- in any capacity whatsoever.

The point of using the bookstores as an example was that they could very easily use a bookstore to conduct those illegal activities, to get access to computers or perhaps literature that would help them ply their trade, conspire, and perhaps build and explode dangerous devices.

Mr. Nadler. Reclaiming my time, I would point out anybody can do anything. They can certainly do that --

Mr. Smith. But why make it easier for them?

Mr. Nadler. No, no. The question is, what level of knowledge or of suspicion or of facts should be necessary for the government to invade your privacy because they think that maybe you are an al Qaeda terrorist? What we are saying is the level that I articulated a few minutes ago.

And the proper debate is not a generalized statement of, "Gee, terrorists can do things." The proper level of debate is why the standard that we are proposing here is too narrow, too broad, or not appropriate.

I will yield back.

Mr. Chaffetz. Mr. Chairman?

Chairman Conyers. Yes, who seeks time?

Mr. Chaffetz. I move to strike the last word, if I may.

Chairman Conyers. The gentleman is recognized for 5 minutes.

Mr. Chaffetz. Thank you, Mr. Chairman.

This is obviously a very important topic.

I find it interesting that the gentleman from New York would actually argue that the history is irrelevant. That was the first statement that you made. As a freshman here, and dealing with a very sensitive subject, I think the dialogue and the discussion and the understanding of the history of how we got to this point is exactly what we should be reviewing.

And I would join with Mr. Quigley in expressing some concern to this committee that we didn't have a legislative hearing on this bill. We certainly could have spent the time.

Now, you may argue that it is a subcommittee level of which I am not a participating member. There was some discussion. I think it would have been entirely appropriate and timely to actually have a legislative hearing about this bill.

And, further, I would like to know, personally, where the administration stands formally in dealing with these certain provisions.

Mr. Nadler. Would the gentleman yield?

Mr. Chaffetz. Yes, of course.

Mr. Nadler. Well, first of all, I didn't mean to imply that history is irrelevant. I simply meant to imply that it is more productive to talk about the provisions of the bill before us and not to engage in a debate over who did what and whose fault it is, the Republicans or Democrats, et cetera. I would be happy to debate that, but that is not, in my view, the most productive use of our time right now.

Second of all --

Mr. Chaffetz. But, reclaiming my time, for those of us that weren't there for all those discussions, that is an important part of the dialogue. And you may go ahead and assume --

Mr. Nadler. All right. Fine. Fine. If --

Mr. Chaffetz. It is still my time, I believe.

Mr. Nadler. Sorry.

Mr. Chaffetz. It is an important part to understand historically how we got to this position. And what I want to make sure we do is that we fully vet that. I share the position that was offered by Mr. Quigley. I would associate myself with some of those concerns. And I do think it is part of the dialogue. Even for those of you who have been here through some of those discussions, I do think it is a -- it doesn't take that long to go through it, and it is such an important topic, I think we need to do that.

Yes, please.

Mr. Nadler. Thank you.

The second point -- let's see if I remember what I wanted to say. We had a hearing on this in the subcommittee. It wasn't the full committee. I am the chairman of the subcommittee.

I would simply say, for your information because you asked, as far as I know, the administration has not taken a formal position, pro or con, on any of this.

Mr. Chaffetz. Reclaiming my time, that is my understanding. And that is why I am saying it would be helpful if the administration had taken a formal view or participated in a legislative hearing so we could ask those types of questions.

Mr. Nadler. Would the gentleman yield for a moment?

Mr. Chaffetz. Yes, please.

Mr. Nadler. Well, I will simply inform the gentleman that I,

as chairman of the subcommittee, and the chairman of the committee, on a number of occasions, asked the administration over months to give us their opinions on various things, to testify at hearings. They indicated they were not prepared to do so, that they were getting up to speed. And until, what was it, 2 weeks ago, I think, 2 weeks ago, they did send a witness, the Deputy Attorney General Whitten, I think his name is, to testify at a subcommittee hearing on this issue. And he talked about the pros and cons of various things but didn't take a position on specific proposals.

Mr. Chaffetz. Thank you, Mr. Chairman.

Chairman Conyers. I thank the gentleman from Utah.

Mr. Watt. Mr. Chairman?

Chairman Conyers. I now recognize Mel Watt of North Carolina.

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

Chairman Conyers. Without objection, the gentleman is recognized.

Mr. Watt. Mr. Chairman, I just want to make a few comments, some of which may be responsive to Mr. Quigley and my Republican colleague, to put this in context.

First of all, this is a painful discussion to have because, for those of us who were here 8 years ago, the most dramatic, salient recollection it brings back is what led to the PATRIOT Act in the first place.

And you talk about flying by the seat of your pants. Imagine the predicament that members of the Judiciary Committee were in in the aftermath of attacks in New York and at the Pentagon and the outcry of emotion from the American people for retaliation or a response of some kind and trying, in that context, to measure our response in a way that would also honor our constitutional prerogatives and imperatives.

And I would have to say, with great regard to Mr. Sensenbrenner, that I thought it was one of the finest hours of this committee. We got together, we rolled up our sleeves, we listened to experts. We resisted the pressure from the public to do something instantly. And we crafted, as Mr. Sensenbrenner has pointed out, a bill in this committee that was reported out with a unanimous vote.

It wasn't that we didn't have some misgivings about some of the provisions in that bill, but we were flying by the seat of our pants. You think you are flying by the seat of your pants now, imagine the context that we were operating in.

But we reported the bill out, and we thought we had a wonderful, balanced bill. And it went to the Rules Committee, where there probably wasn't a single lawyer on the Rules Committee at that time, basically rewrote the bill. And many of us, including myself, voted against the bill that we voted on on the floor of the House because it was substantially revised to put things that were alien to our notion of what constitutional

imperatives were and are in this country.

We are fortunate that, over all of this time, we have had no additional attacks on the United States, but that is not a reason not to go back and revisit. I don't really think it was the PATRIOT Act that has been responsible for that, if you want my honest opinion.

Mr. Quigley. Will the gentleman yield?

Mr. Watt. No, no, no. Just let me -- you know, you got me reliving painful memories here.

It was the finest hour because we had -- Bob Barr was on the committee, a libertarian who believed in the Constitution. And I keep missing that voice from your side of the aisle that pays attention to constitutional prerogatives. And he was as adamant as we were about protecting individual liberties of the kind that this bill, this manager's amendment, would start to address.

We couldn't get the administration then to take positions. The one thing that this administration has followed the last administration in is, you know, they wanted everything that we would give them to give them more power to do whatever they wanted to do and stay out of their way. And, as soon as they got as much as they could get from us, then they went to the Rules Committee and then they went to the Senate and asked for more power.

That was the context in which we were operating, a context that led me, on a number of occasions, to say, "Well, if Attorney General Ashcroft is protecting me from terrorists, who is

protecting me from Attorney General Ashcroft?" And I have said it numerous times publicly.

This is a difficult issue. And I think the manager's amendment has improved the bill, gotten it back more toward a balance that I think is the balance that we ought to be looking for.

Mr. Gallegly. Would the gentleman yield for one quick question, a yes-or-no?

Chairman Conyers. The gentleman's time has expired, but I can give him an additional minute.

Mr. Watt. And I will yield to the gentleman.

Mr. Gallegly. I just wanted to clarify, the Bob Barr you are referring to, is that the ACLU attorney Bob Barr?

Mr. Watt. Well, it wasn't the ACLU Bob Barr at that time, 8 years ago. A lot of water has gone under the bridge then. But his beliefs in individual liberties and in the Constitution were just as strong, he said, then. Of course, he voted for the bill that we didn't -- ultimately that I voted against.

Mr. Gallegly. I just wanted to make sure I hadn't made a mistake.

Mr. Watt. But at least he made the pretense of standing up for the rights of individuals in this country. And I long for the day that somebody on your side of the aisle will take up that mantel and remember that it was you who believed in individual rights and stood for individual rights at one point in your

party's history.

Chairman Conyers. The Chair is pleased now to recognize someone that may fit that category, namely Elton Gallegly of California, who may have an amendment and/or a statement.

Mr. Gallegly. Thank you, Mr. Chairman. And thank you for that very generous comment and introduction. I appreciate you yielding.

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

Chairman Conyers. The clerk will report the Gallegly amendment.

The Clerk. Amendment offered by Mr. Gallegly to the amendment offered by Mr. Conyers --

Chairman Conyers. Without objection, the amendment is considered as read.

[The information follows:]

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

Chairman Conyers. And the gentleman is recognized in support of his amendment.

