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2 MARKUP OF H.R. 400, THE "WAR
3 PROFITEERING PREVENTION ACT OF 2007";
4 H.R. 2102, THE "FREE FLOW OF
5 INFORMATION ACT OF 2007"; H.R. 3013,
6 THE "ATTORNEY-CLIENT PRIVILEGE
7 PROTECTION ACT OF 2007"; H.R. 2740,
8 THE "MEJA EXPANSION AND ENFORCEMENT
9 ACT OF 2007"; H.R. 1119, THE "PURPLE
10 HEART FAMILY EQUITY ACT OF 2007"; AND
11 H.R. 1071, THE "SEPTEMBER 11 FAMILY
12 HUMANITARIAN RELIEF AND PATRIOTISM ACT"
13 Wednesday, August 1, 2007
14 House of Representatives,
15 Committee on the Judiciary,
16 Washington, D.C.

17 The committee met, pursuant to call, at 10:29 a.m., in Room
18 2131, Rayburn House Office Building, Hon. John Conyers
19 [chairman of the committee] presiding.

20 Present: Representatives Conyers, Berman, Boucher,
21 Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Delahunt,
22 Sanchez, Cohen, Johnson, Sutton, Sherman, Weiner, Schiff,
23 Davis, Wasserman Schultz, Ellison, Baldwin, Smith, Coble,
24 Gallegly, Goodlatte, Chabot, Lungren, Cannon, Keller, Issa,
25 Pence, Forbes, King, Feeney, Franks, Gohmert, and Jordan.

26 Chairman Conyers. [Presiding.] Good morning,
27 subcommittee. The committee will come to order.

28 We have a pretty large agenda: War Profiteering
29 Prevention Act; Free Flow of Information; Attorney-Client
30 Privilege Protection Act; MEJA Expansion and Enforcement Act;
31 Purple Heart Family Equity Act.

32 And on the last measure that was before us, I would like
33 to yield to the gentlelady from California, Subcommittee
34 Chair Zoe Lofgren.

35 Ms. Lofgren. Mr. Chairman, I am aware that the ranking
36 member of the Immigration Subcommittee has expressed an
37 interest in receiving additional time on this measure and
38 that there is going to be a discussion among myself, yourself
39 and the ranking member about immigration generally, so I
40 would ask that that be pulled at this time and be part of
41 that discussion.

42 Chairman Conyers. Thank you.

43 Mr. Smith?

44 Mr. Smith. Mr. Chairman, I don't have any objection to
45 that bill being removed from the agenda. And I have
46 consulted with the ranking member, Mr. King, and he concurs,
47 as well.

48 Chairman Conyers. Thank you. I thank you all.

49 And pursuant to notice, I now call up H.R. 400, War
50 Profiteering Prevention Act, for purposes of markup.

51 The clerk will report the bill.

52 The Clerk. "H.R. 400, a bill to prohibit profiteering
53 and fraud relating to military action, relief, and
54 reconstruction efforts, and for other purposes—"

55 [The bill follows:]

56 ***** INSERT *****

57 Chairman Conyers. Without objection, the bill will be
58 considered as read and open for amendment at any point.

59 And I would choose chairman of the Subcommittee on
60 Crime, the gentleman from Virginia, Bobby Scott, for an
61 opening statement describing the bill that came from his
62 subcommittee.

63 Mr. Scott. Thank you, Mr. Chairman.

64 Mr. Chairman, the Subcommittee on Crime, Terrorism and
65 Homeland Security reports favorably the bill H.R. 400 and
66 moves its favorable recommendation to the full House. And I
67 want to thank you, Mr. Chairman, for holding today's markup
68 for this very important bill.

69 As evidenced at the hearing on the Subcommittee on
70 Crime, Terrorism and Homeland Security conducted on war
71 profiteering, reconstruction fraud has run rampant during the
72 engagement of U.S. forces in Iraq and Afghanistan. The
73 United States has devoted more than \$50 billion to relief and
74 reconstruction activities in Iraq and Afghanistan. Millions
75 of these dollars are just totally unaccounted for due to
76 fraud, and billions may have been lost to waste or other
77 misconduct.

