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4 FULL COMMITTEE MARKUP OF H.R. 1981, THE PROTECTING CHILDREN
5 FROM INTERNET PORNOGRAPHERS ACT OF 2011; H.R. 1433, THE
6 PRIVATE PROPERTY RIGHTS PROTECTION ACT OF 2011; H.R. 2633,
7 THE APPEAL TIME CLARIFICATION ACT OF 2011; H.R. 83, THE
8 BULLYING PREVENTION AND INTERVENTION ACT OF 2011; AND H.R.
9 2189, THE DEATH IN CUSTODY REPORTING ACT OF 2011
10 Wednesday, July 27, 2011
11 House of Representatives
12 Committee on the Judiciary
13 Washington, D.C.

14 The committee met, pursuant to call, at 11:23 a.m., in
15 Room 2141, Rayburn House Office Building, Hon. Lamar Smith
16 [chairman of the committee] presiding.

17 Present: Representatives Smith, Sensenbrenner, Coble,
18 Gallegly, Goodlatte, Lungren, Chabot, Issa, Pence, Forbes,
19 Franks, Jordan, Poe, Chaffetz, Griffin, Marino, Gowdy,
20 Adams, Quayle, Conyers, Nadler, Scott, Watt, Lofgren,

21 Jackson Lee, Waters, Cohen, Johnson, Pierluisi, Quigley,
22 Chu, Sanchez, and Wasserman Schultz.

23 Staff Present: Sean McLaughlin, Majority Chief of
24 Staff; Allison Halatei, Majority Deputy Chief of
25 Staff/Parliamentarian; Sarah Kish, Clerk; Caroline Lynch,
26 Majority Counsel; Anthony Angeli, Majority Counsel; Perry
27 Apelbaum, Minority Staff Director; and Liliana Coronado,
28 Minority Counsel.

29

30 Chairman Smith. [Presiding] The Judiciary Committee
31 will come to order.

32 Without objection, the chair is authorized to declare
33 recesses of the committee at any time. And the clerk will
34 call the roll to establish a quorum.

35 Ms. Kish. Mr. Smith?

36 Chairman Smith. Present.

37 Ms. Kish. Mr. Sensenbrenner?

38 Mr. Coble?

39 Mr. Coble. Present.

40 Ms. Kish. Mr. Gallegly?

41 Mr. Gallegly. Here.

42 Ms. Kish. Mr. Goodlatte?

43 Mr. Lungren?

44 Mr. Chabot?

45 Mr. Chabot. Present.

46 Ms. Kish. Mr. Issa?

47 Mr. Pence?

48 Mr. Forbes?

49 Mr. King?

50 Mr. Franks?

51 Mr. Franks. Here.

52 Ms. Kish. Mr. Gohmert?

53 Mr. Jordan?

54 Mr. Poe?

55 Mr. Chaffetz?
56 Mr. Chaffetz. Here.
57 Ms. Kish. Mr. Griffin?
58 Mr. Griffin. Here.
59 Ms. Kish. Mr. Marino?
60 Mr. Gowdy?
61 Mr. Gowdy. Here.
62 Ms. Kish. Mr. Ross?
63 Mrs. Adams?
64 Mrs. Adams. Here.
65 Ms. Kish. Mr. Quayle?
66 Mr. Conyers?
67 Mr. Berman?
68 Mr. Nadler?
69 Mr. Scott?
70 Mr. Scott. Present.
71 Ms. Kish. Mr. Watt?
72 Ms. Lofgren?
73 Ms. Lofgren. Here.
74 Ms. Kish. Ms. Jackson Lee?
75 Ms. Waters?
76 Mr. Cohen?
77 Mr. Cohen. Here.
78 Ms. Kish. Mr. Johnson?
79 Mr. Pierluisi?

80 Mr. Quigley?

81 Ms. Chu?

82 Mr. Deutch?

83 Ms. Sanchez?

84 Ms. Wasserman Schultz?

85 [Pause.]

86 Ms. Kish. Mr. Nadler?

87 Mr. Nadler. Present.

88 Chairman Smith. The clerk will report.

89 Ms. Kish. Mr. Chairman, 13 Members responded present.

90 Chairman Smith. A working quorum is present. We are
91 going to start this morning with H.R. 2633, the Appeal Time
92 Clarification Act of 2011. Then we will go to H.R. 1981,
93 Protecting Children from Internet Pornographers Act of 2011.

94 Also, let me to say to Members that it is my intent to
95 recess this markup about 12:30 p.m., both for a lunch break
96 and because we are expecting votes shortly after that. And
97 then we will resume our markup after the first set of votes,
98 probably around 2:00 p.m.

99 Pursuant to notice, I now call up H.R. 2633 for
100 purposes of markup, and the clerk will report the bill.

101 Ms. Kish. H.R. 2633. To amend Title 28 United States
102 Code to clarify the time limits for appeals --

103 Chairman Smith. Without objection, the bill will be
104 considered as read.

105 [The information follows:]

106

107 Chairman Smith. And I will recognize the chairman of
108 the Courts, Commercial, and Administrative Law Subcommittee
109 and the sponsor of the bill, Mr. Coble, the gentleman from
110 North Carolina.

111 Mr. Coble. I thank the chairman.

112 Mr. Chairman, I am told that Mr. Cohen, the
113 distinguished gentleman from Tennessee, is a cosponsor, as
114 is Mr. Conyers, I am told, a bipartisan bill. I introduced
115 the bill at the behest of the United States Judicial
116 Conference.

117 [The information follows:]

118

119 Mr. Coble. It addresses a small problem that must be
120 fixed prior to December 1, 2011. I have a detailed
121 statement, Mr. Chairman, I could read, if anyone wants me
122 to. But otherwise, it appears to be ripe for approval by
123 the full committee.

124 [The statement of Mr. Coble follows:]

125

126 Chairman Smith. Thank you, Mr. Coble.

127 The gentleman from Tennessee, Mr. Cohen, is
128 recognized.

129 Mr. Cohen. Thank you, Mr. Chairman.

130 I, indeed, join with the chairman Mr. Coble in being a
131 sponsor of this bill. And joining with him in the interest
132 of saving time and sucking up to the chairman, who controls
133 all time, I will waive the reading of my statement and enter
134 it into the record.

135 [Laughter.]

136 [The statement of Mr. Cohen follows:]

137

138 Chairman Smith. Much appreciated, Mr. Cohen. Thank
139 you.

140 Are there any amendments to this bill?

141 [No response.]

142 Chairman Smith. If not, I am not sure we have a
143 reporting quorum.

144 [Pause.]

145 Chairman Smith. A reporting quorum is arriving. So
146 we will move the question. And the question is on reporting
147 the bill favorably to the House. Those in favor, say aye.

148 [A chorus of ayes.]

149 Chairman Smith. Opposed, no.

150 [No response.]

151 Chairman Smith. In the opinion of the chair, the ayes
152 have it, and the bill is ordered reported favorably.

153 Without objection, the bill will be reported, and the
154 staff is authorized to make technical and conforming
155 changes. Members will have 2 days to submit their views.

156 [Pause.]

157 Chairman Smith. We will now go to H.R. 1981, the
158 Protecting Children from Internet Pornographers Act of 2011.
159 Pursuant to notice, I call up H.R. 1981 for purposes of
160 markup, and the clerk will report the bill.

161 Ms. Kish. H.R. 1981. To amend Title 18 United States
162 Code with respect to child pornography and child

163 exploitation offenses. A bill to --

164 Chairman Smith. Without objection, the bill will be

165 considered as read.

166 [The information follows:]

167

168 Chairman Smith. I will recognize myself for an
169 opening statement and then the ranking member.

170 According to the Justice Department, trafficking of
171 child pornography images was almost completely eradicated in
172 America by the mid 1980s. Purchasing or trading child
173 pornography images was risky and almost impossible to
174 undertake anonymously.

175 The advent of the Internet reversed this
176 accomplishment. Today, child pornography may be the
177 fastest-growing crime in America, increasing at an average
178 of 150 percent a year for each of the last 10 years. These
179 disturbing images litter the Internet, and pedophiles can
180 purchase, view, or exchange the material with virtual
181 anonymity.

182 The National Center for Missing and Exploited
183 Children, NCMEC, created the CyberTipline 13 years ago. To
184 date, more than 51 million child pornography images and
185 videos have been reviewed by the analysts in NCMEC's Child
186 Victim Identification Program. As NCMEC's president and
187 CEO, Ernie Allen, explained at a hearing 2 weeks ago, "These
188 images are crime scene photos."

189 NCMEC's CyberTipline receives reports of images of
190 sexual assault of even toddlers and infants, and there is a
191 clear link between the possession of child pornography and
192 the actual violation of children. NCMEC estimates that 40

193 percent or more of people who possess child pornography also
194 sexually assault children.

195 H.R. 1981, the Protecting Children from Internet
196 Pornographers Act equips Federal, State, and local law
197 enforcement agencies with the modern-day tools needed to
198 combat the escalation in child pornography and child
199 exploitation crimes. Often, the only way to identify a
200 pedophile who operates a Web site or exchanges child
201 pornography images with other pedophiles is by an Internet
202 protocol address.

203 Law enforcement officials must obtain a subpoena and
204 then request from the Internet service provider the name and
205 address of the user of the IP address. Unfortunately, ISPs
206 routinely purge these records, sometimes just days after
207 they are created, making it difficult, if not impossible,
208 for investigators to apprehend child pornographers on the
209 Internet. Purging these records too soon is like clearing a
210 crime scene before taking fingerprints or photos for
211 evidence.

212 H.R. 1981 directs Internet service providers to retain
213 Internet protocol addresses to assist State and Federal law
214 enforcement officials with child pornography and other
215 Internet investigations. Some Internet service providers
216 currently retain these addresses for business purposes, but
217 the period of retention varies widely among providers from a

218 few days to a few months.

219 The lack of uniform data retention impedes the
220 investigation of Internet crimes. If investigators cannot
221 identify the perpetrator, the investigation is over before
222 it even begins, leaving the pedophile free to continue to
223 sexually abuse a child and swap images with other
224 pedophiles.

225 Critics contend that data retention is unnecessary
226 because current law already requires ISPs to preserve
227 records, at the request of law enforcement agents, for 90
228 days. But ISPs can only preserve the information they still
229 have. By the time investigators discover the Internet child
230 pornography and request the data, the provider has often
231 already purged the IP address records.

232 Critics also contend that law enforcement agents are
233 not hampered by the lack of data in child exploitation
234 cases, but instead by the lack of resources. But all the
235 resources in the world won't help an investigator identify a
236 pedophile if the data needed to do so is not available.

237 Both Democratic and Republican administrations have
238 called for data retention for over a decade. In January,
239 the Justice Department testified that shorter, even
240 nonexistent retention by providers frustrate criminal
241 investigations. Attorney General Holder and FBI Director
242 Mueller testified last spring that data retention is

243 invaluable to investigating child pornography and other
244 Internet-based crimes.

245 H.R. 1981 also creates a new Federal offense to allow
246 Federal prosecution of any person who conducts a financial
247 transaction knowing that it will facilitate access to child
248 pornography. This bill strengthens protections for child
249 witnesses and victims, who are often subjected to harassment
250 and intimidation throughout the trial period. The bill
251 allows a Federal court to issue a protective order if it
252 determines that a child victim or witness is being harassed
253 or intimidated and imposes criminal penalties for violation
254 of a protective order.

255 Finally, H.R. 1981 increases the maximum penalties for
256 child pornography offenders in cases that involve children
257 less than 12 years old and provides limited administrative
258 subpoena authority to the U.S. Marshals Service, the Federal
259 agency primarily tasked with enforcing the Adam Walsh Act.

260 Today, I will offer a manager's amendment to H.R. 1981
261 to, one, modify the financial facilitation offense to exempt
262 financial institutions assisting law enforcement
263 investigations; two, create a more effective and targeted
264 data retention provision; and three, make other technical
265 and conforming changes to the bill.

266 And I would like to thank our colleague who has
267 arrived, Ms. Wasserman Schultz, for being the cosponsor of

268 this much-needed legislation. She has been indefatigable in
269 her support of it. And thanks to her, H.R. 1981 has broad
270 bipartisan support among both committee and noncommittee
271 members.

272 The bill is supported by the National Center for
273 Missing and Exploited Children, the National Center for
274 Victims of Crime, the National Sheriffs' Association, the
275 Major County Sheriffs' Association, the International Union
276 of Police Associations, and the Fraternal Order of Police.

277 I urge my colleagues to join me in reporting the bill
278 from the committee today.

279 Let me say to the gentlewoman from Florida, Ms.
280 Wasserman Schultz, had I noticed that she was here, I was
281 going to recognize her first. But that will come soon
282 enough.

283 And is someone going to -- the gentleman from
284 Virginia, Mr. Scott, is recognized for an opening statement.

285 Mr. Scott. Thank you, Mr. Chairman.

286 Mr. Chairman, this bill, H.R. 1981, among other
287 things, imposes an unfunded data retention mandate on
288 Internet service providers. It gives the United States
289 Marshals Service administrative subpoena authority and
290 substantially increases penalties for certain Federal sexual
291 offenses. The legislation, known as the Protecting Children
292 from Internet Pornographers Act of 2011, is flawed in

293 numerous significant ways.

294 Section 4, as modified by the proposed manager's
295 amendment, imposes a 12-month mandate on ISPs to retain IP
296 addresses on all their customers. As I mentioned at the
297 hearing on this bill we had 2 weeks ago, we still have no
298 idea whether this data retention mandate, which imposes
299 unknown costs on ISPs, will add anything significant to our
300 efforts to combat online child pornography.

301 What I have learned during the hearing and with the
302 Department of Justice is that anecdotal evidence about cases
303 about which they think this mandate might have made a
304 difference. Compelling as they are, we do not know if this
305 legislation will actually increase the number of people
306 apprehended or, more importantly, the number of children
307 saved.

308 What we do know is that the majority of prosecutions
309 that the department is currently bringing are for viewing
310 child pornography, not for producing child pornography. Of
311 the over 2,200 Federal cases brought in fiscal year 2010,
312 only 298 were for production of child pornography. The rest
313 were for receipt or possession.