Mr. Gallegly. Mr. Chairman, under section 215 of the PATRIOT Act, the FISA Court may issue an order for library and bookstore business records only in very limited circumstances. Those circumstances are when the records are needed as part of a foreign intelligence, international terrorism, or clandestine intelligence investigation.

The manager's amendment is an improvement over the original bill. However, it still imposes heightened standards for obtaining library and bookseller records. This change, to me, is still unacceptable.

Why are we amending the use of business record orders for library and bookseller records at all? Is this authority being abused? Is the Justice Department using it to monitor the library and bookstore activities of innocent Americans? The answer to that question is clearly "no."

Mr. Chairman, the two separate audits by the DOJ's inspector general into the government's use of business record authority found only a handful of isolated incidents of overcollection. Moreover, as part of the 2005 PATRIOT Act reauthorization, the business records provision already provides increased protection for library and bookstore business orders. These orders, which are issued only by the court, can be accessed as part of a foreign

intelligence, international terrorism, or clandestine intelligence investigation.

The current law requires applications for orders seeking library or bookstore records to be approved by the director of the FBI or the deputy director of the FBI or the executive assistant director of national security. This authority cannot be further delegated.

Further, the business records provision currently protects the free-speech right of Americans by protecting the use of these authorities solely on the basis of activities protected by the first amendment.

There is simply no evidence that the national security investigators are misusing the ability to obtain library and bookstore records. The government is not simply reviewing reading habits of ordinary Americans. However, we do know that terrorists and spies have used libraries to plan and carry out activities that threaten our national security and the safety of Americans from coast to coast.

We cannot endanger our citizens or our national security because of the imagined belief that the authority to access these records is being used. I would urge my colleagues on both sides to seriously consider and agree with this amendment.

And I yield back.

Chairman Conyers. Thank you for your thoughtful --

Mr. Watt. Mr. Chairman, parliamentary inquiry.

Chairman Conyers. What is your inquiry?

Mr. Watt. I am trying to figure out what it is Mr. Gallegly is trying to do here. Is he amending your amendment, or is he amending the base bill?

Chairman Conyers. He is amending the manager's amendment, which is the only thing on the floor at this point.

Mr. Watt. It seems to me that the first part of what he is doing is amending the base bill, not the manager's amendment. Is that --

Mr. Gallegly. Technically, it does both. But we are addressing the --

Mr. Watt. I am raising a parliamentary inquiry of whether he can do that all in one fell swoop.

Chairman Conyers. It barely passes parliamentary scrutiny. And so, it does both, and so we are going to allow it.

Mr. Watt. Well, I move for a division of the question at an appropriate time.

Chairman Conyers. Well, I wish that the gentleman would reserve that for at least a little while.

Mr. Watt. I will reserve.

Chairman Conyers. Can I recognize Jerrold Nadler, and then I am going to attempt to have a vote on your provision because you have argued it extensively and well, Mr. Gallegly. And then I would seek a vote on the manager's amendment itself. Let's see if we can do that.

The gentleman from New York is recognized.

Mr. Nadler. Thank you, Mr. Speaker.

I oppose this amendment, and I urge all Members to oppose the amendment.

The amendment would remove the protections that we are trying to put in here to protect the privacy of people who go to libraries or to bookstores -- to bookstores, really -- while, at the same time, giving the government the ability to get information when they really need it, to strike a balance.

Congress has worked for years to provide greater protections. This House passed the Sanders amendment on the floor a number of years ago to do try to do this. This amendment is very similar to what that Sanders amendment was. It passed overwhelmingly, with over 300 votes, as I recall.

And what the amendment says -- or, rather, what the manager's amendment says, which the gentleman from California is trying to remove, is that if the information you are seeking -- that is, the government is seeking -- contains personally identifiable information about a patron of the library, it can't get that unless it can show a statement of specific and articulable facts showing there are reasonable grounds to believe.

Now, what do these articulable and specific facts have to show? That there are reasonable grounds to believe that the records sought are relevant to an authorized investigation and pertain to a foreign power or an agent of a foreign power, which

means a terrorist too, or are relevant to the activities of a suspected agent of a foreign power or an individual in contact with or known to be a suspected agent.

So you can get the information, personally identifiable information, that says what Joe Blow is reading if you have some facts to show that it is relevant to an authorized investigation and relevant to an investigation of a suspected terrorist or agent of a foreign power. If it is not that, then it is a fishing expedition and you, frankly, have no business getting it.

So this manager's amendment strikes the proper balance that we have been seeking for years.

Now, if Mr. Gallegly's amendment were to pass, then basically you can go in and get anything about what you are reading, about what someone else is reading in a library or bookstore without having to show specific facts that it is even relevant to an authorized investigation or to an investigation of a suspected terrorist.

So I would oppose that. It would gut the protection we are trying to put in. And there is no legitimate reason why the government needs that information unless it can show that it is relevant to an authorized terrorist investigation.

Mr. Gallegly. Would the gentleman yield?

Mr. Nadler. I will yield.

Mr. Gallegly. You know, I don't have the benefit of your longstanding legal credentials, but this specifically requires an

order by the court. And the court makes the order based on a request from the director of the FBI, the deputy director of the FBI, or the executive assistant director of national security, and no one else.

Mr. Nadler. Yes, but, reclaiming my time, requiring an order of the court is not the key. The key is what the court has to find, what you have to show the court. And if you have to show the court basically very little, it doesn't protect you.

What the manager's amendment says is that you have to show the court that you have specific and articulable facts showing that there are reasonable grounds to believe that the information you are seeking is relevant to an authorized investigation or to an investigation of a terrorist. And if there are no reasonable facts to believe that it has anything to do with a terrorist or with an authorized investigation, then you shouldn't get it.

Mr. Gallegly. Will the gentleman yield?

Mr. Nadler. Yes, I will yield.

Mr. Gallegly. It still requires the same as it would in the case of a grand jury subpoena.

Mr. Nadler. I am sorry?

Mr. Gallegly. The relevance would be the same standard as the standard of relevance in a grand jury subpoena.

Mr. Nadler. Well, grand jury subpoenas go to a lot of things. You don't normally subpoena what someone was reading in a library.

All we are talking about here is personally identifiable information about a patron of a library or bookstore. And, again, the question is, should the government have to show some reason to believe that it is relevant to an authorized investigation or to a terrorist investigation? We say "yes." Your amendment says "no." That is essentially what it is.

Chairman Conyers. Would the gentleman yield back his time?

Mr. Nadler. I yield back.

Chairman Conyers. We are going to vote on this, so, please, nobody leave. We are going to recognize the Ranking Member, Mr. Smith, for 1 minute, and then we will take a vote only on the Gallegly provision. And then we will go vote.

The gentleman is recognized.

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

This amendment appropriately removes the provision in the manager's amendment to impose a heightened standard of specific and articulable facts for library and bookseller business records.

These records already have additional protections under existing law, and no such heightened standard applies to grand jury subpoenas for library and bookseller records. Why should terrorists receive greater protections?

My colleagues ought to support this amendment. And I yield back.

Chairman Conyers. The Chair now closes the discussion here and calls for a record vote.

The clerk will call the roll on the Elton Gallegly amendment.

The Clerk. Mr. Conyers?

Chairman Conyers. No.

The Clerk. Mr. Conyers votes no.

Mr. Berman?

[No response.]

The Clerk. Mr. Boucher?

Mr. Boucher. No.

The Clerk. Mr. Boucher votes no.

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?

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?

Mr. Wexler. No.

The Clerk. Mr. Wexler votes no.

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. No.

The Clerk. Mr. Quigley votes no.

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?

Mr. Gonzalez. No.

The Clerk. Mr. Gonzalez votes no.

Mr. Weiner?

[No response.]

The Clerk. Mr. Schiff?

Mr. Schiff. No.

The Clerk. Mr. Schiff votes no.

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?

Mr. Gallegly. Aye.

The Clerk. Mr. Gallegly votes aye.

Mr. Lungren?

Mr. Lungren. Aye.

The Clerk. Mr. Lungren votes aye.

Mr. Issa?

Mr. Issa. Aye.

The Clerk. Mr. Issa votes aye.

Mr. Forbes?

Mr. Forbes. Aye.

The Clerk. Mr. Forbes votes aye.

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?

[No response.]

The Clerk. Mr. Poe?

Mr. Poe. Aye.

The Clerk. Mr. Poe votes aye.

Mr. Chaffetz?

Mr. Chaffetz. Aye.