78 Inspectors general have opened hundreds of
79 investigations into fraud, waste and abuse in Iraq, Kuwait
80 and Afghanistan, involving kickbacks, bid rigging,
81 embezzlement, and fraudulent overbilling. Considering the

82 vast amount of evidence and investigations, there have been
83 relatively few prosecutions for reconstruction fraud.

84 The inspector general for Iraq reconstruction has more
85 than 70 open and active investigations in contracting fraud
86 and abuse. In addition, private whistleblowers have filed
87 numerous civil claims involving Iraq fraud under the False
88 Claims Act. Despite the breadth of all of these
89 investigations and cases, the Justice Department has chosen
90 to pursue a relatively small number of cases.

91 To enhance DOJ prosecution on reconstruction fraud, the
92 gentleman from Hawaii, Mr. Abercrombie, introduced H.R. 400,
93 the War Profiteering Prevention Act of 2007. Although there
94 are anti-fraud laws to protect against the waste of U.S. tax
95 dollars at home, no law expressly prohibits war profiteering
96 or expressly confers jurisdiction of U.S. federal court to
97 hear fraud cases occurring outside the normal bounds of the
98 U.S. criminal code.

99 To this end, H.R. 400 would criminalize overcharging
100 taxpayers to defraud and to profit excessively from a war,
101 military action or reconstruction effort. This crime would
102 be a felony, subject to criminal penalties up to 20 years in
103 prison, and fines up to \$1 million or twice the illegal gross
104 profits of the crime, whichever is higher.

105 The bill also prohibits false statements connected with
106 the provision of goods and services in connection with the war

107 or reconstruction effort. This crime would also be a felony,
108 subject to criminal penalties of up to 10 years in prison,
109 and fines of up to \$1 million or twice the illegal gross
110 profits of the crime, whichever is higher.

111 H.R. 400 sends a clear message: All contracting fraud,
112 whether it occurs in Iraq or elsewhere overseas, for
113 exorbitant gain is not only unacceptable and reprehensible,
114 it is illegal.

115 In its current form, the bill is quite good, but could
116 be made clearer, and shortly I will offer a substitute
117 amendment, along with the ranking member, Mr. Forbes, to make
118 some additional refinements to the bill.

119 With that, Mr. Chairman, I yield back the balance of my
120 time.

121 Chairman Conyers. I thank the gentleman.

122 And I recognize now the distinguished ranking member
123 from Texas, Lamar Smith.

124 Mr. Smith. Thank you, Mr. Chairman.

125 We all agree that fraud against the United States in the
126 defense industry or in relief of reconstruction activities
127 undermines our national security. Such schemes directly harm
128 our military, the success of the mission, and our country's
129 global war against terrorism.

130 Cases of fraud related to defense operations have
131 unfortunately been present throughout our nation's history.

132 They are not unique to our current national efforts. Many
133 successful prosecutions have been brought by the Justice
134 Department so far, and it is likely that more will be brought
135 in the future.

136 I understand that Crime Subcommittee Chairman Scott and
137 Ranking Member Forbes have reached an agreement on a
138 manager's amendment to H.R. 400, which addresses concerns
139 raised by the Department of Justice. I support this
140 legislation with the changes contained in the manager's
141 amendment.

142 And, Mr. Chairman, I will yield to the ranking member of
143 the Crime Subcommittee, the gentleman from Virginia, Mr.
144 Forbes.

145 Mr. Forbes. Thank you, Ranking Member Smith. And I
146 want to thank Crime Subcommittee Chairman Scott for his
147 cooperation in this manner.

148 The manager's amendment first revises the scope of the
149 new criminal offense to address fraud committed against the
150 United States or provisional authority; secondly, restricts
151 the scope of the false statement offenses to matters
152 involving such fraud; and, third, adds the new criminal
153 offenses of money laundering and RICO wiretapping predicate.