314 Before imposing such a huge mandate on industry, we
315 should be sure that we are actually going to see better
316 results than this. When you consider the fact that law
317 enforcement is already receiving over 100,000 tips from ISPs

318 every year, the current 2,200 prosecutions is obviously
319 unacceptable, and we have to note that during the budget
320 negotiations, if any of these budget proposals are agreed
321 to, it is likely that the number of FBI agents able to do
322 these investigations will certainly be reduced.

323 It is worth noting that every time a provider gives a
324 tip to law enforcement in these cases, they are required by
325 existing law to preserve data -- not simply an IP address,
326 but the content as well -- for up to 180 days. This gives
327 law enforcement time to get the legal process done,
328 compelling the ISP to turn over that information.

329 In other words, we have laws on the books today that
330 approach the problem in a way that is more in line with our
331 fundamental principles of justice, that is targeting
332 individuals who are actually suspected of wrongdoing, not
333 collecting data on every American who uses the Internet just
334 in case one of the tens of millions of users might happen to
335 be engaging in illegal activity. Unfortunately, it is my
336 understanding that the present data retention tools are
337 underutilized by law enforcement.

338 Although the bill purports to protect children, it
339 does nothing to address the myriad of factors that pose
340 challenges to child pornography prosecution, such as the
341 documented backlog in forensic examination of computers or
342 the lack of personnel. This bill ignores the issues that

343 could be addressed with additional resources, instead
344 saddles the industry with a costly mandate and compromises
345 consumer privacy and individual civil liberties in the
346 process.

347 The resources that providers would spend complying
348 with this mandate would be better spent on investigations
349 and prosecutions. That is why I will be offering an
350 amendment to provide additional resources for personnel
351 dedicated to these kinds of cases.

352 Although the manager's amendment narrows the scope of
353 the mandate, I cannot support the bill that has data
354 retention as a part of it. In an effort to alleviate some
355 of the problems of Section 4 of the bill, the manager's
356 amendment appears to have created new ones.

357 For example, it appears now that ISPs will have to
358 actually create logs of temporary Internet addresses and
359 identifying information rather than simply retain the
360 information they already have.

361 In addition, in an effort to limit access to these
362 records to nongovernmental entities -- a laudable objective
363 -- the amendment has the unintended consequence of
364 precluding Interpol and foreign law enforcement from
365 accessing these records. These difficulties demonstrate the
366 enormous challenges inherent in the data retention mandate.

367 And for these reasons, I urge my colleagues to oppose

368 the legislation.

369 I yield back.

370 Chairman Smith. Thank you, Mr. Scott.

371 The gentleman from Wisconsin, Mr. Sensenbrenner, the
372 chairman of the Crime Subcommittee.

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

374 With regret, I differ from the chairman on this
375 legislation, and I oppose this bill. It can be amended, but
376 I don't think it can be fixed.

377 Law enforcement agencies at the Federal, State, and
378 local levels must be provided with sufficient resources to
379 pursue child pornography and abuse cases. I recognize the
380 legitimate need to have all possible information available
381 to fight these reprehensible crimes. However, I am
382 concerned that H.R. 1981 poses numerous risks that well
383 outweigh any benefits, and I am not convinced that it will
384 contribute in a significant way to protecting children.

385 H.R. 1981 directs Internet service providers to retain
386 IP addresses to assist Federal law enforcement officials
387 with child pornography and other Internet investigations.
388 The manager's amendment will lower the time limit from 18 to
389 12 months, and this takes a step in the right direction by
390 reducing the retention. But it does not go far enough.
391 This personal data should not be retained for a year.

392 Preserving the data of suspects can already be found

393 in current law. Law enforcement agencies can request emails
394 and other information, as well as IP addresses, to ensure
395 that evidence for a court order is preserved. ISPs
396 currently have the right to voluntarily retain data routed
397 through their servers.

398 Individuals enter a voluntary contract with ISPs,
399 knowing that they will be passing information through a
400 server and that such data may be retained by the ISP for
401 some time. In fact, most ISPs already store data for a
402 short time without strong objection.

403 The problem arises when data retention is Government
404 mandated. It is the Government's role to conduct criminal
405 investigations through the established legal process, but it
406 is not the role of Government to mandate how private
407 businesses arrange storage procedures independent of the
408 legal process. Simply put, the decision to store data
409 should be a business decision and not a Government decision.

410 The data retention mandate imposed by this bill would
411 also threaten personal privacy at a time when the public is
412 already justifiably concerned about privacy online. A key
413 to protecting privacy is to minimize the amount of data
414 collected and held in the first place. The data retention
415 law would undermine this key principle.

416 The bill would establish surveillance of all Internet
417 users, regardless of whether there is any reason to believe

418 they have engaged in unlawful activity. Ordinary citizens
419 would have a year's worth of their online activity retained.

420 Finally, I am concerned with the provision in this
421 bill which would give the U.S. Marshals administrative
422 subpoena authority. The administrative subpoena is an order
423 from a Government official to a third party, instructing the
424 recipient to provide certain information. Congress has
425 granted subpoena authority to many agencies that exercise
426 regulatory powers.

427 One problem with administrative subpoenas is that they
428 are not reviewed by the courts unless challenged or for
429 enforcement reasons. I will be offering an amendment to
430 repeal all subpoena powers granted in this legislation.

431 I generally oppose administrative procedures within
432 the executive branch, specifically those for law
433 enforcement. During the debates on reauthorizing the
434 PATRIOT Act, I closely examined the issues surrounding the
435 administrative subpoenas and determined that that authority
436 would be too much of a risk to privacy to confer on the
437 Government. I opposed granting the FBI administrative
438 subpoena authority during consideration of the PATRIOT Act,
439 and I oppose it in this case.

440 Congress must take steps to address the scourge of
441 child pornography, especially with stiffer sentences for
442 offenders and greater resources for law enforcement

443 officials. Extensive data retention mandates, however, pose
444 a threat to the privacy of average law-abiding citizens and
445 are unlikely to solve the problem that Congress seeks to
446 address.

447 Therefore, I urge my colleagues to vote against this
448 bill and yield back the balance of my time.

449 Chairman Smith. Thank you, Mr. Sensenbrenner.

450 We welcome back to the committee today the gentlewoman
451 from Florida, Ms. Wasserman Schultz, for perhaps her last
452 Judiciary Committee meeting. And we appreciate her many
453 contributions during the time she has been on the committee.

454 The gentlewoman from Florida, the other original
455 cosponsor of this legislation, is recognized for her
456 statement.

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

458 And thank you for your leadership on this issue. I am
459 really honored to be your cosponsor on this legislation, and
460 it has been a wonderful experience working with you,
461 bringing it to this point.

462 For too long -- I am not even going to ask what the
463 gentleman from Wisconsin is saying.

464 For too long, since the advent of the Internet, those
465 who wish to abuse and exploit children have been able to do
466 so and disseminate documentation of their heinous acts to
467 pedophiles across our country and around the world largely

468 unabated.

469 As talented as our local, State, and Federal law
470 enforcement officers are, the sick fact remains that many of
471 these criminals are able to manipulate technology in order
472 to perpetuate the monstrous, disgusting evidence of their
473 crimes. Every time a pornographic image or video of a child
474 is forwarded, that child is victimized all over again. The
475 cycle must end, and that begins today.

476 This bill, the Protecting Children from Internet
477 Pornographers Act, will finally equip law enforcement with
478 the evidence they need in order to stop these perpetrators
479 in their tracks. These criminals operate like spiders,
480 weaving a web of abuse and harm as they trade images and
481 videos with other pedophiles.

482 Every time law enforcement is able to get to one
483 spider, they have the potential to investigate their web and
484 trace their way back to every other pedophile with whom they
485 traded images or videos. In some cases, in too many cases,
486 these images not just those of faceless, nameless children.
487 They are images of the perpetrator's children, his
488 neighbors, his babysitting charges.

489 But law enforcement cannot stop the perpetrators that
490 they know are out there if the only link that we have to
491 them, the IP address they use to share the images, is gone.

492 Mr. Chairman, over the last few months, I have heard

493 too many stories of law enforcement finding images of
494 pornography. In one, it was a young girl being raped by her
495 father. She was an actual victim in immediate need of
496 rescue, but law enforcement was unable to find that child
497 because the only link they had to her was gone. All they
498 had was a picture documenting the abuse, with no way to find
499 it and stop it. This must end.

500 We don't like to think about it, but we can't ignore
501 the numbers. This is a cancer on the fabric of our Nation.
502 The Department of Justice estimates that every year child
503 pornography on the Internet increases by 150 percent. There
504 are more than 1 million, 1 million, pornographic images of
505 children on the Internet, with 200 more being posted every
506 day.

507 This is 200 children every day. Two hundred young
508 Americans being stripped of their ability to live a safe,
509 happy life. Two hundred young faces and young minds who
510 deserve the very best protection that we can give them.

511 I am particularly passionate about this issue, Mr.
512 Chairman, not just because I am a mom, but because my State
513 of Florida is unfortunately disproportionately plagued by
514 this epidemic. In 2008, there were 37,345 computers
515 identified in Florida as trafficking in child pornography.
516 In 2007, there was so much child pornography generated in
517 Florida that if our State was a country, it would rank

518 seventh in the world in production of these sickening images
519 and videos.

520 In fact, just this morning, my local newspaper ran a
521 story about four men from Broward County, my home county,
522 including two sex offenders, whom Federal authorities have
523 charged with possession of child pornography. I am thankful
524 that these men were caught, but I am concerned that there
525 are thousands more out there that we haven't yet found and
526 that we can't get to.

527 And I refuse to let these stories keep appearing in
528 our newspapers and on our evening news broadcasts. I refuse
529 to let this issue go without the attention and help it
530 deserves, the help that our children deserve.

531 Mr. Chairman, we say that every day, and I have heard
532 it said over and over on this committee, children are our
533 most valuable resource. We must do everything in our power
534 to protect them. It is time to put our words into action.

535 Thank you, Mr. Chairman, and thank you to my
536 colleagues on this committee on both sides of the aisle who
537 have joined us as cosponsors of H.R. 1981. Thank you also
538 to all of those who have worked to get this bill this far --
539 the Internet service providers, law enforcement officers,
540 child safety groups, and civil liberties organizations who
541 have remained dedicated and offered invaluable
542 recommendations and input into the legislative process.

543 And to my good friend Mr. Scott, the gentleman from
544 Virginia, Chairman Smith and I have had numerous
545 conversations with the Department of Justice to answer the
546 very question that you raised a concern about, whether
547 giving law enforcement a 12-month window of data retention
548 would allow them to arrest more perpetrators. And they
549 resoundingly have told us yes.

550 And to my dedicated friends in the civil liberties
551 community, thank you for working with us despite your
552 reservations. At the end of the day, we all want to make
553 sure that we protect privacy without protecting the
554 predators who harm children.

555 I urge my colleagues here today to support the
556 manager's amendment to H.R. 1981. I can tell you that I
557 wanted to go further, but we need to make sure that we
558 protect these children.

559 We made several important modifications to the bill as
560 introduced to address some legitimate concerns, and this
561 will be an historic step forward in the fight against child
562 exploitation.

563 With that, Mr. Chairman, thank you, and it has been a
564 privilege to serve as a member of the House Judiciary
565 Committee.

566 I yield back.

567 Chairman Smith. Thank you, Ms. Wasserman Schultz.

568 I now recognize myself for a manager's amendment to
569 the underlying bill. The clerk will report the amendment.

570 Ms. Lofgren. Mr. Chairman? Mr. Chairman? I thought
571 I was to be recognized to deliver Mr. Conyers's statement.

572 Chairman Smith. Okay. I didn't realize that. And if
573 the clerk will suspend, the gentlewoman from California is
574 recognized for her statement.

575 Ms. Lofgren. Thank you, Mr. Chairman.

576 I will be brief. I would like to begin our discussion
577 on this by stipulating that every single member of this
578 committee is opposed to child pornography. I think it is
579 important that we not get side tracked on that issue.

580 As a mother, I really felt that although I have qualms
581 about the death penalty as applied in the United States, I
582 could make an exception for those who would sexually exploit
583 a child. This is a very serious offense.

584 Having said that, this bill is so massively overbroad
585 that I cannot support it. What it would do would say to
586 every American that the ISPs and other providers are going
587 to keep track of every Web site that you visit and make that
588 information available to the Federal Government upon their
589 request without a warrant.

590 It is like saying we oppose bullying. Bullying often
591 occurs in the bathrooms of junior high schools, and
592 therefore, we are going to impose a camera in every bathroom

593 in America. We would say, wait a minute, that is a little
594 bit overbroad.

595 I think it is important to note what the law is today.
596 Under current law, the Electronic Communications Privacy Act
597 has a requirement to preserve evidence to allow law
598 enforcement to request that an ISP retain all records and
599 information that it has on a particular user, and this
600 includes a log of assigned IP addresses.

601 Now the data preservation requirement is found in 18
602 U.S. Code 2703(f). These records can be retained for up to
603 180 days, and perhaps we could work together on a bipartisan
604 basis to extend that time.

605 If we have got a suspected child pornographer, we
606 ought to go after that person, big time. And perhaps that
607 180-day limit should be removed. That is something that we
608 could work together on a bipartisan basis.

609 This bill, however, turns the idea of going after the
610 wrongdoer on its head and basically says we are going to
611 keep this information about every single American and make
612 that available upon a simple request by law enforcement. It
613 is really over the top.

614 I would also make another point. There is complete
615 liability relief for ISPs about data release. Now, hacking
616 is a problem in this country. We know that we have had
617 repeated hacking attacks, and personal information is

618 released. If there is complete liability relief for those
619 who retain this data, what it means is there will be less
620 effort to protect this data.

621 And I think in this era where you can put two and two
622 together and go in and raid your bank account, where crime
623 victims can be discovered by their victims, the idea that we
624 would lower the bar for protection from hacking is
625 completely at odds with where we need to be going as a
626 country.

627 So I just think that, you know, in many ways this is
628 among the most astonishing increases in the power of the
629 Federal Government to gain private information for every
630 American that I have seen in the 17 years I have been on the
631 Judiciary Committee. It is an unprecedented power grab by
632 the Federal Government. It goes way beyond fighting child
633 pornography, and it is not something I can support.

634 And I yield back.

635 Chairman Smith. Okay. Thank you, Ms. Lofgren.

636 I will recognize myself for a manager's amendment to
637 the underlying bill, and the clerk will report the
638 amendment.