The Clerk. Mr. Chaffetz votes aye.

Mr. Rooney?

[No response.]

The Clerk. Mr. Harper?

Mr. Harper. Aye.

The Clerk. Mr. Harper votes aye.

Chairman Conyers. Are there any Members that -- yes, Mr.

Goodlatte?

Mr. Goodlatte. Aye.

The Clerk. Mr. Goodlatte votes aye.

Chairman Conyers. Yes, Ms. Waters?

Ms. Waters. No.

The Clerk. Ms. Waters votes no.

Chairman Conyers. Mr. Weiner?

Mr. Weiner. No.

The Clerk. Mr. Weiner votes no.

Chairman Conyers. Mr. Scott?

Mr. Scott. No.

The Clerk. Mr. Scott votes no.

Chairman Conyers. Mr. Jordan, Ohio?

Mr. Jordan. Yes.

The Clerk. Mr. Jordan votes yes.

Chairman Conyers. The clerk will report.

The Clerk. Mr. Chairman, 13 Members voted aye, 21 Members voted nay.

Chairman Conyers. The amendment is unsuccessful.

And the committee stands in recess until the votes are concluded on the House floor.

[Recess.]

RPTS KESTERSON

DCMN SECKMAN

[3:32 p.m.]

Chairman Conyers. The committee will come to order.

The Chair asks that a quorum call be called at this point.

The clerk will call the roll.

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. Cohen. Here.

The Clerk. Mr. Johnson.

Mr. Pierluisi.

Mr. Quigley.

Mr. Quigley. Here.

The Clerk. Ms. Chu.

Mr. Gutierrez.

Ms. Baldwin.

Ms. Baldwin. Present.

The Clerk. Mr. Gonzalez.

Mr. Gonzalez. Present.

The Clerk. Mr. Weiner.

Mr. Schiff.

Mr. Schiff. Present.

The Clerk. 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. Issa.

Mr. Forbes.

Mr. King.

Mr. Franks.

Mr. Gohmert.

Mr. Jordan.

Mr. Poe.

Mr. Poe. Here.

The Clerk. Mr. Chaffetz.

Mr. Rooney.

Mr. Harper.

The Clerk. Ms. Lofgren.

Ms. Lofgren. I am present.

The Clerk. Ms. Chu.

Mr. Wexler.

Mr. Wexler. Present.

The Clerk. Mr. Watt.

Mr. Watt. Present.

The Clerk. Mr. Smith.

Mr. Smith. Present.

Chairman Conyers. The clerk will report.

The Clerk. Mr. Chairman, 14 Members responded present to the quorum call.

Chairman Conyers. Thank you.

That constitutes a working quorum.

The Chair is pleased to recognize Dan Lungren of California.

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

I have an amendment at the desk. It should be Amendment No. 3, I believe, dealing with the NSL minimization.

Chairman Conyers. The Clerk will report the amendment.

The Clerk. Amendment offered by Mr. Lungren to the amendment offered by Mr. Conyers. Beginning on Page 8, strike the amendment proposed to be made to the material beginning on line --

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

[The information follows:]

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

Chairman Conyers. Without objection.

And the gentleman is recognized in support of his amendment.

Mr. Lungren. Thank you very much, Mr. Chairman. I think my amendment deals with a section of the bill that somehow got in here because they did it on the Senate side but doesn't really fit the circumstances of the bill. This amendment strikes Section 208, which calls for the establishment of minimization procedures relating to information obtained pursuant to National Security Letters.

Now, I would say at the outset, if there are some relevant, specific, tangible problems which have arisen concerning the retention of information obtained from NSLs, let us address it by creating new procedures that would deal with the issue directly.

The problem is that we are attempting to apply the concept of minimization in the NSL context, and I don't believe it can work. We can't impose a process used for electronic surveillance and patch it on to National Security Letters. It is sort of like putting a square peg into a round hole.

I think sometimes we lose sight of the fact that the object of National Security Letters is not the content of the communications; rather, this is in contrast to electronic surveillance, where there is a significant expectation of privacy and where the surveillance is sufficiently intrusive to require a warrant in the criminal context or a FISA order in the national

security context.

NSLs allow the FBI to request production of records held by third parties and where, in a criminal context, they have been able to obtain such information through the use of grand jury subpoenas. The Supreme Court as repeatedly explained that is a difference between the content of a communication and the record of such a communication. The difference is in the essential legal analysis.

There is generally not an expectation of privacy in a record that a communication occurred rather than the communication itself. And I'm talking about such things as entries in a phone bill.

While there is, as I say, a constitutionally protected expectation of privacy in the context of the communication itself, the actual communication, thus the longstanding U.S. Supreme Court precedent *ex parte Jackson* is that the statutory structure governing law enforcement is different for access of records of communications and contents of the communications.

I don't understand why we have it in here. It seems to be misplaced. It doesn't seem to really fit the occasion of the circumstances that this bill is addressing. And if anything at all, we will probably have chaotic consequences which will threaten the continued viability of NSLs as an investigative tool in terrorism cases.

I know there are some who don't like NSLs, don't believe they

are appropriate. And we can have that debate if that's what we want to do. But much like criminal cases where multiple grand jury subpoenas may be used through the duration of the investigation, I would argue that similar flexibility needs to be available in investigations where national security and safety of the public is at stake.

It sort of goes back to the argument we just had on the previous amendment. It seems at least strange that we would have a higher degree of proof or a higher bar dealing in the terrorist context than we would in the criminal context. The required destruction of the early building blocks of an investigation will, I believe, hamper development of evidence and potentially lead to the use of more intrusive investigative means.

The language of the bill calls on the Attorney General to establish minimization procedures that are, quote, reasonably designed in light of the purpose and technique of a National Security Letter. The problem is, I think, a minimization is inapplicable to NSLs.

I would ask support in striking Section 208 of the bill. And as far as I can find from anything that we have received from the administration, there is no support for this particular provision of the bill.

And I believe we received -- well, I guess Senator Leahy received a letter from DOJ on September 14th talking about what they wished we would do in terms of the reauthorizations in the

three areas, and I find nothing in there that would suggest that the administration believes this is either necessary or appropriate.

So, with that, Mr. Chairman, I would yield back the balance of my time.

Chairman Conyers. I want to thank you, Mr. Lungren, for the detail and scrupulous study that you have attended to the minimization section of the bill.

It is important, and I think your efforts are good faith.

What we are saying is specific procedures, reasonably designed in light of the purpose and technique of a National Security Letter to minimize the acquisition and retention and prohibit the dissemination of nonpublicly-available information concerning unconsenting United States persons. And we want this to be consistent with the need of the Nation to obtain, produce, and disseminate foreign intelligence information.

Now, these minimization procedures are an effective control on ensuring that nonpublicly-available information collected by the government during national security investigations concerning innocent United States citizens is not inappropriately disclosed or retained by law enforcement. I think that is not too controversial a statement of what we ought to be doing and how we ought to be doing it.

Now the language that is in the manager's amendment has been carefully vetted by the Department of Justice on the appropriate

legislative language to accomplish these necessary privacy protections. The privacy experts and the Department of Justice have acknowledged the need for these types of formal procedures or guidelines. So this wasn't invented by staff or dreamed up even by any of our distinguished colleagues.

The manager's amendment makes changes to the language in 3485 to account more accurately for how minimization procedures can be applied to the information collected through the use of National Security Letters. Indeed, it calls only for minimization procedures reasonably designed in light of the purpose and technique of a National Security Letter and directs the Attorney General to submit these procedures to Congress.

And so I'm hoping that we can go along with the intention of refining the minimization procedures that already exist.

Mr. Lungren. Will the chairman yield?

Chairman Conyers. Of course I will.

Mr. Lungren. Mr. Chairman, I realize that there have been discussions with the Justice Department, and the Justice Department -- we are looking at refining procedures with respect to the NSLs. But I am unaware, perhaps the chairman can correct me on this, I'm unaware of the Justice Department either suggestion or serious consideration of applying minimization requirements to NSLs as part of their overall good-faith effort to try and refine NSLs. Is there new information of which I'm unaware? Has the Justice Department changed its position on that?

Chairman Conyers. Well, let me rephrase our relationship with the Department of Justice. We have been working together. They have been tweaking our work. They haven't signed off -- if I had a letter that would address this to your satisfaction, I would be proud to produce it. I do not have such a letter.

But we do know that we are all working together. They know what we are doing and why we are doing it. And I can say to you that we have not encountered any objection to the approach that is embodied in the manager's amendment, and that is as far as I can go.