154 And I think it is always important that we keep the
155 scheme of these things in perspective. And the testimony
156 that we had at our hearing showed overwhelmingly that, in the

157 scheme of all the expenditures in the war, that the amount of
158 fraud and abuse was a very small percentage and that such
159 actions as the ranking member mentioned have been prevalent
160 in all our wars throughout history. However, even a small
161 percentage is unacceptable.

162 And so I want to thank Chairman Conyers and Ranking
163 Member Smith for their support and commitment to addressing
164 the Justice Department's concerns and the modifications that
165 we negotiated to make sure that this bill didn't actually
166 work unintended consequences that make it more difficult to
167 prosecute war profiteering and fraud.

168 And I yield back to Ranking Member Smith.

169 Mr. Cannon. Would the gentleman yield?

170 Mr. Forbes. I will be happy to yield.

171 Mr. Smith. And I will yield to the gentleman from Utah,

172 Mr. Cannon.

173 Mr. Cannon. War profiteering is a horrible thing, but
174 could someone who has been engaged with the bill talk about
175 what it means to profit or for "materially overvalues"? What
176 does that mean? In a war situation, you often have distorted
177 markets. Do you use a market price for that? Or how is that
178 going to be established under this bill?

179 Thank you, Mr. Ranking Member. I yield back.

180 Mr. Scott. Would the gentleman yield?

181 Mr. Smith. I would be happy to yield to the gentleman

182 from Virginia, Mr. Scott.

183 Mr. Scott. The definition in the substitute clarifies
184 the definition of war profiteering and says, "In any
185 contract, someone knowingly executes or attempts to execute a
186 scheme to defraud the United States or materially overvalues
187 any good or services." That would be a matter of fact to be
188 proved beyond a reasonable doubt that it is materially
189 overvalued with the intent to defraud.

190 That is a very difficult standard to achieve, but you
191 know when you see it, and some of these contracts can
192 actually prove that standard. But when you materially
193 overvalue with the intent to defraud is not going to be an
194 easy burden to prove.

195 Mr. Cannon. If the gentleman would yield, I thank the
196 gentleman. I appreciate that clarification.

197 Mr. Smith. Thank you, Mr. Chairman. I yield back.

198 Chairman Conyers. Thank you.

199 All other members' statements will be included in the
200 record.

201 Do I understand that the chairman of the subcommittee
202 has a manager's amendment?

203 Mr. Scott. I have an amendment at the desk, Mr.
204 Chairman.

205 Chairman Conyers. All right. The clerk will report.

206 The Clerk. "Amendment in the nature of a substitute to

207 H.R. 400, offered by Mr. Scott of Virginia and Mr. Forbes of
208 Virginia. Strike all after the enacting clause—"

209 [The amendment by Mr. Scott and Mr. Forbes follows:]

210 ***** INSERT *****

211 Mr. Scott. Mr. Chairman, I ask unanimous consent that
212 the amendment be considered as read.

213 Chairman Conyers. So ordered.

214 The gentleman is recognized.

215 Mr. Scott. Thank you, Mr. Chairman.

216 Mr. Chairman, the substitute amendment is offered
217 jointly, as we have indicated, with the ranking member to
218 make changes in the underlying bill.

219 First, it begins by clarifying that the criminal
220 provision prohibition applies not only to a contract with the
221 federal government overseas, but also with any provisional
222 authority. One person who defrauded the authority was let
223 off because defrauding the authority was technically not
224 defrauding the United States government. We want that fraud
225 to be covered.

226 We clarify the definition of excessive profits, as we
227 have described with the gentleman from Utah. And as the
228 ranking member mentioned, it makes the war profiteering as a
229 predicate to a RICO and money laundering statute.