639 Mr. Nadler. Mr. Chairman? I would like to strike the
640 last word before the manager's amendment.

641 Chairman Smith. Okay. The clerk will suspend again.

642 The gentleman from New York, Mr. Nadler. Our normal

643 procedure is to recognize the ranking and chairman of the
644 relevant full committee and subcommittees and perhaps an
645 original cosponsor, which we have already done today, and
646 then move on with consideration of the bill.

647 The gentleman can speak now, or he can speak during
648 the manager's amendment or some other time. But I would
649 like to sort of move on, if we could? If the gentleman
650 insists, he will be recognized.

651 Mr. Nadler. I thank you because, otherwise, I would
652 do it right after the manager's amendment. I think it is
653 more relevant --

654 Chairman Smith. Okay. The gentleman from New York,
655 Mr. Nadler, is recognized for an opening statement.

656 Mr. Nadler. Thank you, Mr. Chairman.

657 I move to strike the last word, and I want to explain
658 why I cannot support this bill, H.R. 1981.

659 Like most Americans, I am very concerned about the
660 explosion of child pornography on the Internet. Technology
661 is making this heinous crime easier to commit and harder to
662 detect. Innocent children are at risk, and we ought to make
663 sure we are doing what we can to protect them.

664 Unfortunately, the bill before us goes way beyond
665 child pornography. It would impose a Federal Government
666 mandate that Internet service providers, ISPs, keep Internet
667 protocol, IP, addresses of all Internet users for 18 months.

668 This information would allow someone to find out wherever
669 anyone went on the Internet, even if most of us were doing
670 nothing wrong.

671 Just to catch some bad actors, the Federal Government
672 should not require that such private information be kept on
673 all Internet users. Normally, in law enforcement, we target
674 those suspected of a crime. We do not require that records
675 be kept for everyone, just in case they might be useful down
676 the road. That typical policy should be our policy here as
677 well.

678 Moreover, by requiring that records of everyone be
679 kept, we are putting innocent people at risk. Since the
680 requirement to keep records is not limited to those relevant
681 to protecting children, all data is subject to access. Law
682 enforcement may unfairly target those who have what are
683 considered to be dissenting political views, for example.

684 And IP addresses may fall into the wrong hands.
685 Individuals may have their records targeted, or there could
686 be broad data breaches affecting tens of thousands of
687 people. Just in the last few weeks, we all saw the major
688 phone hacking scandal involving News Corp and Rupert
689 Murdoch.

690 The more data we keep, the more likely it is we will
691 have more of these intrusions. Such breaches could lead to
692 significant harm, such as identity theft or domestic

693 violence.

694 In addition to these problems with the bill, it is
695 likely that there are better ways to improve our efforts to
696 fight child pornography. We have no real evidence as to how
697 often a Federal Government 18-month data retention
698 requirement would help law enforcement in child pornography
699 cases. Our best guess is that it would not make much
700 difference.

701 For example, the Government Accountability Office
702 reported last March that the task forces on Internet crimes
703 against children felt they already were able to obtain the
704 information they needed. What we do know is that there are
705 problems being created by the increased volume of electronic
706 information and the demand for analysis of that information
707 in child exploitation cases.

708 According to the GAO, again, "Forensic resources
709 available to review digital evidence in support of
710 investigations and prosecutions of online child pornography
711 crime are scarce relative to the demand for such services."

712 The inability to quickly analyze such information "may
713 delay and in some cases hinder investigations and
714 prosecutions of offenders." In other words -- in other
715 words, the problem in dealing with child pornography on the
716 Internet is not a lack of adequate information. It is,
717 rather, the lack of sufficient resources to analyze and,

718 therefore, utilize the voluminous information already
719 collected.

720 Providing law enforcement with the resources it needs
721 to analyze the information it already obtains can make a
722 real difference in protecting children. I urge Members to
723 keep this in mind as some in Congress talk nonstop about
724 cutting Government to the bone. Ensuring sufficient
725 resources ought to be our approach, as opposed to a bill
726 like this one for which the benefits are unknown and the
727 risks to privacy are great and the Federal intrusion on
728 everyone is fantastic.

729 A Federal Government mandate to retain personal data
730 on millions of innocent people carries real risks and sends
731 the wrong message as to who it should require information be
732 kept on. A number of privacy and consumer organizations,
733 such as the American Civil Liberties Union, Consumer
734 Federation of America, and Electronic Privacy Information
735 Center, have expressed similar concerns in a letter to
736 Chairman Smith and Ranking Member Conyers in opposing the
737 bill.

738 I think we have to take these concerns seriously and
739 focus our energy on providing sufficient resources to
740 analyze the data already collected and on other ways to
741 combat the problem of child pornography on the Internet.

742 Thank you. I yield back the balance of my time.

743 Chairman Smith. Thank you, Mr. Nadler.

744 The clerk will report the manager's amendment.

745 Ms. Kish. Amendment to H.R. 1981 offered by Mr. Smith
746 of Texas. Page 2, line 3, insert "in general" before
747 "whoever."

748 Chairman Smith. Without objection, the manager's
749 amendment will be considered as read.

750 [The information follows:]

751

752 Chairman Smith. I will recognize myself to explain
753 the amendment.

754 On the way to the amendment, let me say to the
755 gentleman from New York and the gentlewoman from California,
756 that I want to repeat the fact again that the only
757 information available is the IP address.

758 And contrary to what the gentlewoman from California
759 said, she said it was obtainable by a simple request. It is
760 not obtainable by a simple request, I guess, unless you
761 consider a subpoena to be a simple request. I do not. But
762 the information has to be subpoenaed. It is not available
763 any other way.

764 The manager's amendment makes a number of improvements
765 and technical changes to the bill, including revising
766 Section 4 relating to data retention. First, the amendment
767 adds language to the financial facilitation offense created
768 in Section 2 of the bill. This language makes clear that
769 credit card companies and other financial institutions can
770 continue to assist law enforcement investigations in child
771 pornography cases.

772 At the hearing on H.R. 1981, we learned from Ernie
773 Allen, president of the National Center for Missing and
774 Exploited Children, that many financial institutions
775 actively participate in the center's financial coalition
776 against child pornography. Credit card companies and banks

777 work with undercover law enforcement officers to identify
778 and take down commercial child pornography enterprises.

779 The language added to Section 2 by my amendment will
780 ensure that this important work continues by exempting
781 financial institutions that assist law enforcement
782 investigations from being charged with the offense.

783 This amendment replaces Section 4 of the bill with a
784 revised data retention provision. This new provision
785 accomplishes our goals of ensuring that this data is
786 available for law enforcement investigations while also
787 addressing the concerns of providers and privacy groups.

788 The most important change is the removal of the
789 exemption for wireless providers. Wireless technology
790 continues to expand at a rapid pace. It seems that every
791 day a new smartphone or tablet is put on the market.

792 Americans can now perform nearly all the same Internet
793 functions from their wireless devices that just a few years
794 ago could only be done from their computer or laptop. And
795 while wireless technology makes it easier for us to surf the
796 Web or keep in touch with friends and family, it can also be
797 used by pedophiles to trade child pornography images or
798 videos.

799 The sale of smartphones and other wireless devices
800 increases each year. Consumers now want mobile devices that
801 do not just send text and picture messages, but also allow

802 the user to browse the Web, send emails, and perform other
803 tasks that require an Internet connection.

804 According to Gartner, worldwide, 1.6 billion wireless
805 units were sold in 2010. Our law enforcement tools must
806 keep pace with technology, and it appears that wireless is,
807 in fact, the technology of the future.

808 H.R. 1981 provides perhaps the narrowest type of data
809 retention possible. The bill does not require the retention
810 of any email or telephone content. It does not require the
811 retention of numerous types of records. It only requires
812 providers retain a log of the Internet protocol addresses
813 they assign to their customers. H.R. 1981 has a singular
814 narrow focus, identifying a criminal suspect.

815 This amendment further narrows the data retention
816 requirement. First, it exempts companies that provide
817 "remote computing services." This type of service does not
818 involve assigning IP addresses to customers and subscribers.
819 Therefore, it is not necessary to include these companies in
820 this mandate.

821 By limiting data retention to only commercial
822 providers, the amendment exempts from the mandate the
823 Internet services, including Wi-Fi offered by coffee shops,
824 book stores, and hotels. It also exempts business networks
825 and free Wi-Fi access provided by local governments.
826 Investigators can still request data from commercial

827 providers that will help them identify pedophiles and other
828 criminals using these Internet services.

829 The amendment clarifies that providers must retain not
830 simply a list of the IP addresses they assign to customers,
831 but rather a log of the IP addresses and the corresponding
832 account information needed to identify the customer. To
833 address cost concerns raised by providers and to further
834 protect customer privacy, the amendment limits access to the
835 retained data to only governmental entities and gives
836 providers up to 180 days after the date of enactment to
837 comply with the retention requirement.

838 The amendment also reduces the retention period from
839 18 months to 1 year. This is even less than the current 18-
840 month FCC mandate regarding retention of telephone toll
841 records.

842 The cosponsor, Congresswoman Wasserman Schultz, and I
843 spent the last several months meeting with and listening to
844 law enforcement agencies, providers, and privacy groups.
845 This amendment represents the culmination of those efforts
846 to create a balanced, but effective data retention provision
847 that addresses industry needs, protects consumer privacy,
848 and provides a much-needed tool to combat modern-day crime.

849 I urge my colleagues to support the manager's
850 amendment.

851 Are there those who wish to be recognized to speak on

852 the manager's amendment? The gentleman from Virginia, Mr.
853 Scott?

854 Mr. Scott. Mr. Chairman, I have an amendment to your
855 amendment, and I think people may want to speak generally to
856 it before. I don't know what procedure you want to --

857 Chairman Smith. Are there Members who wish to speak
858 on the manager's amendment before we consider amendments?

859 Ms. Lofgren. Mr. Chairman?

860 Chairman Smith. The gentlewoman from California, Ms.
861 Lofgren?

862 Ms. Lofgren. I have a number of questions about the
863 amendment. Before I get into them, I would note that by
864 exempting free Wi-Fi, you are essentially saying to the
865 child pornographers go to the library and go to Starbucks,
866 and I don't know that that is actually a great result and
867 one that we want to foment.

868 But moving beyond that --

869 Chairman Smith. If the gentlewoman will yield on that
870 point real quickly? If that were the case, I certainly
871 would not have exempted them. But the commercial providers
872 are the ones that will have that information, and that
873 information or at least the IP addresses would be available
874 to the law enforcement agencies. So --

875 Ms. Lofgren. Well, then that gets into my other
876 question, which is the mandate in Section 4, as rewritten by

877 the manager's amendment, requires service providers to
878 retain a log of assigned IP addresses that enables the
879 identification of the corresponding customer or subscriber
880 information under Subsection (c)(2) of the section.

881 Now that last phrase, Subsection (c)(2), is a
882 reference to 18 U.S. Code 2703(c)(2), which says, "A
883 provider of electronic communication service or remote
884 computing service shall disclose to a Government entity the
885 name, address, local and long distance telephone connection
886 records, or records of session times and durations, lengths
887 of service, telephone or instrument number, means and source
888 of payment for such service, including any credit card or
889 bank account number."

890 So the question is, under the new data retention
891 mandate, does every service provider have to retain all of
892 this personal information as a link to assigned IP
893 addresses, and what if they don't already collect all of it?
894 What about providers of paid wireless hotspots in hotels and
895 airports and Kinko's? Would those places need to collect
896 all of the personal data listed in Subsection (c)(2) before
897 they can sell someone an hour of Internet service?

898 The data retention mandate in the manager's amendment
899 only applies to commercial providers who offer Internet
900 access capability for a fee to the public, regardless of the
901 facilities used. This presumably still applies to public

902 Wi-Fi hotspots in coffee shops, hotels, airports, as long as
903 they charge a fee for access.

904 What kinds of equipment and software will these
905 providers have to purchase in order to comply with the new
906 mandate, and how much will it cost them? What if a coffee
907 shop provides free Wi-Fi access, but only gives the access
908 code to someone who makes a purchase? Does that count as
909 offering access for a fee, and then does that require that
910 Starbucks to go ahead and get the credit card information,
911 address, and the like, as required by the underlying
912 statute?

913 How will various types of service providers have to
914 modify their system to comply with the new mandate, and how
915 much will it cost? In particular, what will the burdens be
916 on wireless broadband providers who may assign dozens of
917 different IP addresses to a single phone in a given hour?

918 What will the burdens be on providers of dial-up
919 Internet access -- yes, there still is some -- which do not
920 assign static IP addresses to their users? How much will
921 this increase the cost of this affordable way to access the
922 Internet, which is still important to rural Americans?

923 The manager's amendment only allows access to the
924 retained data when compelled by a governmental entity. Does
925 this include civil litigants who get court orders to compel
926 the production of data?

927 If so, I would like to note the opposition letter from
928 the National Network to End Domestic Violence. There is a
929 concern that this new mandate will create a data cache that
930 domestic violence victims -- could be later used against
931 them, to locate them, especially through civil litigation.

932 And would this allow for defense lawyers for those
933 accused of criminal child exploitation or other crimes to
934 get access to the data? If not, I think there will be
935 serious due process concerns. The accused is going to have
936 access to the data, just like law enforcement and
937 prosecutors, especially in cases where the IP address may
938 exonerate them.

939 And I am wondering if you can address any of these
940 questions?

941 Chairman Smith. If the gentlewoman would yield?

942 Ms. Lofgren. I would be happy to yield for answers.

943 Chairman Smith. And I will be happy to answer. The
944 answer is to all the gentlewoman's questions is no. And my
945 first response covered the answers to all of her questions,
946 that only the commercial entities are going to be required
947 to retain the IP address, not the Starbucks, not the credit
948 cards, not the other Wi-Fi entities.

949 Ms. Lofgren. So reclaiming my time, you are saying
950 then that Subsection (c)(2) that is in your amendment that
951 refers to 18 U.S. Code 2703, in fact, does not relate to it?

952 Chairman Smith. No, it does not require detention, as
953 the gentlewoman would suggest, only a log that enables the
954 ID of the personal information. The commercial companies
955 already had that information. We don't need to go further
956 than that.

957 Ms. Lofgren. So you are saying that if Starbucks
958 charges a fee --

959 Chairman Smith. Correct.

960 Ms. Lofgren. -- they are not included?

961 Chairman Smith. That is correct.

962 Ms. Lofgren. And if a hotel charges a fee for
963 service, they are not included?

964 Chairman Smith. That is correct. The commercial
965 entities would have had the information. We don't have to
966 ask the hotels or Starbucks or any of the other
967 establishments that the gentlewoman mentioned to retain that
968 data.