Mr. Lungren. Will the chairman further yield?

I appreciate that very much. It is just that, with all due respect, this is the first I had heard that the Justice Department was either considering it or had not raised any objections to this, because it was my understanding they felt that this was --

Chairman Conyers. Let us --

Mr. Lungren. An appropriate transfer of a process that is used in the electronic surveillance arena to this. That's all, the point I was making.

Chairman Conyers. And it is a good faith point, and I appreciate it. And I have got some -- I have got an idea that I would like to be present to you afterward that would perhaps make you a little more comfortable about this.

If there is no further discussion -- oh, I'm sorry.
Mr. Smith, the Ranking Member, is recognized.

Mr. Smith. Thank you, Mr. Chairman.

I support this amendment. The minimization provisions called for in Section 208 of the bill will only burden the FBI with unnecessary procedural impediments and impose limitations that are not necessary. In the absence of any demonstrated or recent abuse of the NSL authority, there is no reason to direct the FBI to establish minimization requirements for information collected by an NSL.

Rather, we should permit the people in the best position to know, the agents and analysts at the FBI and within the Justice Department who actually conduct these investigations, to decide what the best policy is with respect to handling the information collected through an NSL.

Mr. Lungren's amendment would delete Section 208 of the bill and entrust these decisions to the dedicated men and women who seek to protect us each and every day and whom I trust to act in good faith under the appropriate supervision of the FBI Director and Attorney General. So I urge my colleagues to support this amendment.

Mr. Chairman, I would also like to say, all the questions that have been raised and uncertainties that have ensued could have at least partially and perhaps wholly been resolved if we had had a hearing; we would have been in a position to have asked the administration, ask the Department of Justice exactly what their positions were. Our understanding on this side is that the DOJ

supports a straight reauthorization. Certainly, the FBI Director who testified does and all the more reason to have had a hearing so we could have found out exactly rather than have to guess what the administration's position is.

And I will yield back.

Chairman Conyers. I thank the gentleman. And that is fair.

I have a page full of hearings that we have had and of noncommittee-hearing discussions and meetings.

But to you and perhaps others they were insufficient, and I apologize for that.

But now that we are faced with this question -- and by the way, we did not receive any notice of what your amendments were, and we could have perhaps alleviated some of this discussion had we known right to this minute. I don't know what other amendments are coming. But let us try to extend our cooperative spirit both in the committee hearings and outside of the committee hearings as well.

Now, the question occurs on the Lungren amendment.

All those in favor, say aye. All those opposed, say no.

The noes have it.

Mr. Lungren. Mr. Chairman, can I have a recorded vote?

Chairman Conyers. And a recorded vote is requested by the gentleman from California.

The Clerk. Mr. Conyers?

Mr. 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?

Mr. Scott. No.

The Clerk. Mr. Scott votes no.

Mr. Watt?

[No response.]

The Clerk. 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?

[No response.]

The Clerk. Mr. Pierluisi?

[No response.]

The Clerk. Mr. Quigley?

Mr. Quigley. No.

The Clerk. Mr. Quigley votes no.

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?

Mr. Gonzalez. No.

The Clerk. Mr. Gonzalez votes no.

Mr. Weiner?

[No response.]

The Clerk. Mr. Schiff?

Mr. Schiff. No.

The Clerk. Mr. Schiff votes no.

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?

[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?

Mr. Issa. Aye.

The Clerk. Mr. Issa votes aye.

Mr. Forbes?

Mr. Forbes. Aye.

The Clerk. Mr. Forbes votes aye.

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?

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. Wexler?

Mr. Wexler. No.

The Clerk. Mr. Wexler votes no.

Mr. Johnson?

Mr. Johnson. No.

The Clerk. Mr. Johnson votes no.

Mr. Berman?

Mr. Berman. No.

The Clerk. Mr. Berman votes no.

Mr. Weiner?

Mr. Weiner. No.

The Clerk. Mr. Weiner votes no.

Mr. Watt?

Mr. Watt. No.

The Clerk. Mr. Watt votes no.

Mr. Boucher?

Mr. Boucher. Votes no.

The Clerk. Mr. Boucher votes no.

Chairman Conyers. The clerk will report.

The Clerk. Mr. Chairman, 8 Members voted aye; 18 Members voted nay.

Chairman Conyers. The amendment is unsuccessful.

The Chair recognizes Mr. Chaffetz for an amendment.

Mr. Chaffetz. Thank you, Mr. Chairman.

And I appreciate the great pronunciation of my name, too. I want you to know how much I appreciate it.

Chairman Conyers. We've been working on it, sir.

Mr. Chaffetz. It's impressive.

I have an amendment at the desk.

Chairman Conyers. The clerk will report the Chaffetz amendment.

The Clerk. Amendment to manager's amendment to H.R. 3845, offered by Mr. Chaffetz of Utah. Page 7, beginning in Line 14 --

Chairman Conyers. I ask unanimous consent that the amendment be considered as read, and the gentleman is recognized in support of his amendment.

[The information follows:]

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

Mr. Chaffetz. Thank you, Mr. Chairman.

This amendment strikes those portions of Section 204, the manager's amendment, that requires the government to, in addition to all of the requirements for issuing a National Security Letter document in a separate writing "specific and articulable facts" to believe that the information sought "pertains to a foreign power or an agent of a foreign power." The manager's amendment attempts to diminish the severity of the effects on NSLs by allowing information to be sought not just if it pertains to a foreign power or agent of a foreign power, but also if it is "relevant to the activities of a suspected agent of a foreign power who is the subject of such authorized investigation" or information that "pertains to an individual in contact with or personally known to a suspected agent of a foreign power who is the subject of such authorization."

This change does nothing to improve the ramifications of a heightened standard on the use of NSLs. My amendment replaces this language with the requirement that the separate writing contains a "statement of facts that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities."

Section 204, as it currently stands, represents a backdoor attempt to roll back the standards for NSLs without explicitly doing so in order to justify the ultimate attempt to sunset the

current standards in 2013. Previously, the Congress intentionally did away with the "specific and articulable facts" in the original PATRIOT Act, and Congress refused to return to that standard in the 2005 reauthorization.

Nothing has changed to cause the administration or those seriously concerned about preventing future terrorist attacks to return to a standard that severely restricted the use of NSLs. This amendment also restricts NSLs by requiring that any government agency issuing an NSL separately document that the information sought can be directly tied to terrorist or spies, the activities of terrorists or spies or a known associate of a terrorist or spy.

As currently written, this provision misses the mark. How can we limit the use of NSLs to instances where we know the information relates to a foreign power or agent of a foreign power, their activities or associates, when often that is exactly why the NSL is being used to determine?

NSLs are most effectively used at the early stages of an investigation in order to gather evidence to establish that a person is linked to a spy or a terrorist. If investigating agencies have to know that before they begin, then the NSL becomes useless, which is perhaps the intent of the provision.

By limiting the issuance of NSLs to only those situations where government -- where government officials already know that the information sought pertains to those criteria, we are

prematurely cutting off investigations without knowing all the facts. The consequence of limiting these investigations is dangerous and potentially immeasurable.

We here in Congress should be promoting the complete and thorough investigation of terrorism and intelligence matters rather than limiting them. For that reason, I'm offering this amendment to bring the standard for this so-called "separate writing" in line with the current and appropriate standard for the use of NSLs.

I would urge my colleagues to vote in favor of this amendment.

Chairman Conyers. Thank you, sir.

Mr. Nadler, would you advance the majority position on this amendment?

Mr. Nadler. Yes. Thank you, Mr. Chairman.

Mr. Chairman, I rise in opposition to this amendment. We have sought to properly balance considerations of national security and considerations of privacy and personal liberty. And the National Security Letter is issued without any court okay and is issued by the FBI, by various officials in the FBI, and should be held to a high standard; a higher standard than a Section 215 business order, business records order, which has to get court approval.

So our standard is that they have to be reasonable, specific, and articulable facts showing that there are reasonable grounds to

believe that the information sought relates to a foreign power or an agent of a foreign power, is relevant to the activities of a suspected agent who is a subject of such an authorized investigation, or pertains to an individual in contact with a known to be in contact with someone who is the subject of an authorized investigation. So you have to have reasonable grounds to believe that it is subject to or that it is relevant to an authorized -- that it pertains to a foreign power or to a terrorist.

If you can't have reasonable grounds to believe that it pertains to a terrorist, you ought not be getting this intrusive an invasion of privacy. What the amendment says is a statement of facts showing the information is relevant to an authorized investigation, just relevant to an authorized investigation. That is the standard we set for Section 215 orders, which at least the court has to look at. And there ought to be a hierarchy here, and that is what we've set up.