230 Mr. Chairman, I would hope that we would adopt the
231 amendment and pass the bill.

232 Chairman Conyers. I thank the gentleman.

233 Does the gentleman from Virginia seek recognition, Mr.
234 Forbes?

235 Mr. Forbes. -subcommittee, Congressman Scott, for his

236 work and cooperating with us, and also to thank DOJ and
237 staffs from both the majority and the minority for their hard
238 work in making sure this language was tightened. And I hope
239 we will adopt the amendment.

240 Chairman Conyers. I thank the gentleman.

241 Ms. Jackson Lee. Mr. Chairman?

242 Chairman Conyers. Any other discussion about this
243 amendment before we get ready to go to the floor?

244 Ms. Jackson Lee. Mr. Chairman?

245 Chairman Conyers. Who seeks—Sheila Jackson Lee, yes.

246 Ms. Jackson Lee. Mr. Chairman, let me just quickly say
247 for the record, I think it is important to emphasize the
248 vitalness of this. Many of us may have our opinions about
249 the war in Iraq and its lack of success, but certainly
250 reconstruction is crucial. And I think it is important to
251 note the billions of dollars that have been lost or misplaced
252 through either contractual fraud or the inability to use
253 effectively those reconstruction dollars.

254 My question is to the proponents of this legislation:
255 Does the action accrue or exist during wartime, and is it to
256 be prosecuted in this instance simultaneously? Or is the
257 language such that the prosecution would be after the
258 completion of the war?

259 Mr. Scott. If the gentlelady would yield.

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

261 Mr. Scott. You don't have to wait until the end of the
262 war to prosecute.

263 Ms. Jackson Lee. So it is simultaneously or existing as
264 it is perpetrated and discovered?

265 Mr. Scott. Right.

266 Ms. Jackson Lee. Let me thank the gentleman for that
267 clarification. I think it is important. The Iraq war is
268 wracked with fraud on many of these instances, and I think
269 this is important legislation. I yield back.

270 Chairman Conyers. Thank you.

271 The question is on the amendment in the nature of a
272 manager's amendment.

273 All those in favor will say, "Aye."

274 All those opposed, say, "No."

275 Ayes have it, and the amendment is agreed to.

276 Are there any other amendments?

277 If not, we have a reporting quorum, of course. And the
278 question is on reporting the bill as amended favorably to the
279 House.

280 All those in favor will signify by saying, "Aye."

281 Those opposed, "No."

282 The ayes have it. And so the bill is ordered reported
283 favorably to the House.

284 Without objection, the bill will be reported favorably
285 to the House in the form of a single amendment in the nature

286 of a substitute incorporating the amendment adopted here
287 today.

288 Without objection, the staff is directed to make any
289 technical and conforming changes, and all members will have 2
290 days as provided by House rules to submit additional views.

291 So we have one bill out of the way. We have two votes
292 on the floor. The committee will stand in recess until we
293 have disposed of the two votes on the floor.

294 Thank you very much.

295 [Recess.]

296 Chairman Conyers. The committee will come to order.

297 And pursuant to notice, I call up H.R. 2102, the Free
298 Flow of Information Act, for purposes of markup and ask the
299 clerk to report the bill.

300 The Clerk. "H.R. 2102, a bill to maintain the free flow
301 of information to the public by providing conditions for the
302 federally compelled disclosure of information by certain
303 persons connected with the news media—"

304 [The bill follows:]

305 ***** INSERT *****

306 Chairman Conyers. Without objection, the bill will be
307 considered as read, open for amendment at any point.

308 In recent years, the press has been under assault as
309 reporters by increasingly being imprisoned for obstruction of
310 justice and other charges. According to the Washington Post
311 editorial this morning, over 40 reporters have been hauled
312 into federal court and questioned about their sources, notes,
313 and reports in civil and criminal cases.

314 There are many causes of these attacks, including an
315 increasingly consolidated media, abuse of positions of power
316 to intimidate members of the press, and co-opting of the
317 media as an investigative arm of the government.