969 Ms. Lofgren. Reclaiming my time, I will just say that
970 I think there remains some ambiguity here, but if the intent
971 is to keep track of all Web use so that anybody who does
972 wrong can be found, that this creates an enormous hole in
973 that scheme. And we will be pushing the child pornography
974 users into certain spots in society -- into the Starbucks,
975 into the libraries, into the hotels -- and it really doesn't
976 accomplish what the proponents of this legislation have

977 suggested, falling far short even of what I am sure are good
978 intentions.

979 This is a mess of a bill, and I yield back.

980 Chairman Smith. Thank you.

981 Ms. Lofgren, I answered your questions to the best of
982 my ability. If you oppose the bill, you oppose the bill.
983 But that is your prerogative.

984 The gentleman from Virginia is now recognized to offer
985 an amendment.

986 Mr. Scott. Thank you, Mr. Chairman.

987 I have an amendment at the desk, Number 1.

988 Chairman Smith. The clerk will report the amendment.

989 Mr. Scott. Number 1.

990 Ms. Kish. Amendment to the Smith of Texas Amendment
991 to H.R. 1981 offered by Mr. Scott. On the first page, line
992 8, strike "one year" and insert "180 days."

993 [The information follows:]

994

995 Chairman Smith. The gentleman from Virginia is
996 recognized to explain his amendment.

997 Mr. Scott. Thank you, Mr. Chairman.

998 This amendment limits the data retention mandate
999 contained in Section 4 of H.R. 1981, as proposed by the
1000 manager's amendment, from a period of 12 months to a period
1001 of 180 days, or 6 months.

1002 Although I am opposed to the data retention mandate
1003 and look forward to Ms. Lofgren's amendment to strike the
1004 entire section, if it is going to be part of 1981, it should
1005 be for a reasonable length of time. By limiting the period
1006 to 180 days, this amendment tries to strike some balance
1007 among the competing interests implicated by such a mandate.

1008 The 6-month retention period will significantly extend
1009 the retention period for ISPs that do not currently retain
1010 the information for more than 30 days, while not unduly
1011 overburdening them. These ISPs that wish to retain data
1012 longer can do so. This will be more practical for those
1013 ISPs that currently retain data for 6 to 12 months as part
1014 of their business practices, which is actually what a
1015 majority of the ISPs do.

1016 But for those that cannot afford to retain the data
1017 longer than 6 months, they will not be required to do so.
1018 The cost of complying with H.R. 1981 will be onerous for all
1019 companies, particularly smaller companies that could be put

1020 out of business by this requirement.

1021 Easing this burden by shortening the retention period
1022 to 6 months may be the least we can do when imposing an
1023 unfunded mandate on the industry. Although the proposed
1024 manager's amendment lowers it to 12 months, a year of data
1025 is still a significant amount of data.

1026 Consider that smaller ISPs assign 50 million IP
1027 addresses ever day. Multiply that by 365 days and
1028 subscriber information for each address and think about how
1029 much data that would be.

1030 Now, note that it is not clear what the optimum
1031 retention period should be, as there is no statistical
1032 analysis of the average age of this data at the time law
1033 enforcement requests it, how frequently law enforcement is
1034 unable to retain data, and the reasons for its
1035 unavailability. This area needs to be studied.

1036 Shortening the period will lower the costs and, thus,
1037 the burdens on industry. It does not preclude future study
1038 on whether a 6-month period gives law enforcement
1039 information they need in the majority case, and it would
1040 also limit the amount of data which is retained which would
1041 deal with the privacy concerns and the risks for consumers
1042 if the data illegally accessed.

1043 And although I oppose the retention of data generally,
1044 I support this amendment in trying to get some balance.

1045 Now the gentlelady from Florida indicated the
1046 Department of Justice thinks that this idea is necessary to
1047 pursue cases and ignores the fact that over 100,000 tips
1048 come in every year. They only pursue about 2,200, a little
1049 over 2,200 cases. It is hard to imagine how the retention
1050 of hundreds of millions of records is necessary to pursue
1051 more cases when 97 percent of the leads don't get pursued
1052 now.

1053 And further, Mr. Chairman, as the gentlelady from
1054 California has indicated, this retained data will be sitting
1055 there for uses other than child pornography. It can get
1056 hacked for ID theft, and now that will be without liability;
1057 copyright infringement cases, who has been downloading what
1058 songs. I don't know for those who retain the data, there is
1059 no -- I don't think there is any reason why they can't do it
1060 for marketing purposes.

1061 And all kinds of crimes, like stalking. And if that
1062 information can be subpoenaed, the perpetrator of that would
1063 get information on the victim. That is under subpoena. And
1064 if you are going to subpoena something, all kinds of civil
1065 litigation, like divorces, might also get this newly
1066 retained data.

1067 And we are talking about calling this a child
1068 pornography bill. When we had -- it has already been
1069 indicated, when the "sneak and peek" provision was put into

1070 the code for terrorism cases, we looked up in 700 uses of
1071 the sneak and peek power, they used the power over 700
1072 times, 3 times for terrorism cases. So suggesting that this
1073 is a child porn law when it is unlikely that any meaningful
1074 portion of the use of this retained data will be for child
1075 pornography cases, it is going to be used for anything and
1076 everything else but.

1077 So I would hope we would limit this to 6 months and
1078 not to the 12 months in the manager's amendment.

1079 I yield back.

1080 Chairman Smith. Thank you, Mr. Scott.

1081 I will recognize myself in opposition.

1082 I know it is not going to persuade the gentleman from
1083 Virginia, but firstly, every law enforcement organization
1084 disagrees with him as far as the effectiveness of being able
1085 to use this information. Investigators do not become aware
1086 of a crime the moment it happens. When dealing with a crime
1087 on the Internet, which can easily cross State or even
1088 international jurisdictions, weeks or months may pass before
1089 they discover or are tipped off about a crime.

1090 The retention period must be long enough to serve a
1091 legitimate law enforcement function while still
1092 accommodating providers' cost concerns and limiting the
1093 potential for a breach of the information.

1094 At a briefing last month, the Justice Department

1095 described a case in which they discovered a man who was
1096 molesting a child that he had direct access to.
1097 Unfortunately, the identification information was no longer
1098 available from the provider because it was more than 6
1099 months old. Investigators could not pursue the case, and
1100 the child was not rescued from her molester.

1101 H.R. 1981, as introduced, imposed an 18-month
1102 retention period on providers. This marries an existing FCC
1103 regulation that requires telephone companies to retain for
1104 18 months telephone toll records, including the name,
1105 address, and telephone number of the caller, plus each
1106 telephone number called and the date, time, and length of
1107 the call -- far more information than is required under this
1108 bill.

1109 The 1-year retention period proposed in the manager's
1110 amendment is even shorter than this longstanding FCC
1111 regulation and will reduce costs for providers while still
1112 assisting law enforcement officers while apprehending some
1113 of the most dangerous criminals we have.

1114 This amendment significantly weakens the retention
1115 provision and will prevent numerous children from being
1116 rescued by dangerous pedophiles. I urge my colleagues to
1117 oppose this amendment.

1118 Are there others who wish to speak on this amendment?

1119 The gentleman from Virginia, Mr. Goodlatte?

1120 Mr. Goodlatte. Thank you, Mr. Chairman.

1121 I share the concern of my friend from Virginia, Mr.
1122 Scott, that data retention mandates for long periods of time
1123 can have a serious impact on consumer privacy. However, the
1124 concession that was made in the manager's amendment -- and
1125 Mr. Chairman, I appreciate you working with those of us who
1126 shared our concerns about the length of time -- in reducing
1127 that data retention period from 18 to 12 months is an
1128 equitable balance.

1129 And while I still have concerns about mandating
1130 companies to retain personal information they do not want to
1131 retain and what that means if there are breaches of those
1132 companies' networks after this mandate goes into effect, I
1133 do appreciate the chairman hearing concerns of those like me
1134 about the length of the retention requirement. And I join
1135 him in opposing the amendment.

1136 Chairman Smith. Thank you, Mr. Goodlatte.

1137 Others who wish to be heard on the amendment? The
1138 gentleman from Utah, Mr. Chaffetz?

1139 Mr. Chaffetz. Thank you, Mr. Chairman.

1140 I actually do support this amendment. But as Mr.
1141 Sensenbrenner has said, I oppose the underlying bill. I
1142 just believe that it goes too far. I believe that a
1143 Government data retention mandate is not something that we
1144 should be participating in.

1145 Americans, I believe, have a reasonable expectation of
1146 privacy. We are innocent until proven guilty, and that is
1147 the foundation of our liberty within this country.

1148 And I recognize that probably the most heinous,
1149 reprehensible crime you can possibly think of is child
1150 pornography. I think we would all concur on that, and it
1151 makes people -- I mean, I could just go on about how sick
1152 that makes everybody.

1153 But at the same time, I worry that under the guise of
1154 trying to make this protection, we are stepping too far to
1155 mandating private entities to participate in a Government
1156 mandate that goes, in my opinion, just too far.

1157 I think Mr. Sensenbrenner said it very eloquently. I
1158 wish to associate his comments with mine.

1159 Mr. Nadler. Would the gentleman yield?

1160 Mr. Chaffetz. Yes.

1161 Mr. Nadler. I could not forego the opportunity of
1162 asking the gentleman to yield to express a rare agreement
1163 with him.

1164 [Laughter.]

1165 Mr. Chaffetz. I am reclaiming my time. I was hoping
1166 that wasn't going to happen. And that is why I am glad that
1167 there is no record that will be kept. I would hope that
1168 there would be no record of this discussion.

1169 Mr. Nadler. Well, but the gentleman makes a very good

1170 point, and I just want to expand the point a bit.

1171 Most invasions of privacy, most deprivations of
1172 liberty, most expansions of Government power in a way that
1173 endanger liberty are always justified in the name of
1174 averting some evil, in the name of affording some
1175 protection. History shows us that we have to be very
1176 careful with Government power, especially in areas of
1177 privacy and invasion of liberty.

1178 And here we have a practical alternative because, as I
1179 stated before from the GAO, the real problem is not a
1180 shortage of data, which this would increase. The real
1181 problem is that they are besieged by data. They are
1182 overwhelmed by data. They don't have the resources to
1183 analyze data.

1184 And millions and billions of bits of data sitting
1185 unanalyzed but subject to abuse or to hacking or whatever
1186 will not help with child pornography. And this goes well
1187 beyond child pornography to everybody.

1188 So I agree with the amendment because it undoes some
1189 of the problem with the underlying bill. I disagree with
1190 the underlying bill.

1191 I agree with the gentleman from Utah. I thank him for
1192 yielding.

1193 Mr. Chaffetz. Thank you.

1194 Reclaiming my time, there are some other issues that

1195 perhaps are not as pertinent, but I do think are worthy of
1196 our consideration. That is the cost, the impediment in the
1197 rural situations for smaller ISPs. I recognize there is
1198 more of a phase-in here, and I appreciate the sensitivity to
1199 that.

1200 But the other thing that I think should be paramount
1201 in our thoughts is the cybersecurity problems that we have
1202 in this country. And when you create a database by Federal
1203 mandate for, say, a year or longer or shorter, whatever it
1204 might be, you are also opening yourselves up to a can of
1205 worms where others can go in and track and find. And I just
1206 don't believe that that logic holds water.

1207 I just don't believe that we should be following
1208 everyone all the time, which is essentially what we would be
1209 doing here, on everywhere that they go on the Internet. I
1210 just don't believe that to my core.

1211 And with that, I yield back.

1212 Chairman Smith. Thank you, Mr. Chaffetz.

1213 Are there others who wish to be heard? If not -- the
1214 gentleman from California, Mr. Lungren, first. Then Mr.
1215 Issa.

1216 Mr. Lungren. Mr. Chairman, thank you.

1217 I rise in opposition to the amendment. There seems to
1218 be a little confusion here. People are talking about a
1219 violation of privacy as if we are creating a new avenue at

1220 getting at certain information. What we are doing is
1221 extending the time the information might be available.

1222 And why is it important here? Well, it has been my
1223 observation that in child pornography cases, in many
1224 situations, the child pornographers try hard to cloak their
1225 activities. It is not like they want to be revealed
1226 immediately.

1227 It takes intensive law enforcement investigation to
1228 determine whether you have a case. This does not -- this
1229 section of this bill does not give you the opportunity, that
1230 is the Government the opportunity to seize content. It is
1231 the IP address.

1232 And people are talking about how terrible the crime
1233 is. Yes, it is a terrible crime. But what we are talking
1234 about here is the underlying evidence of the crime being
1235 available to law enforcement. That is why you are asking
1236 for it. You are not asking for a different type of
1237 information than is currently available. These are business
1238 records.

1239 What you saying is or the justification of this is --
1240 and we can talk later on about whether you want to limit it
1241 to only child pornography cases. But the justification for
1242 it is the difficulty law enforcement has in obtaining this
1243 information. It doesn't matter how many law enforcement
1244 officers you have if the information is no longer available.

1245 It doesn't give you any ability to go after the crime.

1246 And so, at least let's separate these two issues. I
1247 mean, if you are talking about an invasion of the right of
1248 privacy, then talk about not allowing the Government ever to
1249 go after these addresses if that is your concern. That is
1250 not what we are talking about here. We are talking about IP
1251 addresses that would be made available as a result of a
1252 retention of business records for this period of time.

1253 Mr. Chaffetz. Will the gentleman yield?

1254 Mr. Lungren. The inadequacy of the investigation as a
1255 result of the information no longer being held is the reason
1256 we are doing this. So that is what we are talking about.

1257 I would be happy to yield to the gentleman from Utah.

1258 Mr. Chaffetz. So under that logic that we should be
1259 able to follow somebody backwards in time, would that same
1260 philosophy, would that same attitude, would that same hold
1261 true for, say, GPS devices? There are lots of crimes that
1262 are committed -- I am sure child pornography cases that are
1263 committed by people who drive to a certain location, and
1264 that GPS information is stored sometimes for a limited
1265 amount of time. Should we --

1266 Mr. Lungren. Reclaiming my time, the gentleman might
1267 want to talk about that particular issue. That is not the
1268 one before us. The question I would have for the gentleman,
1269 is he prepared to offer an amendment that doesn't allow us

1270 to ever request the IP addresses for any period of time
1271 because that is a violation of one's privacy?