If you can only show that it is relevant to an authorized investigation but you cannot show that it is relevant in any way to a suspected terrorist or a suspected agent of foreign power, go to a court and get a Section 215 order. If you want an NSL without any court supervision, you ought to be able to be held to a slightly higher standard to show that you can at least show that it is relevant to somebody you suspect, that the information you're looking for is relevant to someone you suspect might be a

terrorist or an agent of a foreign power.

So we provided for both those contingencies. We have provided it somewhat separately but in a way that is more protective of privacy but meets the national security concerns and is an improvement on the present law.

What this seeks to go back to is essentially the current law, which has led to many abuses as you know. So I recommend that we do not accept this amendment.

Chairman Conyers. Thank you for that explanation.

Do you seek recognize, Mr. Smith?

Mr. Smith. Yes, I do.

Chairman Conyers. The gentleman is recognized.

Mr. Smith. Thank you, Mr. Chairman.

I support this amendment. In both 2001, when we enacted the initial U.S. PATRIOT Act, and again in 2005, when we reauthorized its provisions, we specifically rejected the need to have "specific and articulable facts" to support the issuance of a National Security Letter, and nothing has changed to justify the imposition of such a standard today.

NSLs are a vital intelligence tool, enabling the FBI to collect vital intelligence at an early stage of any investigation. The types of limitations the bill in the manager's amendment would impose are the sorts of things we might want to see in an approach that was purely an after-the-fact one. But we learned the hard way that our country is best served by preventing terrorist

attacks, not by responding to them after they have occurred.

Mr. Chairman, the amendment by Mr. Chaffetz preserves the current standards for issuing a National Security Letter. We've already heard a number of expert witnesses testify as to this approach, which they support, so I urge my colleagues to support the amendment.

Chairman Conyers. I thank the gentleman.

And to close the debate down, I would cite to him the fact that there has been at least one IG report talking about the abuses that have come out of this. My staff may give me a couple of IG reports, which I will put in the record with the specific referencing of the subject of this amendment.

[The information follows:]

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

Chairman Conyers. And that is why it is what has changed that we have been able to document that have created the need for us writing the manager's amendment in this way. I urge that this amendment be rejected, and I call for the question --

Mr. Issa. Mr. Chairman?

Chairman Conyers. Who seeks recognition?

Yes.

Mr. Issa. I would like to speak --

Chairman Conyers. Darrell Issa is recognized.

Mr. Issa. Thank you, Mr. Chairman.

The majority may choose not to support this particular amendment, but with the majority of the abuses that I understand we are speaking about being recordkeeping-related, and I certainly think that we can find ways to sanction those who do not keep the records up to snuff, which is a big part of what I understand from the hearing to have been the IG finding. I would ask the majority to justify if not this amendment, then where in the base text would we not curtail the legitimate use of -- for example, we discover that there is a plot to put liquid homemade bombs on to airplanes in Britain. Do we have a specific individual? Perhaps not. Do we in fact tie the hands here to follow up to see if there are similar activities and the like? I think we do.

So I guess my question -- I'm willing to accept that perhaps Mr. Chaffetz's amendment is not the only solution. But would the

chairman speak to the base text still enabling, notwithstanding abuses, the appropriate use, because what all I can see in the base text or the manager's amendment is that what you are doing is saying because there have been primarily administrative abuses, we are going to cut off the tool? Would either the chairman or the majority's representative perhaps be helpful in answering why there is the base text of the manager's amendment somehow doesn't do just what I said?

Chairman Conyers. Well, all I can tell the gentleman in answer to his excellent question is that, in March 2007, a review of the Federal Bureau of Investigation's use of National Security Letters cited the problems that have led us to the manager's amendment style.

Mr. Issa. Reclaiming my time, Mr. Chairman.

I guess it answers the question of why you believe there needs to be a change; it still, in my opinion, begs the question of, if we take away from President Obama and his administration legitimate tools because of abuses that could be cured through an actual, if you will, response to the failures to use these properly, then we would be doing our appropriate oversight.

Yielding again to the chairman.

Chairman Conyers. Just a moment. The only thing we are doing is requiring that they go to court. Am I not right? We are not taking away anything.

Mr. Issa. If I understand, you're taking away the

requirement -- you're adding the requirement to go to court effectively -- Mr. Nadler, I would be glad to yield to you. But I believe you said that if, then they should go to court. That is a tool --

Mr. Nadler. I said -- what I said was or I meant to say -- and I'm confused to as what your question was. I have been trying to figure it out, talking here maybe because only -- half talking, half listening. I'm very confused. But what I tried to say before was that we are establishing two standards; one standard for Section 215 to get business orders, to look at certain things, but to do that you need to get a court order because it is a 215; and a somewhat higher standard to look at the similar records without a court order, and that's with an NSL.

So I'm not saying we are requiring a court order. But with a lower standard, you would need a court order because presumably you could get a 215 order. If you have specific and articulable standards to show facts, rather, if you have some facts to show that this is relevant to a suspected terrorist or foreign agent, then you could get an NSL --

Mr. Issa. Reclaiming my time.

I think I would yield to the gentleman who has actually real-life experience in what it is like to head up an investigation team, Mr. Lungren.

Mr. Lungren. If we could just review this. If we recall the big concerns with the FBI were in exigent letters, which they no

longer utilize -- we know that practice has changed -- and in the area of NSLs. And I was, along with some other members of this panel, both on the Democrat and Republican side, busy questioning the Director of the FBI as to their sloppy recordkeeping. And if you look at the IG's report, that is what they talked about. They didn't find any evidence of malintent. They found a tremendously sloppy recordkeeping. That was several years ago.

Every indication we have from the Director of the FBI is that has been changed and those problems have been taken care of. So I would suggest to the gentleman that his questions are very appropriate.

We are now administering a change in standard based on a practice that no longer exists that was essentially sloppy recordkeeping, and the sloppy recordkeeping's impediment was that if you went back to review to make sure they were doing a good job, you couldn't find that out. That has been taken care of.

Mr. Issa. So reclaiming my time and summing up, we have had the change, which was the change in the old administration and the change to the new administration, negating any legitimacy to this change that is in the manager's amendment. That would be correct.

I thank you. I thank you, Mr. Chairman, for letting us make that clear and yield back the balance of my time.

Chairman Conyers. Well, you didn't intentionally plan to stir up what was a very ordinary and --

Mr. Issa. Mr. Chairman, Mr. Watt is not here, So it is kind

of hard to comment on. I thought he was referring to me as the replacement for the ACLU attorney, Bob Barr, because it was Barney and Bob and myself that were in that room. And you were certainly welcome. And I think we were there for part of with the ACLU and the NRA making sure this was as good as it could be the first time when it left this committee unanimously, notwithstanding the fact that wasn't when we voted for on the floor.

You know, Mr. Chairman, I am so much wanting to get back to what we voted on a bipartisan basis out of this bill originally on the House floor and would hope that the majority would want the same thing.

Chairman Conyers. Well, your intentions could not ever be questioned by anybody on either side of the aisle in this case.

Mr. Issa. Thank you, Mr. Chairman.

Chairman Conyers. A final comment, and I'm going to call for the vote.

Mr. Nadler. Thank you.

I may be mistaken, but my recollection, which may be wrong, is that the bill rather that we reported unanimously out of committee called for specific and articulable facts.

But be that as it may, the gentleman from California -- in fact, the two gentlemen from California -- were talking a moment ago about how the FBI abuses were recordkeeping abuses and they have been taken care of.

Well, the fact is, they weren't just recordkeeping abuses. I

will give you just a few examples of abuses that we are trying to deal with that weren't just recordkeeping abuses. So, for example, they received documents reflecting receipt of responsive records that included Social Security numbers and date-of-birth information on individuals who were irrelevant to the underlying information. The FBI issued an NSL to obtain educational records from a university, even though the particular statute that applied specifically did not authorize the acquisition of education records. These are from the IG reports in 2007.

The FBI acquired full credit reports in a counterintelligence investigation when full credit reports are permissible only in counterterrorism cases. Those are some -- in a couple of instances, after the FISA court denying FBI requests in 2006 for a Section 215 business record based on first amendment concerns, which the FISA court said you can't get. I don't know the details, but it said, because of First Amendment concerns, the court said no. The FBI simply went around the court and issued an NSL for the exact same information, circumventing the court's oversight, despite the fact that NSLs are subject to the same First Amendment constraints as are Section 215 orders.