1272 Mr. Chaffetz. Would the gentleman yield so I can
1273 answer that question?

1274 Mr. Lungren. That has never been the case. That is
1275 not, in fact, supported by any analysis of the Fourth
1276 Amendment because these are business records. These are not
1277 content records. And so, the question is whether one
1278 believes that evidence ought to be preserved in a reasonable
1279 fashion for a reasonable period of time so that law
1280 enforcement can go through with the investigation of a
1281 particular concern that many of us have with respect to a
1282 crime of child pornography.

1283 Ms. Lofgren. Would the gentleman yield?

1284 Mr. Lungren. Now if the gentleman wants to offer an
1285 amendment later on limiting this to child pornography cases,
1286 that is a different question. But the gentleman has
1287 undercut the very argument that we retain this information,
1288 or cause this information to be retained.

1289 The fact of the matter is if you don't have the
1290 information, the child pornography cases are not going to be
1291 prosecuted. At least you have to deal with that issue, and
1292 this amendment says that the period of time that we have is
1293 not a reasonable one, and it ought to be limited to half
1294 that time. In the judgment of law enforcement, that would

1295 be too short a period of time.

1296 Now let's debate that issue as opposed to the issue
1297 the gentleman has raised, which is not really going to this
1298 amendment, but would support an amendment, if the gentleman
1299 is going to offer it, to disallow the Government to ever
1300 obtain IP addresses because the gentleman believes somehow
1301 that is an invasion of privacy, which would go far beyond
1302 any Federal interpretation of the Fourth Amendment
1303 protection.

1304 Mr. Chaffetz. If the gentleman would yield?

1305 Mr. Lungren. I would be happy to yield to the
1306 gentlelady from California.

1307 Ms. Lofgren. I would just like to weigh in, if I may,
1308 on the whole issue of what information can be obtained.
1309 Because if you have an IP address and you couple that with
1310 the information you can obtain from URLs and Web sites, you
1311 can get a comprehensive picture of where a person lives,
1312 what they see, everything about them. This is available
1313 right now, even without this bill, on the basis of an
1314 administrative subpoena issued by the U.S. attorney.

1315 The bill would actually lower that to include U.S.
1316 marshals, and there is no limitation to pursuit of child
1317 pornography cases. It is any information that you -- and
1318 this is not a court order -- that you want to get, and it is
1319 a broad invasion of privacy.

1320 And I thank the gentleman for yielding.

1321 Chairman Smith. The gentleman's time has expired.

1322 As I mentioned when we started this morning, my intent
1323 was to recess at 12:30 p.m. So as soon as we vote on this
1324 amendment, we will recess until after the votes, and I would
1325 like to proceed with the vote now, unless someone wants to
1326 be recognized?

1327 The gentleman from California, Mr. Issa?

1328 Mr. Issa. Thank you.

1329 Chairman Smith. Mr. Issa, you should be aware and
1330 others should be aware that a number of individuals relied
1331 upon being told that we were going to recess at 12:30 p.m.
1332 and have made plans. So if you can --

1333 Mr. Issa. I will be brief. But I think when I fail
1334 to agree with my chairman, who I agree with so often on so
1335 many issues, and with my colleague from California, Mr.
1336 Lungren, I think a few things have to be said.

1337 First of all, Mr. Lungren said we can talk about other
1338 things, and that is one of my fears. It is very clear that
1339 you can eliminate the word "child pornography" and just say
1340 "must maintain records for all things that law enforcement
1341 wants," period, and then you are at least honest about what
1342 this bill will do. Not what it says it will do, what it
1343 will do.

1344 So the first thing you do is everyone here from child

1345 pornography, please understand this is not an attack on
1346 trying to deal with child pornography. This is very much
1347 about the Constitution and people's private rights. Because
1348 this is not about child pornography, never has been, never
1349 will be. This bill is opening Pandora's box.

1350 We objected under Obamacare to the fact that there was
1351 a personal mandate. I object to this kind of mandate for
1352 the same reason.

1353 I am investigating Fast and Furious next door. Why?
1354 Because it was a dumb program that didn't need to be done
1355 the way it is, and Americans and Mexican citizens have died
1356 because of it. This is not the only way you can go after
1357 child pornography. There is no question anybody can surf
1358 the Internet, find child pornography, identify a site.

1359 Get a warrant not just for that site, but for anyone
1360 visiting it. Catch in real time the URLs involved and the
1361 IPs, and require these ISPs to cooperate in that
1362 investigation where you have a known offender -- they
1363 actually are pretty easy to find -- and the people going
1364 there and downloading it.

1365 These kinds of investigations -- and there are people
1366 on this committee who are a lot smarter about the history of
1367 how you do them -- they can be done. This is a convenient
1368 way for law enforcement to get what they couldn't get in the
1369 PATRIOT Act, what they couldn't get in a bunch of other

1370 areas, and I am offended that they are using child
1371 pornography and the terrible tragedy that happens there to
1372 try to take away one more aspect of what I consider to be
1373 part of our liberties and tradition in this country.

1374 So, yes, I will vote for anything to limit it. But
1375 quite frankly, cutting it in half isn't really my choice. I
1376 intend to vote for in anything close to the way this bill
1377 is, the final bill.

1378 And it is not about caring about child pornography.
1379 Mr. Chairman, I do care, care deeply. But I would help in
1380 any legislation offered by either side of the aisle that
1381 would actually help law enforcement do a better job of
1382 getting and trapping and doing stings and doing other things
1383 to go after these predators. I don't want to simply have
1384 this be another crutch that clearly will not be limited to
1385 child pornography.

1386 I appreciate the chairman's indulgence, and I yield
1387 back.

1388 Ms. Jackson Lee. Mr. Chairman? Mr. Chairman?

1389 Chairman Smith. The gentlewoman from Texas, Ms.
1390 Jackson Lee?

1391 Ms. Jackson Lee. Mr. Chairman, I think a lot of us
1392 have spent time discussing these issues of privacy. In
1393 particular, I remember the PATRIOT Act and the whole issue
1394 of libraries, and many of the friends on the other side of

1395 the aisle were not supportive of positions on this side of
1396 the aisle, particularly in protecting the list of books and
1397 usage.

1398 We have come into a new world, and it is a frightening
1399 new world that includes, as my colleagues have indicated,
1400 cybersecurity that is sometimes beyond our understanding.
1401 The likes of international newspapers hacking into deceased
1402 teenagers' phones. It is a frightening world.

1403 And for those of us who have held the standards of
1404 civil libertarian attitudes and the freedom that has been
1405 expressed by my colleagues, it is a difficult choice. But I
1406 would say to my colleagues that there is an opportunity to
1407 provide the tools that the underlying bill has and provide
1408 the protection for the do-gooders, those who are not in the
1409 eye of the storm.

1410 I believe the gentleman from Virginia has an amendment
1411 that does, in fact, have language that says that this is
1412 limited to child pornography, and I, frankly, believe that
1413 is a good amendment. But there is a recent study that says
1414 a study of convicted Internet offenders suggests that 85
1415 percent of the offenders said that they had committed acts
1416 of sexual abuse against minors ranging from inappropriate
1417 touching to rape.

1418 Just ask a child that has been a victim. They are her
1419 rights, and I do think their First Amendment rights are

1420 precious under the Bill of Rights. But we have to find a
1421 way, and if Mr. Issa wants to have a supportive legislation
1422 coming forward, we should look at it.

1423 But I believe that on the four corners of the
1424 legislation, the issue on which it is attempting to address
1425 is so severe that it is important to look at the limitations
1426 that the manager's amendment has with respect to time and
1427 with respect to exempting small businesses.

1428 And I do think there will have to be some subsequent
1429 oversight. This bill is making its way, if it moves, to
1430 deal with how the retained data is handled. That is of
1431 concern. But we cannot deny that there are equal-weighted
1432 issues here, and child pornography that leads to the
1433 victimizing of children, I believe, is an epidemic.

1434 And I know Mr. Smith has been very energetic in
1435 legislation, and some of which I have agreed and many of
1436 which probably not. But I do think it is important to look
1437 at the timeframe of the review that involved law enforcement
1438 officers. And I say to my law enforcement community,
1439 judiciousness and respect for rights will have to be
1440 included in this.

1441 But the focus of this bill is to focus in, to hone in
1442 on the myriad of individuals sitting in their isolated
1443 areas, very difficult to -- very, very difficult to be able
1444 to determine their activity -- who are threats to our

1445 children wherever they might be. Library books are
1446 conspicuous. You might have a surveillance camera that
1447 watches and sees someone go into a library.

1448 I am not promoting that, but it is far different for
1449 the isolated use of the Internet. We have become a
1450 different world. We have to grapple with our Bill of Rights
1451 that was established in a totally different world and make
1452 the Constitution a living document. But I also think it is
1453 important to recognize the underlying threat, and it is a
1454 threat that has to be addressed.

1455 However we can put the restraints that are necessary
1456 to protect the First Amendment, but more importantly, the
1457 privacy that is really a key, I will look, Mr. Chairman, at
1458 any number of amendments. But I cannot in any way equate an
1459 adult's right to sit and to abuse a child by their actions
1460 of pornography, which will wind up in the inappropriate
1461 actions with that child, that minor, and the viciousness of
1462 rape or even to the most dastardly act is the act of rape
1463 and murder.

1464 I think we have to do something about it, and I yield
1465 back to the gentleman.

1466 Chairman Smith. Thank you, Ms. Jackson Lee.

1467 The vote is on the Scott Amendment. All in favor, say
1468 aye.

1469 [A chorus of ayes.]

1470 Chairman Smith. Opposed, nay.
1471 [A chorus of nays.]
1472 Chairman Smith. In the opinion of the chair, the nays
1473 have it.
1474 And a recorded vote has been requested, and the clerk
1475 will call the roll.
1476 Ms. Kish. Mr. Smith?
1477 Chairman Smith. No.
1478 Ms. Kish. Mr. Smith votes no.
1479 Mr. Sensenbrenner?
1480 Mr. Sensenbrenner. Aye.
1481 Ms. Kish. Mr. Sensenbrenner votes aye.
1482 Mr. Coble?
1483 Mr. Coble. No.
1484 Ms. Kish. Mr. Coble votes no.
1485 Mr. Gallegly?
1486 [No response.]
1487 Ms. Kish. Mr. Goodlatte?
1488 Mr. Goodlatte. No.
1489 Ms. Kish. Mr. Goodlatte votes no.
1490 Mr. Lungren?
1491 Mr. Lungren. No.
1492 Ms. Kish. Mr. Lungren votes no.
1493 Mr. Chabot?
1494 Mr. Chabot. No.

1495 Ms. Kish. Mr. Chabot votes no.
1496 Mr. Issa?
1497 Mr. Issa. Aye.
1498 Ms. Kish. Mr. Issa votes aye.
1499 Mr. Pence?
1500 [No response.]
1501 Ms. Kish. Mr. Forbes?
1502 Mr. Forbes. No.
1503 Ms. Kish. Mr. Forbes votes no.
1504 Mr. King?
1505 [No response.]
1506 Ms. Kish. Mr. Franks?
1507 Mr. Franks. No.
1508 Ms. Kish. Mr. Franks votes no.
1509 Mr. Gohmert?
1510 [No response.]
1511 Ms. Kish. Mr. Jordan?
1512 [No response.]
1513 Ms. Kish. Mr. Poe?
1514 [No response.]
1515 Ms. Kish. Mr. Chaffetz?
1516 Mr. Chaffetz. Aye.
1517 Ms. Kish. Mr. Chaffetz votes aye.
1518 Mr. Griffin?
1519 Mr. Griffin. No.

1520 Ms. Kish. Mr. Griffin votes no.
1521 Mr. Marino?
1522 Mr. Marino. No.
1523 Ms. Kish. Mr. Marino votes no.
1524 Mr. Gowdy?
1525 Mr. Gowdy. No.
1526 Ms. Kish. Mr. Gowdy votes no.
1527 Mr. Ross?
1528 [No response.]
1529 Ms. Kish. Mrs. Adams?
1530 [No response.]
1531 Ms. Kish. Mr. Quayle?
1532 [No response.]
1533 Ms. Kish. Mr. Conyers?
1534 [No response.]
1535 Ms. Kish. Mr. Berman?
1536 [No response.]
1537 Ms. Kish. Mr. Nadler?
1538 Mr. Nadler. Aye.
1539 Ms. Kish. Mr. Nadler votes aye.
1540 Mr. Scott?
1541 Mr. Scott. Aye.
1542 Ms. Kish. Mr. Scott votes aye.
1543 Mr. Watt?
1544 Mr. Watt. Aye.

1545 Ms. Kish. Mr. Watt votes aye.
1546 Ms. Lofgren?
1547 Ms. Lofgren. Aye.
1548 Ms. Kish. Ms. Lofgren votes aye.
1549 Ms. Jackson Lee?
1550 Ms. Jackson Lee. No.
1551 Ms. Kish. Ms. Jackson Lee votes no.
1552 Ms. Waters?
1553 Ms. Waters. Aye.
1554 Ms. Kish. Ms. Waters votes aye.
1555 Mr. Cohen?
1556 [No response.]
1557 Ms. Kish. Mr. Johnson?
1558 Mr. Johnson. Aye.
1559 Ms. Kish. Mr. Johnson votes aye.
1560 Mr. Pierluisi?
1561 Mr. Pierluisi. No.
1562 Ms. Kish. Mr. Pierluisi votes no.
1563 Mr. Quigley?
1564 Mr. Quigley. No.
1565 Ms. Kish. Mr. Quigley votes no.
1566 Ms. Chu?
1567 Ms. Chu. Aye.
1568 Ms. Kish. Ms. Chu votes aye.
1569 Mr. Deutch?

1570 [No response.]

1571 Ms. Kish. Ms. Sanchez?

1572 Ms. Sanchez. Aye.

1573 Ms. Kish. Ms. Sanchez votes aye.

1574 Mr. Conyers?

1575 Mr. Conyers. Aye.

1576 Ms. Kish. Mr. Conyers votes aye.

1577 Chairman Smith. Are there other Members who wish to

1578 cast a vote? If not, the clerk will report.

1579 The clerk will suspend. The gentleman from Florida,

1580 Mr. Deutch?

1581 Mr. Deutch. No.

1582 Ms. Kish. Mr. Deutch votes no.

1583 Chairman Smith. The clerk will report.

1584 Ms. Kish. Mr. Chairman, 12 Members voted aye; 14

1585 Members voted nay.

1586 Chairman Smith. A majority having voted against the

1587 amendment, the amendment is not agreed to.

1588 The Judiciary Committee will stand in recess until

1589 after the first series of votes, which I expect will be

1590 about 2:00 p.m.

1591 [Whereupon, at 12:44 p.m., the committee recessed, to

1592 reconvene at 2:00 p.m., the same day.]

1593 Chairman Smith. The Judiciary Committee will resume

1594 its markup, and the clerk will call the roll to determine a

1595 quorum.

1596 Ms. Kish. Mr. Smith?

1597 Chairman Smith. Present.

1598 Ms. Kish. Mr. Sensenbrenner?

1599 Mr. Sensenbrenner. Here.

1600 Ms. Kish. Mr. Coble?

1601 Mr. Gallegly?

1602 Mr. Goodlatte?

1603 Mr. Lungren?

1604 Mr. Chabot?

1605 Mr. Issa?

1606 Mr. Pence?

1607 Mr. Forbes?

1608 Mr. King?

1609 Mr. Franks?

1610 Mr. Gohmert?

1611 Mr. Jordan?

1612 Mr. Poe?

1613 Mr. Chaffetz?

1614 Mr. Chaffetz. Here.

1615 Ms. Kish. Mr. Griffin?

1616 Mr. Marino?

1617 Mr. Marino. Here.

1618 Ms. Kish. Mr. Gowdy?

1619 Mr. Ross?

1620 Ms. Adams?
1621 Ms. Adams. Here.
1622 Ms. Kish. Mr. Quayle?
1623 Mr. Conyers?
1624 Mr. Berman?
1625 Mr. Nadler?
1626 Mr. Scott?
1627 Mr. Scott. Present.
1628 Ms. Kish. Mr. Watt?
1629 Mr. Watt. Here.
1630 Ms. Kish. Ms. Lofgren?
1631 Ms. Lofgren. Here.
1632 Ms. Kish. Ms. Jackson Lee?
1633 Ms. Waters?
1634 Mr. Cohen?
1635 Mr. Cohen. Here.
1636 Ms. Kish. Mr. Johnson?
1637 Mr. Johnson. Here.
1638 Ms. Kish. Mr. Pierluisi?
1639 Mr. Pierluisi. Here.
1640 Ms. Kish. Mr. Quigley?
1641 Mr. Quigley. Here.
1642 Ms. Kish. Ms. Chu?
1643 Mr. Deutch?
1644 Ms. Sanchez?

1645 Ms. Kish. Mr. Gallegly?

1646 Mr. Gallegly. Here.

1647 Ms. Kish. Mr. Coble?

1648 Mr. Coble. Here.

1649 Chairman Smith. The clerk will report.

1650 Ms. Kish. Mr. Chairman, 14 members responded present.

1651 Chairman Smith. Okay, a working quorum is present, so

1652 we will proceed with debating the next amendment, which will

1653 be offered by the gentleman from Virginia, Mr. Scott.

1654 And he is recognized to offer that amendment.

1655 Mr. Scott. Mr. Chairman, I have an amendment at the

1656 desk, No. 2.

1657 Chairman Smith. Without objection, the clerk will

1658 report the amendment.

1659 Ms. Kish. Amendment to the Smith of Texas amendment

1660 to H.R. 1981 offered by Mr. Scott.

1661 Page 2, after line 9, insert the following: "Access

1662 to a record or information retained under this subsection

1663 may not be compelled except in connection with an

1664 investigation of an offense.

1665 "(A) under section 1591 (relating to sex trafficking

1666 of children) section 2243 (relating to sexual abuse of a

1667 minor or ward), section" --

1668 Chairman Smith. Without objection, the amendment will

1669 be considered as read.

1670 [The information follows:]

1671

1672 Chairman Smith. And the gentleman from Virginia is
1673 recognized to explain his amendment.

1674 Mr. Scott. Mr. Chairman, I would like to amend my
1675 amendment, if I could, just to delete the second page?

1676 Chairman Smith. That is, I believe, a unanimous
1677 consent request. Does the gentleman so make that unanimous
1678 consent request?

1679 Mr. Scott. Yes.

1680 Chairman Smith. And is there any objection?

1681 [No response.]

1682 Hearing none, the amendment is amended to delete page
1683 2.

1684 Mr. Scott. Thank you.

1685 Mr. Chairman, this amendment would allow law
1686 enforcement access to data retained pursuant to section 4,
1687 and that is the data required to be retained pursuant to the
1688 mandates in section 4 only for investigations of child
1689 exploitation cases.

1690 Now if this legislation is being marketed as a child
1691 porn bill, then let's make it a child porn bill. But let's
1692 not bait and switch by calling it a child porn bill and then
1693 using it for everything else but.

1694 The entire discourse around the need for this data has
1695 revolved around child exploitation cases. Understandably,
1696 in these cases there is particular urgency. There may be

1697 particular urgency to obtain data and solve a case, but law
1698 enforcement should not be able to obtain these records for
1699 ordinary, run-of-the-mill cases, which is precisely what is
1700 going to occur if this amendment is not adopted.

1701 Now the Justice Department admitted that this is what
1702 it wants to do. The department testified before the Crime
1703 Subcommittee that it wants a retention mandate to apply to
1704 all crimes, not just child porn cases.

1705 Now the sheriff, Sheriff Brown, and the National
1706 Center for Missing and Exploited Children, on the other
1707 hand, testified that their support of the mandate only
1708 applied to child pornography cases.

1709 This reminds me of the reasons about why we had to
1710 rush to enact the USA PATRIOT Act, namely that law
1711 enforcement needs these tools to foil terrorism. But it
1712 turns out, when you look at the sneak-and-peek provisions
1713 that ended up in that bill, 763 cases of -- requests used
1714 sneak-and-peek, 763 times, three involved terrorism cases.
1715 Sixty-five percent were drug cases.

1716 I am concerned the same thing will happen in this bill
1717 with the USA PATRIOT Act, and that is it will be used for
1718 everything but child pornography cases, like drug cases;
1719 like intellectual property cases where you look around, who
1720 has been downloading certain songs; get a subpoena and get
1721 divorce information for divorce cases.

1722 It will allow violation -- you can get, as a defense
1723 in a criminal case, you can subpoena records of victims or
1724 other people, if your allegation is that there wasn't a
1725 crime, and you can show the person wasn't even at the crime
1726 scene. You can show that with their IP address, they were
1727 at home on the computer.

1728 If you can show that, then the court will issue a
1729 subpoena to get all the records. Then you have got the
1730 records.

1731 ID theft, all this information is sitting around.

1732 And, Mr. Chairman, in the manager's amendment, there
1733 is a little confusion about what's actually involved in the
1734 manager's amendment, because it is my understanding that the
1735 manager's amendment requires the retention of -- it says a
1736 commercial provider of an electronic communication service
1737 shall retain for a period of at least 1 year a log of the
1738 temporary assigned work addresses the provider assigns to a
1739 subscriber, to a customer of such search service that
1740 enables the identification of the corresponding customer or
1741 subscriber information under section (C)(2) of this section.

1742 Now (C)(2) says name, address. What else is -- the
1743 way you paid for it. That is your credit card information.

1744 You are going to be providing -- holding up this
1745 credit card information on the Internet for years for the
1746 hackers to get in and get that, too.

1747 We need to limit the access to this just to the child
1748 porn cases, since that is how it is being marketed. And for
1749 those who say, well, you are taking authority that is
1750 already there, the manager's amendment does that by saying
1751 you can't disclose it to nongovernmental entities. So that
1752 change would be a change restriction, too.

1753 As the gentleman from California, Mr. Issa, pointed
1754 out, this bill could have been labeled the "retain
1755 information for all uses act," and eliminate any reference
1756 to child porn. But if we are going to call it a child porn
1757 bill, we ought to conform the title to fit the bill and the
1758 bill to fit the title.

1759 Mr. Sensenbrenner. Will the gentleman yield?

1760 Mr. Scott. I yield.

1761 Mr. Sensenbrenner. I ask unanimous consent that the
1762 gentleman --

1763 Chairman Smith. The gentleman's time has expired.

1764 Mr. Sensenbrenner. -- be given an additional minute.

1765 Chairman Smith. And without objection, the gentleman
1766 is yielded an additional minute.

1767 Mr. Scott. I yield.

1768 Mr. Sensenbrenner. I have been looking at this
1769 amendment, and I have one concern, and that is that, when we
1770 are talking about the retention of records with the
1771 gentleman from Virginia's amendment, would this preclude a

1772 grand jury subpoena to an ISP for something other than an
1773 offense against a child?

1774 Mr. Scott. Hopefully. And if you are going to
1775 require the information for the purpose of child porn cases,
1776 it ought to be limited to child porn cases.

1777 Now, the fact of the matter is, if it is there, if you
1778 retain this information, without this amendment, you can get
1779 it for any reason you want.

1780 Mr. Sensenbrenner. Thank you.

1781 Ms. Lofgren. Will the gentleman further yield?

1782 Mr. Scott. I yield.

1783 Chairman Smith. The gentleman's time has expired.

1784 Without objection, the gentleman is --

1785 Mr. Sensenbrenner. Mr. Chairman?

1786 Chairman Smith. The gentleman's time has expired.

1787 The gentleman from Wisconsin, Mr. Sensenbrenner, is
1788 recognized.

1789 Mr. Sensenbrenner. Mr. Chairman, I rise in opposition
1790 to the amendment.

1791 I think the gentleman from Virginia's heart is in the
1792 right place, but the unintended consequence of his amendment
1793 with the limitation of government access to certain records
1794 would preclude a judicial subpoena in support of a
1795 legitimate law enforcement investigation, other than
1796 something related to an offense against children, from being

1797 served upon an Internet service provider.

1798 I view restrictions very particularly. I am against
1799 this bill, as everybody here knows, but I think that if
1800 there is something that is a law enforcement issue, or a
1801 judicial subpoena or grand jury subpoena is served upon the
1802 ISP, then they should not be precluded under the amendment
1803 of the gentleman from Virginia.

1804 I think the gentleman from Virginia may have written
1805 his amendment in an overly broad manner, and, as it is
1806 presented, I would oppose it.

1807 I yield back the --

1808 Ms. Lofgren. With the gentleman yield?

1809 Mr. Sensenbrenner. I yield to the gentlewoman from
1810 California.

1811 Ms. Lofgren. I was looking at this as well with some
1812 questions, and it seems to me, if you take a look, it is
1813 access to a record or information retained under this
1814 subsection.

1815 And I am wondering, under existing law, U.S. Attorneys
1816 can get all of this data with a subpoena. They don't need
1817 to go to court. They don't need a grand jury. And I am not
1818 sure that this reaches that underlying law issue.

1819 I think that the problem is the data retention, and I
1820 think I can support this amendment, but I don't think it
1821 solves the problem, because of the underlying ability to

1822 obtain all business records within an administrative --

1823 Mr. Sensenbrenner. Well, reclaiming my time, I guess
1824 I come to the opposite conclusion on this, because I don't
1825 know the extent of this amendment.

1826 Certainly, we want to restrict this type of activity
1827 to only offenses against children. But I think that we
1828 should not use this amendment or this bill to restrict what
1829 the Justice Department can already do, and that is my
1830 concern.

1831 And I yield back the balance of my time.

1832 Chairman Smith. Thank you, Mr. Sensenbrenner.

1833 Mr. Scott. Will the gentleman yield?

1834 I'm sorry.

1835 Ms. Lofgren. Mr. Chairman?

1836 Chairman Smith. The gentlewoman from California is
1837 recognized.

1838 Ms. Lofgren. Yes, maybe I can ask the question of Mr.
1839 Scott, because I think even if the amendment does what he
1840 thinks and passes, the bill is defective, and I couldn't
1841 support it. But the question is, what exactly is the reach?
1842 Does it disturb the underlying ability of the U.S. Attorney
1843 to get any record at any time without a court order or not?

1844 Mr. Scott. Well, the title of the bill suggests it is
1845 child porn, and we are going to require by mandate that they
1846 keep certain records. And if we can do that under the title

1847 "Protecting Children From Internet Pornographers Act of
1848 2011," you ought to limit that information retained because
1849 of the mandate to child porn cases.

1850 If you are not going to limit it to child porn cases,
1851 then take the suggestion of the gentleman from California,
1852 Mr. Issa, and call it the "retention bill for anybody to use
1853 for any reason act."

1854 Maybe including --

1855 Ms. Lofgren. No, I agree with that, but the question
1856 I have is really a technical one.

1857 Mr. Scott. And, yes, there may be information out
1858 there that is sitting out there, that might have been
1859 sitting out there, regardless of the bill because the
1860 Internet providers hold the information longer into the
1861 period that is required, and would have done it anyway.

1862 Yes, you wouldn't be able to get that information, so
1863 it would be a step backwards for the --

1864 Ms. Lofgren. But it says that the information
1865 retained under this section. So if you have -- here's what
1866 I think of the amendment --

1867 Mr. Scott. With the gentlewoman yield?

1868 Ms. Lofgren. No, let me just finish the question,
1869 because I think what the bill does is it gives U.S. Marshals
1870 the same authority that U.S. Attorneys have right now, vis-
1871 a-vis administrative subpoenas and getting business records

1872 and data.

1873 The question is, if you limit the U.S. Marshals to --

1874 Mr. Scott. No, it actually gives them more power.

1875 Ms. Lofgren. Well, it does give them more power. You
1876 are right. The U.S. Marshals would have more power.

1877 But the point is, in both cases, they have access to
1878 records without a court order.

1879 And I agree with what you are trying to do, which is
1880 to limit the scope of this to child pornography, because
1881 that is what the advanced rationale is. But I think that if
1882 you are an ISP and you are required to hold all of this
1883 data, you are going to be subject to giving that up with an
1884 administrative subpoena to a U.S. Attorney under the
1885 business records rule anyhow.

1886 Mr. Scott. Well, the amendment would prevent that.
1887 And as the gentleman from Wisconsin says, it may be
1888 legitimate to get it, but if you are going to get the
1889 information because it was required to be retained under the
1890 Protecting Child From Internet Pornographers Act, then we
1891 ought to be honest about that.