So even without the exigent letters, there were far more abuses that are not properly characterized as simply recordkeeping. These are some of the things we are trying to get at. The record of abuse shows that these powerful tools need strong oversight and clear boundaries and limits. And we have to

craft the bill to prevent future abuses and set appropriate limits on surveillance and collection of information to protect America's privacy while permitting necessary investigations.

Mr. Chaffetz. Will the gentleman yield?

Mr. Nadler. Yes, I will yield.

Mr. Chaffetz. My understanding is in those three or so examples is that these were examples where they moved outside of the law. It doesn't mean that the law was wrong. It doesn't mean that the law needed to be changed. But it means that they did things contrary to what was already currently on the books. Am I right?

Mr. Nadler. Reclaiming my time. We disagree on that. We are not going to go into detail on each of these cases. But I don't think that is accurate.

Mr. Chaffetz. Will the gentleman yield?

Chairman Conyers. May I point out that we have now reached the point, thanks to Darrell Issa, that we should --

Mr. Issa. You're most welcome, Mr. Chairman.

Chairman Conyers. That we should vote on the Chaffetz amendment, and all in favor, say aye. All opposed, say no. The noes have it. And the amendment is unsuccessful.

Mr. Chaffetz. Mr. Chairman.

Chairman Conyers. Would you like a record vote?

Mr. Chaffetz. Please.

Chairman Conyers. The clerk will call the role.

The Clerk. Mr. Conyers?

Mr. Conyers. No.

The Clerk. Mr. Conyers votes no.

Mr. Berman?

Mr. Berman. No.

The Clerk. Mr. Berman votes no.

Mr. Boucher?

[No response.]

The Clerk. Mr. Nadler?

Mr. Nadler. No.

The Clerk. Mr. Nadler votes no.

Mr. Scott?

Mr. Scott. No.

The Clerk. Mr. Scott votes no.

Mr. Watt?

[No response.]

The Clerk. Ms. Lofgren?

Ms. Lofgren. No.

The Clerk. Ms. Lofgren votes no.

Ms. Jackson Lee?

[No response.]

The Clerk. Ms. Waters?

Ms. Waters. No.

The Clerk. Ms. Waters votes no.

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. No.

The Clerk. Mr. Pierluisi votes no.

Mr. Quigley?

Mr. Quigley. No.

The Clerk. Mr. Quigley votes no.

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?

Mr. Weiner. No.

The Clerk. Mr. Weiner votes no.

Mr. Schiff?

Mr. Schiff. No.

The Clerk. Mr. Schiff votes no.

Ms. Sanchez?

[No response.]

The Clerk. Ms. Wasserman Schultz?

[No response.]

The Clerk. 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?

[No response.]

The Clerk. Lungren?

Mr. Lungren. Aye.

The Clerk. Mr. Lungren votes aye.

Mr. Issa?

Mr. Issa. Aye.

The Clerk. Mr. Issa votes aye.

Mr. Forbes?

Mr. Forbes. Aye.

The Clerk. Mr. Forbes votes aye.

Mr. King?

Mr. King. Aye.

The Clerk. Mr. King votes aye.

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?

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.

Ms. Wasserman Schultz?

Ms. Wasserman Schultz. No.

The Clerk. Ms. Wasserman Schultz votes no.

Mr. Watt?

Mr. Watt. No.

The Clerk. Mr. Watt votes no.

Chairman Conyers. The clerk will report.

The Clerk. Mr. Chairman, 11 Members voted aye, and 18 Members voted nay.

Chairman Conyers. The amendment is unsuccessful.

The question is on the manager's amendment.

All in favor indicate by saying aye.

All opposed indicate by saying no.

The ayes have it, notwithstanding the abuse of the microphone.

A recorded vote is requested.

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?

Mr. Scott. Aye.

The Clerk. Mr. Scott votes aye.

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?

[No response.]

The Clerk. 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?

[No response.]

The Clerk. 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?

Mr. Weiner. Aye.

The Clerk. Mr. Weiner votes aye.

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. 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?

Mr. Sensenbrenner. No.

The Clerk. Mr. Sensenbrenner votes no.

Mr. Coble?

Mr. Coble. No.

The Clerk. Mr. Coble votes no.

Mr. Gallegly?

[No response.]

The Clerk. Mr. Lungren?

Mr. Lungren. No.

The Clerk. Mr. Lungren votes no.

Mr. Issa?

Mr. Issa. No.

The Clerk. Mr. Issa votes no.

Mr. Forbes?

Mr. Forbes. No.

The Clerk. Mr. Forbes votes no.

Mr. King?

Mr. King. No.

The Clerk. Mr. King votes no.

Mr. Franks?

Mr. Franks. No.

The Clerk. Mr. Franks votes no.

Mr. Gohmert?

[No response.]

The Clerk. Mr. Jordan?

[No response.]

The Clerk. Mr. Poe?

[No response.]

The Clerk. Mr. Chaffetz?

Mr. Chaffetz. No.

The Clerk. Mr. Chaffetz votes no.

Mr. Rooney?

Mr. Rooney. No.

The Clerk. Mr. Rooney votes no.

Mr. Harper?

Mr. Harper. No.

The Clerk. Mr. Harper votes no.

Mr. Wexler?

Mr. Wexler. Yes.

The Clerk. Mr. Wexler votes yes.

Mr. Berman?

Mr. Berman. No -- yes.

The Clerk. Mr. Berman votes aye.

Ms. Chu?

Ms. Chu. Aye.

The Clerk. Ms. Chu votes aye.

Ms. Waters?

Ms. Waters. Aye.

The Clerk. Ms. Waters votes aye.

Mr. Boucher?

Mr. Boucher. Aye.

The Clerk. Mr. Boucher votes aye.

Chairman Conyers. Are there any other Members that wish --

Ms. Wasserman Schultz?

The Clerk. Ms. Wasserman Schultz?

Ms. Wasserman Schultz. Aye.

The Clerk. Ms. Wasserman Schultz votes aye.

Chairman Conyers. If all have voted, the clerk will report.

The Clerk. Mr. Chairman, 19 Members voted aye; 11 Members voted nay.

Chairman Conyers. The manager's amendment is agreed to. We now turn to the amendments to the U.S. PATRIOT Act of 2009.

The Chair recognizes the gentleman from California, Mr. Schiff, for an amendment.

Mr. Schiff. 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 of California. Page 4, strike Lines 1 through 3, and insert the following.

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

Chairman Conyers. Without objection, the amendment will be considered as read, and the gentleman from California is recognized in support of his amendment.

[The information follows:]

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

Mr. Schiff. Thank you, Mr. Chairman.

I have an amendment that makes changes to section -- the section of the bill dealing with Section 215. Section 215 of the PATRIOT Act may be used by the government to order the production of any tangible thing. It is a broad power, and one that should not be used lightly. Section 215 orders -- I think it is on, isn't it? The light is not on, but the mike is.

The orders are reviewed by the FISA court in order to determine relevance. The statute instructs the court that the information sought is presumptively relevant in cases that pertain to a foreign power or agent of a foreign power. The bill before the committee today would leave in place that presumption while changing the statute to specify that rather than submit simply a statement of facts to show relevance, the government must submit a statement of specific and articulable facts.

As members of the committee know, the administration has expressed concern publicly that the new standard might impact ongoing intelligence-gathering activities, the nature of which is classified. My amendment would remove the specific and articulable language, but at the same time, it would eliminate the presumption of relevance found in the current statute.

I believe this strikes the right balance. The government has to prove relevance rather than specific and articulable facts, but it will no longer have the benefit of the presumption that merely

because it asks the information, the information must be relevant.

Finally, my amendment adds a new section to the end of the bill requiring the President to report to Congress within 6 months on ways in which information it seeks can be obtained through other means that may be more protective of privacy interests. It is difficult to discuss this issue in an open section, but this language is a reasonable approach to the questions this committee is facing concerning any ongoing programs employing Section 215 orders.

What the language does is to help prod the executive branch to consider new ways in which they can accomplish the twin missions of protecting privacy and civil liberties while also protecting the national security of the American people.

Mr. Chairman, I believe the overall impact of the amendment is to ensure necessary efforts to protect the country to go forward while strengthening protections for civil liberties and privacy in the statute. I want to compliment the Chair on all the work he has done on this bill and urge the adoption of this amendment.

And I yield back the balance of my time.

Chairman Conyers. Will the gentleman yield to the gentleman from Illinois, Mr. Quigley, for a question?