1892 Ms. Lofgren. I don't disagree with you on that.

1893 Mr. Scott. And the administrative subpoena that is
1894 referred to is actually a more powerful subpoena than the
1895 Secret Service has even in face of an imminent threat on the
1896 life of the President of the United States.

1897 Ms. Lofgren. That is correct.

1898 Mr. Scott. Because the Secret Service would have to
1899 go through more in that situation than the U.S. Marshals
1900 would have to do in a routine case.

1901 Ms. Lofgren. The gentleman from New York asked that I
1902 yield, and I will yield.

1903 Mr. Nadler. Yes, thank you.

1904 I think that, you know, the question that is raised
1905 with this amendment, which I support, I think it is very
1906 good idea, would this amendment mean that you couldn't get
1907 information that they might have kept, that they be required
1908 to keep, but might have kept anyway?

1909 According to the wording of the amendment, which says
1910 access to relevant information retained under this
1911 subsection may not be compelled, I think if you could show
1912 that the information subject to this subsection would have
1913 been retained anyway, then you can still get it, because it
1914 is then not retained under this subsection.

1915 It is retained under this subsection if it would have
1916 been thrown out, but because this subsection is kept -- so
1917 what this amendment does is it says, okay, if you are
1918 keeping information because of this subsection -- in other
1919 words, if it is kiddie porn-related, if it is beyond a year
1920 or whatever, if it is beyond the time you normally would
1921 have kept it, you are keeping it because it is kiddie porn-

1922 related -- I'm sorry, you are keeping it because of the
1923 subsection that says you have to keep all information, you
1924 can only get it if it is kiddie porn-related, unless you can
1925 show that you would have kept it anyway.

1926 Ms. Lofgren. Reclaiming my time, I think the problem
1927 with that is that the ISPs have various standards. Some of
1928 the big ones keep their records for 6 months. Some of the
1929 little guys keep it for a week. I mean, it is all over the
1930 board.

1931 And so you would have evidentiary issue here that
1932 could be complicated.

1933 Mr. Nadler. Would the --

1934 Ms. Lofgren. I would yield.

1935 Mr. Nadler. You might have an evidentiary issue, but
1936 clearly if an ISP has a policy of keeping it for a week but
1937 has kept it for a year because of this subsection, then it
1938 will be subject to this subsection.

1939 If it has a policy of a year, then it wouldn't be
1940 subject to this subsection, because it wouldn't be kept
1941 anyway.

1942 Ms. Lofgren. I see my time has expired. I yield
1943 back.

1944 Chairman Smith. The gentlewoman's time has expired.
1945 She yields back.

1946 I'm going to recognize myself in opposition to the

1947 amendment.

1948 And let me say at the outset that I know the amendment
1949 it is well-intended. In fact, I tried to write an amendment
1950 along the same lines, but was not successful in doing so
1951 because of the unintended consequences that have been
1952 referred to by Mr. Sensenbrenner and, in part, by Ms.
1953 Lofgren.

1954 Unfortunately, this amendment would limit the ability
1955 of law enforcement officials to pursue other types of crime
1956 that they can now investigate. In other words, it is a step
1957 backward when it comes to other types of crime.

1958 There was a time when child pornography was
1959 practically eliminated from American society. The Internet
1960 changed all that, and today the sale and exchange of child
1961 pornography is increasing exponentially, and predominantly
1962 on the Internet.

1963 It is this unique characteristic of child pornography
1964 that makes data retention so critical for these offenses.
1965 We know that pedophiles mask their identities on the
1966 Internet. This forces investigators to request IP address
1967 information from providers in hopes of apprehending these
1968 predators and rescuing the child they are abusing in order
1969 to produce the pornography.

1970 While child pornography and exploitation offenses are
1971 an important, even paramount, purpose for pursuing uniform

1972 data retention, these are not the only Internet-based crimes
1973 for which investigators rely on this data.

1974 The Justice Department tells us that, "Internet and
1975 cell phone company records are crucial evidence in cases
1976 involving a wide array of crimes, including child
1977 exploitation, violent crime, terrorism, drug trafficking,
1978 computer hacking, and other privacy crimes."

1979 Some providers currently retain IP address data,
1980 although for varying lengths of time. This data can be
1981 accessed for any law enforcement investigation in which the
1982 information is relevant -- drug trafficking offenses, cyber-
1983 attacks, data breaches, or threats against the President.

1984 Limiting access to this data for only certain offenses
1985 will pose significant compliance problems for the providers.
1986 Grand jury subpoenas do not identify the crime under
1987 investigation, because these proceedings are secret.

1988 So in the vast majority of requests, providers will
1989 not be able to discern the purpose of the request. They
1990 will only know the information is being requested as part of
1991 a grand jury investigation.

1992 In many cases the limitation proposed in the
1993 amendment, and I know these were not intentional, can only
1994 be satisfied by breaching grand jury secrecy.

1995 Although our motivation for pursuing data retention
1996 was the need to identify child pornographers and predators

1997 on the Internet, investigators should not be prohibited from
1998 accessing this limited data, which does not include any
1999 content, only connectivity data, to identify other criminals
2000 operating on the Internet.

2001 So I oppose this amendment.

2002 Are there other members who wish to be heard?

2003 Mr. Nadler. Mr. Chairman?

2004 Chairman Smith. The gentleman from New York, Mr.
2005 Nadler, is recognized.

2006 Mr. Scott. Mr. Chairman? Could you yield on your
2007 time?

2008 Chairman Smith. I would be happy to yield whatever
2009 remaining time I had.

2010 Mr. Scott. Thank you, Mr. Chairman, because in your
2011 comments, you accused me of introducing this amendment in
2012 good faith.

2013 Chairman Smith. Oh, is that an accusation the
2014 gentleman is going to question?

2015 Mr. Scott. Or good intent.

2016 The purpose of the amendment was to expose the title
2017 as being misleading, and I think your comments have
2018 indicated that the purpose of the bill includes all kinds of
2019 other things other than child pornography. And, therefore,
2020 the purpose of the amendment has been served.

2021 And I wouldn't plead guilty to doing this in good

2022 faith. The purpose of the amendment, I think, has been
2023 served.

2024 The purpose of amendment has been served, and I ask
2025 unanimous consent to withdraw it.

2026 Ms. Adams. Mr. Chairman?

2027 Chairman Smith. Without objection, the amendment is
2028 withdrawn.

2029 Does the gentlewoman from Florida seek recognition?

2030 Ms. Adams. Yes.

2031 Chairman Smith. For what purpose?

2032 Ms. Adams. I was going to ask the gentleman if he
2033 would yield for just a second.

2034 Mr. Scott. I was on the chairman's time.

2035 Ms. Adams. Okay.

2036 Then, Mr. Chairman, if you will yield before
2037 withdrawing the amendment?

2038 Chairman Smith. I was distracted there for a minute.

2039 The gentlewoman from Florida, Ms. Adams, did you have
2040 a question for me or were you seeking time?

2041 Ms. Adams. I was seeking time on the amendment, Mr.
2042 Chair.

2043 Chairman Smith. Okay, even though the amendment has
2044 been withdrawn, the gentlewoman is recognized to make any
2045 comments she wants to on that amendment.

2046 Ms. Adams. Thank you, Mr. Chair.

2047 And I appreciate Mr. Scott clarifying why he offered
2048 the amendment.

2049 My concern is that, in offering the amendment, there
2050 was some information that may have gone unnoticed and that
2051 is when we have children, small children, that become
2052 missing in areas, sometimes this information is crucial in
2053 locating them before they are killed or mutilated. And,
2054 therefore, I think every tool that we have that will protect
2055 a child, we should be looking into.

2056 Mr. Scott. With the gentlelady yield?

2057 Ms. Adams. Yes.

2058 Mr. Scott. Well, if purpose of the legislation is
2059 restricted to children, then restrict the legislation to
2060 children. The fact of the matter is, and the purpose of the
2061 amendment, was to expose the fact that, just like sneak-and-
2062 peek was marketed as anti-terrorism, in 99.5 percent of the
2063 time it is used, it doesn't have anything to do with
2064 terrorism.

2065 So marketing the amendment as the Protect Children
2066 From Internet Pornographers Act is misleading. And the
2067 gentleman from California had suggested an alternative title
2068 of "bill to require retention of information for any use at
2069 all act."

2070 I yield back.

2071 Ms. Adams. Thank you.

2072 Well, I would just like to point out that I, for one,
2073 want to make sure that law enforcement has every ability to
2074 find our children if they go missing.

2075 Mr. Scott. Well, that is not what the bill is limited
2076 to.

2077 Chairman Smith. Thank you, Ms. Adams.

2078 Does the gentleman from Virginia have another
2079 amendment?

2080 Mr. Scott. Yes, Mr. Chairman, No. 3.

2081 Chairman Smith. The clerk will report Scott amendment
2082 No. 3.

2083 Ms. Kish. Amendment to the Smith of Texas amendment
2084 to H.R. 1981 offered by Mr. Scott.

2085 Page 2, after line 9, insert the following: "The
2086 Attorney General shall make a study to determine the costs
2087 associated" --

2088 Chairman Smith. Without objection, the amendment will
2089 be considered as read.

2090 [The information follows:]

2091

2092 Chairman Smith. The gentleman is recognized to
2093 explain the amendment.

2094 Mr. Scott. Thank you, Mr. Chairman.

2095 Mr. Chairman, we don't know what costs we are imposing
2096 on ISPs. And this amendment would just require the Attorney
2097 General to conduct a study of the costs associated with the
2098 data retention mandate in section 4 and report that
2099 information to Congress.

2100 When imposing an unfunded data retention mandate --
2101 while imposing an unfunded mandate, it does not require
2102 right now any reporting requirement. Without this
2103 amendment, we will not be able to know the costs to the
2104 industry that we have imposed on them.

2105 While we've heard from industry that the mandate could
2106 be costly and burdensome, particularly with smaller ISPs, we
2107 do not know exactly what those costs would be. And it would
2108 be nice to know what we have done to people.

2109 There are different kinds of costs. These costs could
2110 be expenditures for additional personnel, additional
2111 hardware, software. There could be even less obvious costs,
2112 such as those associated with protecting the data and
2113 keeping it secure from cyber-criminals. There are all kinds
2114 of costs that could be involved.

2115 And we would just ask the Attorney General, 2 years
2116 from the date of enactment, to report what the results of

2117 the study are, so we will know what costs have been imposed.

2118 And then we would know whether we would want to take any
2119 action as a result.

2120 I would yield back.

2121 Chairman Smith. Okay. Thank you, Mr. Scott.

2122 I support the amendment for the reasons that the
2123 gentleman has cited, and recommend that my colleagues
2124 support it as well.

2125 Any more discussion on this amendment?

2126 If not, we will vote on it.

2127 All in favor say aye.

2128 [A chorus of ayes.]

2129 Chairman Smith. Opposed, nay.

2130 [No response.]

2131 Chairman Smith. The amendment is agreed to.

2132 And now does the gentleman from Virginia have yet
2133 another amendment? Or do you not?

2134 Mr. Scott. Yes, Mr. Chairman, I have an amendment at
2135 the desk, No. 5.

2136 Chairman Smith. The clerk will report the amendment.

2137 Ms. Kish. Amendment to the Smith amendment to H.R.
2138 1981 offered by Mr. Scott.

2139 Page 2, after line 9, insert the following: "A
2140 provider of an electronic communication service or remote
2141 computing service"--

2142 Mr. Scott. I ask unanimous consent that the amendment
2143 be considered as read.

2144 Chairman Smith. Without objection, the amendment will
2145 be considered as read.

2146 [The information follows:]

2147

2148 Chairman Smith. And the gentleman is recognized.

2149 Mr. Scott. Mr. Chairman, this amendment would create
2150 an exemption from the data retention mandate on ISPs for
2151 those ISPs that have less than 2 million subscribers.

2152 We have heard that this is an excessive burden, and
2153 the smaller ISPs could be put out of business, if we impose
2154 these mandates.

2155 And I understand, Mr. Chairman, that you have been
2156 working with the smaller ISPs. And with the commitment that
2157 you will continue to work with them, to make sure that we
2158 are not imposing excessive burdens, and I think we have your
2159 commitment on that, I withdraw the amendment.

2160 Chairman Smith. Thank you, Mr. Scott.

2161 You do have my commitment. We are going to try to
2162 make provisions for the smaller ISPs, and we will work on
2163 that together between now and the House floor.

2164 Without objection, the amendment is withdrawn.

2165 The question is now on the manager's amendment, as
2166 amended.

2167 All in favor say aye.

2168 [A chorus of ayes.]

2169 Chairman Smith. Opposed, no.

2170 [A chorus of noes.]

2171 Chairman Smith. The ayes still have it.

2172 Ms. Lofgren. I ask for a recorded vote.

2173 Chairman Smith. The clerk will call the roll.

2174 Ms. Kish. Mr. Smith?

2175 Chairman Smith. Aye.

2176 Ms. Kish. Mr. Smith votes aye.

2177 Mr. Sensenbrenner?

2178 Mr. Sensenbrenner. No.

2179 Ms. Kish. Mr. Sensenbrenner votes no.

2180 Mr. Coble?

2181 Mr. Coble. Aye.

2182 Ms. Kish. Mr. Coble votes aye.

2183 Mr. Gallegly?

2184 Mr. Gallegly. Aye.

2185 Ms. Kish. Mr. Gallegly votes aye.

2186 Mr. Goodlatte?

2187 [No response.]

2188 Ms. Kish. Mr. Lungren?

2189 Mr. Lungren. Aye.

2190 Ms. Kish. Mr. Lungren votes aye.

2191 Mr. Chabot?

2192 [No response.]

2193 Ms. Kish. Mr. Issa?

2194 [No response.]

2195 Ms. Kish. Mr. Pence?

2196 [No response.]

2197 Ms. Kish. Mr. Forbes?

2198 [No response.]
2199 Ms. Kish. Mr. King?
2200 [No response.]
2201 Ms. Kish. Mr. Franks?
2202 [No response.]
2203 Ms. Kish. Mr. Gohmert?
2204 [No response.]
2205 Ms. Kish. Mr. Jordan?
2206 [No response.]
2207 Ms. Kish. Mr. Poe?
2208 [No response.]
2209 Ms. Kish. Mr. Chaffetz?
2210 Mr. Chaffetz. No.
2211 Ms. Kish. Mr. Chaffetz votes no.
2212 Mr. Griffin?
2213 Mr. Griffin. Aye.
2214 Ms. Kish. Mr. Griffin votes aye.
2215 Mr. Marino?
2216 Mr. Marino. Yes.
2217 Ms. Kish. Mr. Marino votes yes.
2218 Mr. Gowdy?
2219 Mr. Gowdy. Yes.
2220 Ms. Kish. Mr. Gowdy votes yes.
2221 Mr. Ross?
2222 [No response.]