RPTS CALHOUN

DCMN HOFSTAD

[4:22 p.m.]

Mr. Schiff. Yes, of course.

Mr. Quigley. Thank you, Mr. Chairman.

I know it is somewhat redundant, but since it is a new amendment, I will ask. I assume this amendment is the result of discussions with the Department of Justice. Have they given you some answer as to whether or not they support this measure? Have they given you any reaction at all?

Mr. Schiff. I don't think that the Department of Justice has given a definitive answer, really, on any portions of the bill, including this. So, no, I can't represent to you that the Department has a position on this.

The amendment, however, is designed to address concerns that have been raised by the administration. And I believe that it strikes a balance that the administration would be more inclined to support than the provisions that it amends.

Mr. Quigley. And I appreciate your answer and your candid answer.

Mr. Chairman, I will close, and I will support this amendment. But I do hope, if it is not today, that sometime before this goes to the floor, the Department of Justice graces us with their opinions on this. These are critical decisions that we

have to make.

I understand, I believe the Senate's committee has already had a markup without the DOJ reviews. It really makes absolutely no sense. So I will close by suggesting that they need to let us know what their views are on these critical matters, obviously, before it comes to a full vote.

Thank you.

Mr. Schiff. Reclaiming my time, Mr. Chairman. And I second the gentleman's suggestion. And I know, both on the Senate side and the House side, we are working with the Justice Department to try to meet any concerns it raises. And I also concur that it will be nice to get that feedback before the markup rather than afterwards.

Chairman Conyers. Lamar Smith of Texas.

Mr. Smith. Thank you, Mr. Chairman.

First of all, Mr. Chairman, I recognize that this amendment is well-intentioned. And before I give the reasons why I oppose it in its current form, I do want to say to the gentleman from Illinois, as well as the sponsor of the amendment, you both have articulated another reason why we might consider having a hearing and get some of the answers from the administration as to what they support and don't support.

But I do think this amendment is an improvement because it deletes the "specific and articulable facts" standard from section 215 business records. Unfortunately, the amendment goes further

and removes the presumption of relevance of the government's statement of facts in a business records application that the records sought are relevant to an authorized investigation.

This would require investigators to reprise for the court and other litigants the reasons why the records are relevant and may entail the revelation of sensitive and classified information. And I don't know if the gentleman from California might have considered that. It is not necessary to make investigators spend their time doing this when they are dealing with agents of a foreign power as opposed to uninvolved Americans.

Lastly, this amendment includes a reporting requirement on the Attorney General to assess if operations conducted pursuant to business records orders could be modified in a manner that enhances protection for civil liberties. The report must also provide any potential modifications, cost, technical challenges, and the impact of these issues on such operations.

While I appreciate the gentleman's idea of such a reporting requirement, it begs the question of what we are doing considering a bill with all of these so-called civil liberty protections for business records when, apparently, we don't have an understanding of what these protections would entail.

I agree with the sponsor of the amendment that we must be wary of changes to this provision in the name of civil liberties that could interfere with current operations.

And it is my understanding that, momentarily, the gentleman

from California, Mr. Lungren, will be offering a second-degree amendment. And I say to the sponsor of this amendment that that might form a compromise. And if the gentleman does accept Mr. Lungren's amendment, I think I could accept the reporting requirement, and we would be able to have a workable compromise.

With that, Mr. Chairman, I will yield back.

Chairman Conyers. Thank you very much, sir. And I appreciate your thoughtfulness.

Now, the amendment -- let's review this. What Mr. Schiff is talking about, with reference to business records, is that we strike the "specific and articulable facts" standard in the bill and replace it with language reported on a bipartisan basis in the Senate.

We are, I think, in some respects, doing what has been done in the Senate. If I am incorrect, I will yield to the gentleman from California, Mr. Schiff.

And so what we are trying to do is direct the government to submit to the court a statement of facts and circumstances relied upon by the applicant to justify the belief of the applicant that the information sought is relevant -- now, that is the operative word -- to an authorized antiterrorism investigation.

We eliminate a presumption of relevance that is currently in the law, Mr. Smith. So it is not a matter of us making this more complicated; we are making it -- we are being much more specific about it. And I think that the reason that this enjoys bicameral

support and perhaps some bipartisan support is that we are eliminating a presumption of relevance and ask that it be specifically articulated.

And, finally, it orders the President of the United States to submit a report to the House and Senate Judiciary and Intelligence Committees on ways that ongoing operations using section 215 orders can be modified in order to enhance protections for civil liberties. I think that is within a 6-month period.

I yield to the gentleman from California.

Mr. Schiff. I thank the chairman for yielding. And that is exactly right.

The only thing I would add in response to what the Ranking Member has said is that the concern you raised about not wanting to force the government to disclose facts in court that might jeopardize security, the 215 orders are approved by the FISA Court. So this would not be done in an open court proceeding; it would be done by the FISA Court.

I would hope, and I would expect, frankly, that the government, when it makes its 215 order requests, does make a showing of why they are relevant. And I would hope that it could meet the need to show relevance without having to rely on a presumption.

And so, there is no jeopardy here of it being disclosed. We do require that there be a showing of relevance and not rely solely on a presumption. I think that is a fair burden to

provide.

But that is exactly right, Mr. Chairman. It has bipartisan support in the Senate.

And the addition to the report to the Congress is that some of the information that we would like about whether there are alternative approaches to the way we are doing things now I don't think would be ready by the time the sunset expires. So I think it is appropriate to require the government to respond back to us and see if there are other ways we can do this that are more protective of civil liberties.

And I yield back.

Chairman Conyers. I yield back the balance of my time.

All those in favor --

Mr. Lungren. Mr. Chairman? Mr. Chairman?

Chairman Conyers. Oh, I yield to the gentleman from California for his second-degree amendment.

Mr. Lungren. Mr. Chairman, I have an amendment at the desk, amendment to the amendment offered by Mr. Schiff.

Chairman Conyers. Excellent. The clerk will report the amendment, and let's have it distributed.

The Clerk. Amendment to the amendment, offered by Mr. Schiff to H.R. 3845 --

[The information follows:]

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

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

Chairman Conyers. Without objection, so ordered. The gentleman is recognized.

Mr. Lungren. Mr. Chairman, in the first instance, Members will recall the various briefings that we have had concerning the application of the law that we are attempting to amend here. They will recall the centrality of this section of the law to various programs that have proven extremely successful in our fight against terrorism.

They will also recall that the difference between requiring specific and articulable facts versus using a standard of relevance at this stage of the program or programs or whatever we want to call them is very important; and that, in fact, if we revert back to the pre-9/11 standard of specific and articulable facts at this point in the operations of the intelligence community, it would deny us many of the dots that we need to connect, as we were told by the 9/11 Commission following 9/11.

So the gentleman's amendment, at the beginning, where he removes "specific and articulable facts," retains the relevant standard, but requires a statement of facts and circumstances relied upon by the applicant to justify the belief of the applicant are a significant improvement in the underlying manager's amendment.

However, my amendment would strike line 7, on page 1, through line 10, which is the section where he removes the current presumption that goes in the favor of whatever agency is making the application to the FISA Court.

There are two reasons I do this. One is, what evidence is there that there has been any abuse whatsoever by the intelligence communities or agencies of the intelligence communities before the FISA Court here?

Secondly, why ought not there be a presumption on behalf of those elements of the Federal Government that are specifically the most informed on the threats that are out there?

Third, the FISA Court has developed a body of law dealing with the current statute. As has been expressed, there is a concern that, when we would do this to remove the presumption currently given to the applicant, we are essentially telling the court, "We want you to apply a different standard."

And there is absolutely no evidence in the hearings we had, in the briefings we had, in the opportunities members on this committee had when we had the members of the intelligence community before us, that there has been abuse in this particular area. Now, we are limited in what we can say publicly about this, but I would ask my colleagues to think back on those briefings and find one example of an abuse in this area that would require us to change the law and remove the presumption.

So this is one of the key areas of the PATRIOT Act that

answered the question posed by the 9/11 Commission: Why didn't you connect the dots? The answer was: We didn't even have the dots before because of the way the law was written. And it caused us an inability to access the kind of information we are talking about here.

Now, the gentleman from New York said earlier in dealing with the previous amendment, look, where you have the business records required by the NSLs, that should be a higher standard, because, in the other instance, the one we are talking about now, you have the courts review it.

Well, we have had the courts review it. The FISA Court has done an exceptional job. No one has been able to present at any of the briefings we had or hearings we had evidence of the fact that this is a problem that needs to be fixed.

So why would we run the risk of changing the standard that may cause very much the court to change its analysis? Because if we are acting now to, in some way, tell them the past practice was based on a presumption that we don't want you to follow now, the natural reaction of the FISA Court is, "Oh, they want us to follow a different standard." And that is the danger that we have here, with all due respect to my friend from California.

Mr. Schiff. Would the gentleman yield?

Mr. Lungren. I will in just a second.

We had a problem with 9/11. We had a 9/11 Commission review it. They pointed out some of the problems. We attempted to

specifically address it. We addressed it specifically in this instance. We know of programs about which we have been briefed for which this works very well. And now we are running the risk -- I don't know what the percentage of the risk is -- but we are running the risk of sending a message to the court that we want something different than what you have approved in the past.

Now, if I am a member of the court, I have to say, "Man, there is something we missed before. The collective judgment of the Judiciary Committee is they want us to act differently in terms of our approval of these programs. Therefore, maybe we need to change the programs."

I would just ask the gentleman if he is aware of any evidence whatsoever that we found a problem with the way the programs were being run and that this necessitates this change.

Chairman Conyers. What I will do -- and I thank you, Mr. Lungren -- I am going to recognize, first of all, Adam Schiff. Then we are going to vote on the second-degree amendment and the Schiff amendment. And then we are going to recess until 10 o'clock tomorrow.

But I am hoping that our two staffs can work together on any remaining considerations that we will be facing when we come back tomorrow.

So I recognize Mr. Schiff for 5 minutes.

Mr. Schiff. Thank you, Mr. Chairman. And I won't use the whole 5 minutes.

Chairman Conyers. Would the gentleman yield?

Mr. Schiff. Yes.

Chairman Conyers. Am I correct that what you are doing is striking the "specific and articulable facts" requirement and, therefore, taking away the presumptive relevance from the government? Does that sum it up?

Mr. Schiff. Yes, Mr. Chairman, we are doing both those things. We are removing the "specific and articulable" standard, and we are also removing the presumption.

Just to respond briefly to my colleague from California's points, I would say two things.

One is, contrary to what my colleague said, we are not changing the standard. If we left the bill as it is, we would be changing the standard to "specific and articulable." By removing that, we are restoring the standard, which is relevance.

What we are doing is removing the presumption. The standard remains the same; the government has to show relevance. But we are not going to presume, merely because they ask, that something is relevant. I would hope that the government is showing relevance every time they ask for records. They should be showing relevance.

And with respect to my colleague's second point that there has never been an indication that there has been a problem under section 215, I would beg to differ. And it is not something that we can or should discuss here, but we have had public hearings on

problems with the NSLs, and I would not represent that there have been no problems with respect to section 215.

So I will have to leave it at that, but I don't think that the government should be asking for this information if they can't show relevance. And I don't think the government should have to rely on a presumption. And I don't think having to show relevance will impede any program that is ongoing.

And I would urge my colleagues to reject the secondary amendment, and yield back.

Chairman Conyers. I thank the gentleman.

The vote occurs on the Lungren second-degree amendment.

All those that support it, indicate by saying, "Aye."

All those that oppose it, indicate by saying, "No."

Mr. Lungren. Mr. Chairman, I ask for a roll call vote on that, please.

Chairman Conyers. A roll call is demanded. The clerk will call the roll.

The Clerk. Mr. Conyers?

Chairman Conyers. No.

The Clerk. Mr. Conyers votes no.

Mr. Berman?

Mr. Berman. No.

The Clerk. Mr. Berman votes no.

Mr. Boucher?

[No response.]

The Clerk. Mr. Nadler?

Mr. Nadler. No.

The Clerk. Mr. Nadler votes no.

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?

Mr. Wexler. No.

The Clerk. Mr. Wexler votes no.

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. No.

The Clerk. Mr. Quigley votes no.

Ms. Chu?

Ms. Chu. No.

The Clerk. Ms. Chu votes no.

Mr. Gutierrez?

[No response.]

The Clerk. Mr. Sherman?

Mr. Sherman. No.

The Clerk. Mr. Sherman 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. No.

The Clerk. Mr. Schiff votes no.

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?

Mr. Goodlatte. Aye.

The Clerk. Mr. Goodlatte votes aye.

Mr. Sensenbrenner?

Mr. Sensenbrenner. Aye.

The Clerk. Mr. Sensenbrenner votes aye.

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?

Mr. Forbes. Aye.

The Clerk. Mr. Forbes votes aye.

Mr. King?

Mr. King. Aye.

The Clerk. Mr. King votes aye.

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?

Mr. Poe. Aye.

The Clerk. Mr. Poe votes aye. 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.

Chairman Conyers. Are there any Members who would care to --

Ms. Waters. How am I recorded? No.

The Clerk. Ms. Waters votes no.

Mr. Weiner?

Mr. Weiner. No.

The Clerk. Mr. Weiner votes no.

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

The Clerk. Mr. Maffei votes no.

Ms. Lofgren. How am I recorded?

The Clerk. Ms. Lofgren votes no.

Chairman Conyers. The clerk will report. Oh, wait a minute.

Mr. Boucher?

The Clerk. Mr. Boucher?

Mr. Boucher. No.

The Clerk. Mr. Boucher votes no.

Mr. Chairman, 13 Members voted aye, 19 Members voted nay.

Chairman Conyers. The second-degree amendment is
unsuccessful.

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

All those opposed, say, "No."

The clerk will call the roll.

The Clerk. Mr. Conyers?

Chairman Conyers. Aye.

The Clerk. Mr. Conyers votes aye.

Mr. Berman?

Mr. Berman. Aye.

The Clerk. Mr. Berman votes aye.

Mr. Boucher?

Mr. Boucher. Aye.

The Clerk. Mr. Boucher votes aye.

Mr. Nadler?

Mr. Nadler. Aye.

The Clerk. Mr. Nadler votes aye.

Mr. Scott?

Mr. Scott. Aye.

The Clerk. Mr. Scott votes aye.

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?

Ms. Waters. Pass.

The Clerk. Ms. Waters passes.

Mr. Delahunt?

[No response.]

The Clerk. Mr. Wexler?

Mr. Wexler. Yes.

The Clerk. Mr. Wexler votes yes.

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 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?

Mr. Goodlatte. No.

The Clerk. Mr. Goodlatte votes no.

Mr. Sensenbrenner?

[No response.]

The Clerk. Mr. Coble?

Mr. Coble. No.

The Clerk. Mr. Coble votes no.

Mr. Gallegly?

[No response.]

The Clerk. Mr. Lungren?

Mr. Lungren. No.

The Clerk. Mr. Lungren votes no.

Mr. Issa?

Mr. Issa. No.

The Clerk. Mr. Issa votes no.

Mr. Forbes?

Mr. Forbes. No.

The Clerk. Mr. Forbes votes no.

Mr. King?

Mr. King. No.

The Clerk. Mr. King votes no.

Mr. Franks?

Mr. Franks. No.

The Clerk. Mr. Franks votes no.

Mr. Gohmert?

[No response.]

The Clerk. Mr. Jordan?

[No response.]

The Clerk. Mr. Poe?

Mr. Poe. No.

The Clerk. Mr. Poe votes no.

Mr. Chaffetz?

Mr. Chaffetz. No.

The Clerk. Mr. Chaffetz votes no.

Mr. Rooney?

Mr. Rooney. No.

The Clerk. Mr. Rooney votes no.

Mr. Harper?

Mr. Harper. No.

The Clerk. Mr. Harper votes no.

Ms. Waters?

Ms. Waters. How am I recorded?

The Clerk. Ms. Waters, pass.

Ms. Waters. From pass to aye.

The Clerk. Ms. Waters votes aye.

Chairman Conyers. Are there other Members that wish to cast a vote?

Mr. Weiner. Mr. Chairman?

Chairman Conyers. Yes, Mr. Weiner?

Mr. Weiner. Aye.

The Clerk. Mr. Weiner votes aye.

Chairman Conyers. The clerk will report.

The Clerk. Mr. Chairman, 19 Members voted aye, 12 Members voted nay.

Chairman Conyers. The amendment is successful.

The committee will recess the markup until 10:00 a.m. tomorrow morning. And tomorrow morning's Crime Subcommittee hearing will be moved to Friday morning at 10 o'clock, of which

the subject is "Organized Retail Theft."

I thank the Members for their cooperation.

The committee stands in recess.

[Whereupon, at 4:46 p.m., the committee was adjourned.]