2223 Ms. Kish. Ms. Adams?
2224 Ms. Adams. Yes.
2225 Ms. Kish. Ms. Adams votes yes.
2226 Mr. Quayle?
2227 [No response.]
2228 Ms. Kish. Mr. Conyers?
2229 [No response.]
2230 Ms. Kish. Mr. Berman?
2231 [No response.]
2232 Ms. Kish. Mr. Nadler?
2233 Mr. Nadler. Aye.
2234 Ms. Kish. Mr. Nadler votes aye.
2235 Mr. Scott?
2236 Mr. Scott. No.
2237 Ms. Kish. Mr. Scott votes no.
2238 Mr. Watt?
2239 Mr. Watt. Aye.
2240 Ms. Kish. Mr. Watt votes aye.
2241 Ms. Lofgren?
2242 Ms. Lofgren. No.
2243 Ms. Kish. Ms. Lofgren votes no.
2244 Ms. Jackson Lee?
2245 [No response.]
2246 Ms. Kish. Ms. Waters?
2247 Ms. Waters. No.

2248 Ms. Kish. Ms. Waters votes no.
2249 Mr. Cohen?
2250 Mr. Cohen. Aye.
2251 Ms. Kish. Mr. Cohen votes aye.
2252 Mr. Johnson?
2253 Mr. Johnson. Aye.
2254 Ms. Kish. Mr. Johnson votes aye.
2255 Mr. Pierluisi?
2256 Mr. Pierluisi. Aye.
2257 Ms. Kish. Mr. Pierluisi votes aye.
2258 Mr. Quigley?
2259 Mr. Quigley. Aye.
2260 Ms. Kish. Mr. Quigley votes aye.
2261 Ms. Chu?
2262 Ms. Chu. Aye.
2263 Ms. Kish. Ms. Chu votes aye.
2264 Mr. Deutch?
2265 [No response.]
2266 Ms. Kish. Ms. Sanchez?
2267 [No response.]
2268 Chairman Smith. Are there other members who wish to
2269 vote on the manager's amendment?
2270 The gentlewoman from California, Ms. Waters?
2271 Ms. Waters. Aye.
2272 Ms. Kish. Ms. Waters votes aye.

2273 Chairman Smith. The gentlewoman from Texas, Ms.
2274 Jackson Lee?
2275 Mr. Jackson Lee. Aye.
2276 Ms. Kish. Mr. Jackson Lee votes aye.
2277 Chairman Smith. The gentleman from Virginia, Mr.
2278 Forbes?
2279 Mr. Forbes. Aye.
2280 Ms. Kish. Mr. Forbes votes aye.
2281 Chairman Smith. The gentleman from Michigan, the
2282 ranking member, votes?
2283 Mr. Conyers. Aye.
2284 Ms. Kish. Mr. Conyers votes aye.
2285 Chairman Smith. Good timing.
2286 The clerk will report.
2287 Ms. Kish. Mr. Chairman, 19 members voted aye; four
2288 members voted nay.
2289 Chairman Smith. A majority having voted in favor of
2290 the manager's amendment, the amendment is agreed to.
2291 We will now go to amendments to the underlying bill.
2292 And let me say to the members of the Judiciary Committee
2293 that after we consider the next amendment, which I believe
2294 will be offered by Mr. Cohen, we are going to stand in
2295 recess until 4 p.m. There are a number of members who have
2296 the functional equivalent of mandatory meetings with various
2297 members of the leadership. And we are going to respect

2298 their request.

2299 We will not say what the gentleman from New York
2300 asked.

2301 [Laughter.]

2302 Chairman Smith. The gentleman from Tennessee, Mr.
2303 Cohen, is recognized.

2304 Mr. Cohen. Thank you, Mr. Chairman.

2305 I have an amendment at the desk.

2306 Chairman Smith. The clerk will report the amendment.

2307 Ms. Kish. Amendment to H.R. 1981 offered by Mr.

2308 Cohen.

2309 Amend section 9 to read as follows: "Section 9,
2310 Sentencing Guidelines. Pursuant to its authority under
2311 section 994 of title 28 of the United States code" --

2312 Chairman Smith. Without objection, the amendment will
2313 be considered as read.

2314 [The information follows:]

2315

2316 Chairman Smith. And the gentleman from Tennessee is
2317 recognized to explain the amendment.

2318 Mr. Cohen. Thank you, Mr. Chairman.

2319 This amendment addresses section 9, which directs the
2320 U.S. Sentencing Commission to dramatically increase the
2321 sentencing guidelines for certain child sex trafficking and
2322 sexual abuse crimes.

2323 Specifically, the bill calls on the Sentencing
2324 Commission to create at eight-level increase for a range of
2325 offenses, including sex trafficking of minors, sexual
2326 exploitation of minors, and sexual abuse, as well as
2327 possession of child pornography. In some cases it calls for
2328 a 12-point increase.

2329 To be clear, as everybody has before, these are
2330 heinous crimes; they deserve harsh sentences. However, we
2331 have empowered the Sentencing Commission to determine the
2332 appropriate sentencing ranges. That is their function.

2333 I don't believe we should substitute our judgment for
2334 that of the commission, especially since these increases are
2335 not based on specific evidence that they are necessary.

2336 In addition, there is a concern on the part of many
2337 judges that some of the existing guidelines are already too
2338 high. They have gone up like 1560 percent in 20 years.

2339 For example, in the survey conducted by the Sentencing
2340 Commission last year, 71 percent of judges said the

2341 guidelines for possession of child pornography were too high
2342 and thought that the safety valve should be expanded to
2343 include possession.

2344 The child pornography guidelines have, as I said,
2345 increased 1567 percent -- if that's the same figure I used;
2346 if not, I would correct my remarks and reflect these as the
2347 ones that are correct -- since 1987 because of congressional
2348 mandates, which accounts for the frequent below-guideline
2349 sentences that we've seen in recent years.

2350 The Sentencing Commission has launched a review of the
2351 child pornography guidelines because of this high rate of
2352 downward departures, and I think we should wait for them to
2353 complete the report before we dictate our increases.

2354 I would hope that this would be an accepted amendment
2355 from both sides. And I appreciate the willingness of the
2356 chairman to entertain that possibility and work with me on
2357 this issue.

2358 This is not perfect legislation. It may not be, but
2359 with the manager's amendment, it represents strong
2360 improvements to the bill.

2361 I would like to thank the chairman and Ms. Wasserman
2362 Schultz for crafting this bill. It is an important subject
2363 to move forward.

2364 I had a dear friend, one of my best friends of my
2365 life. He was a singer-songwriter named Warren Zevon. He

2366 died in 2003, and child pornography was the thing that he
2367 would not cross a line for. He was so adamant that one of
2368 his best friends and one of his music cohorts for years,
2369 when he was accused of child pornography, he never talked to
2370 him again.

2371 Later when I was in the state senate, David Keith, a
2372 friend of his, became a friend of mine. And David Keith
2373 took child pornography up as an issue, and I always gave
2374 David the benefit of the doubt on the issues because of
2375 Warren, and I do that today for Lamar Smith.

2376 I look forward to continuing to work with the chairman
2377 on this bill, and I hope that he can accept this amendment
2378 on sentencing and leave it to the Sentencing Commission.

2379 Thank you. And I yield back.

2380 Mr. Scott. Will the gentleman yield?

2381 Mr. Cohen. Yes.

2382 Mr. Scott. Will gentleman yield?

2383 Mr. Cohen. Yes.

2384 Mr. Scott. Substantively, how does your amendment
2385 change what is in the bill, because the bill, as I read it,
2386 on page 8, line 12, requires an upward adjustment of
2387 sentencing guidelines, on line 12, "if appropriate."

2388 If the Sentencing Commission doesn't feel it's
2389 appropriate, nothing would happen. How does your amendment
2390 change that?

2391 Mr. Cohen. Well, I believe that -- the bill I think
2392 would be removed with amendment. It doesn't tell them that
2393 it would increase the additional penalty increase up to
2394 eight offense levels if appropriate. It doesn't tell them
2395 the offense levels.

2396 They still could increase it. Indeed, if they do,
2397 they are not told eight offense levels or 12, as in paren 2.

2398 I think we shouldn't be unnecessarily telling them
2399 what to do, and we are not. We are telling them "if it is
2400 appropriate." So it leaves it in their judgment, but it
2401 tells them to take a look at it.

2402 But as the bill, as stated before the amendment, it
2403 also tells them what action to take, and I think that is
2404 really going beyond.

2405 Mr. Scott. Well, if the gentleman would yield?

2406 Mr. Cohen. Yes, sir.

2407 Mr. Scott. I agree with you, but I think as a general
2408 matter, if the underlying bill says "if appropriate," that
2409 addresses many of the concerns you and I have -- maybe not
2410 all, but many.

2411 Chairman Smith. Does the gentleman from Tennessee
2412 yield back?

2413 Mr. Cohen. I would just simply say that if even if -
2414 that -- regardless if that's true, you would like this
2415 better than you would like it before, because it is still

2416 not the --

2417 Chairman Smith. Okay.

2418 Mr. Cohen. I yield back my time.

2419 Chairman Smith. Thank you, Mr. Cohen.

2420 Mr. Cohen, thank you both for offering this amendment

2421 and for your previous comments. They were appreciated.

2422 I do support the amendment.

2423 H.R. 1981 empowers Federal courts to protect minor
2424 witnesses and victims from intimidation and increases
2425 penalties associated with such acts. As currently written,
2426 the law lacks necessary safeguards to protect children from
2427 intimidation aimed at chilling a child's willingness to
2428 cooperate with law enforcement.

2429 This amendment revises the directive to the U.S.
2430 Sentencing Commission contained in section 9 of the bill to
2431 ensure that the courts have the ability to properly sentence
2432 defendants convicted of using physical violence against
2433 child witnesses to intimidate them. Intimidation of minor
2434 witnesses is a persistent problem in criminal prosecutions.

2435 The most notable example is in the case of Deandre
2436 Whitehead, a Baltimore man who was sentenced to 6 years in
2437 Federal prison in 2005 for ordering the killing of an 11-
2438 year-old girl who testified in his murder trial. The U.S.
2439 Attorney for the District of Maryland had to take over the
2440 case after the State prosecutor failed to secure a

2441 conviction in the State's intimidation case.

2442 Prosecutors have long known that children are the
2443 witnesses most vulnerable to intimidation and are easily put
2444 in fear by defendants.

2445 Current fines and contempt citations are inadequate to
2446 protect minor witnesses, especially in child sex abuse
2447 cases. By amending the sentencing guidelines associated
2448 with violence against child witnesses, this amendment
2449 provides Federal courts with the means to control such
2450 intimidation. Such penalties would be directed at the
2451 person convicted of using physical violence to intimidate
2452 witnesses.

2453 This amendment ensures tough penalties for those who
2454 intimidate the most vulnerable witnesses, children.

2455 I thank our colleague, Congressman Cohen, for offering
2456 this amendment and working with us on this legislation.

2457 I urge my colleagues to support the amendment.

2458 Are there any other members who wish to be heard on
2459 this amendment?

2460 If not, the vote is on the amendment.

2461 All in favor say aye.

2462 [A chorus of ayes.]

2463 Chairman Smith. Opposed, no.

2464 The amendment is agreed to.

2465 The Judiciary Committee will now stand in recess until

2466 4 o'clock and look forward to seeing everybody back then.

2467 [Recess.]

2468 Chairman Smith. The Judiciary Committee will come to
2469 order.

2470 And the clerk will call the roll.

2471 Ms. Kish. Mr. Smith?

2472 Chairman Smith. Present.

2473 Ms. Kish. Mr. Sensenbrenner?

2474 Mr. Sensenbrenner. Here.

2475 Ms. Kish. Mr. Coble?

2476 Mr. Gallegly?

2477 Mr. Goodlatte?

2478 Mr. Lungren?

2479 Mr. Chabot?

2480 Mr. Issa?

2481 Mr. Pence?

2482 Mr. Forbes?

2483 Mr. King?

2484 Mr. Franks?

2485 Mr. Gohmert?

2486 Mr. Jordan?

2487 Mr. Poe?

2488 Mr. Chaffetz?

2489 Mr. Chaffetz. Here.

2490 Ms. Kish. Mr. Griffin?

2491 Mr. Marino?
2492 Mr. Marino. Here.
2493 Ms. Kish. Mr. Gowdy?
2494 Mr. Ross?
2495 Ms. Adams?
2496 Mr. Quayle?
2497 Mr. Conyers?
2498 Mr. Berman?
2499 Mr. Nadler?
2500 Mr. Scott?
2501 Mr. Scott. Here.
2502 Ms. Kish. Mr. Watt?
2503 Ms. Lofgren?
2504 Ms. Lofgren. Here.
2505 Ms. Kish. Ms. Jackson Lee?
2506 Ms. Waters?
2507 Mr. Cohen?
2508 Mr. Johnson?
2509 Mr. Pierluisi?
2510 Mr. Quigley?
2511 Ms. Chu?
2512 Mr. Deutch?
2513 Ms. Sanchez?
2514 Mr. Chabot?
2515 Mr. Chabot. Here.

2516 Chairman Smith. The gentleman from Illinois, Mr.
2517 Quigley?

2518 Mr. Quigley. Here.

2519 Ms. Kish. Ms. Adams?

2520 Ms. Adams. Here.

2521 Chairman Smith. I appreciate the members who have
2522 returned in a prompt fashion. I do know there are still
2523 ongoing meetings going on, which is to say Members meetings.
2524 And I think what we will do is recess until tomorrow morning
2525 at 11:00 and get a fresh start. And we will continue our
2526 markup of H.R. 1981, then.

2527 So we will stand in recess until 11 o'clock tomorrow
2528 morning. The individuals who are here now will get extra
2529 credit for being here, but we stand in recess.

2530 [Whereupon, at 4:16 p.m., the committee recessed, to
2531 reconvene at 11:00 a.m., Thursday, July 28, 2011.]