318 Today we are reclaiming one of the most fundamental
319 principles enshrined by the founding fathers in the First
320 Amendment of the Constitution. Freedom of the press is a
321 cornerstone of our democracy. Without it, we cannot have a
322 well-informed electorate and a government that truly
323 represents the will of the people.

324 The measure before us, the Free Flow of Information Act,
325 helps restore the independence of the press so that it can
326 perform its essential duty of getting information out to the
327 public. This bill will ensure that members of the press are
328 free to utilize confidential sources without causing harm to
329 themselves or their sources by providing a qualified
330 privilege that prevents a reporter's source material from

331 being revealed, except under certain narrow circumstances.

332 H.R. 2102 balances the public's right to know against
333 the legitimate and important interests that society has in
334 maintaining public safety. After the hearing we had on this
335 measure in the committee last month, the sponsors of the bill
336 have worked hard to accommodate some of the concerns that
337 they heard and that were raised.

338 The result as reflected in the amendment in the nature
339 of a substitute that will be shortly offered by Mr. Boucher
340 improves the bill significantly; that amendment makes several
341 significant changes to accommodate the concerns of our
342 national security. And I will invite him to identify those
343 three major changes.

344 I also commend Mr. Pence for his act of leadership in
345 helping bring us to this point.

346 And so I will now yield to Lamar Smith, the ranking
347 member of the Judiciary Committee.

348 Mr. Smith. Thank you, Mr. Chairman.

349 First of all, I want to thank the primary authors of
350 H.R. 2102, Mr. Boucher and Mr. Pence, for working with the
351 Department of Justice, interested groups, and members to
352 develop alternative language to address the legitimate
353 concerns of industry and law enforcement officials.

354 On a personal note, I want to thank the gentleman from
355 Indiana, Mr. Pence. And I want him to know that I very much

356 appreciate his patience as he has sought to narrow
357 differences among the various stakeholders in the debate.
358 And I know that patience continues, and I ask for continued
359 patience as we go forward.

360 A free press strengthens democracy. In our nation, the
361 press is guaranteed their freedom in the First Amendment of
362 the Constitution. However, our nation cannot exist if we do
363 not have the ability to protect sensitive or confidential
364 information. Sometimes information related to our national
365 security, a defendant's criminal case, or a company's trade
366 secrets or personal customer information should, in fact,
367 remain confidential.

368 And while H.R. 2102 addresses some concerns, the
369 legislation still has its critics: members of the private
370 sector and law enforcement who believe it diminishes legal
371 rights, public safety, and national security. Also,
372 protections for the mainstream press could extend to tabloids
373 that thrive on gossip and misinformation. We must ensure
374 that whistleblowers can expose crimes, waste and wrongdoing,
375 but we should not create a protection so broad that those who
376 would destroy people's reputations, businesses and privacy
377 can hide behind it.

378 The federal government defends our national security, so
379 we must weigh the benefits of a reporter's privilege with the
380 problems it may cause for those who protect our country.

381 Despite efforts to accommodate their concerns, the Justice
382 Department opposes the bill. They believe the stakes are too
383 high in a post-9/11 world to support the Free Flow of
384 Information Act as now written.

385 For example, they have pointed out that the exceptions
386 language fails to address misconduct that the department
387 confronts on a daily basis. To illustrate, neither the bill
388 nor the manager's amendment allows DOJ to obtain the identity
389 of a new source with knowledge of a child prostitution ring,
390 an online purveyor of pornography, gang violence, or alien
391 smuggling. And the new text governing source disclosure
392 exceptions only addresses prospective events.

393 The department may be able to acquire information about
394 a source's identity to prevent a terrorist attack on the U.S.
395 Capitol, but the language does not help if an attack on the
396 U.S. Capitol has already occurred and the Department of
397 Justice is searching for plotters or witnesses with knowledge
398 about the event or future events.

399 The language does not apply to the imminent attack on
400 soldiers in Iraq, while it does cover imminent attack in
401 America. Shouldn't we also cover our soldiers, embassies and
402 citizens in other countries? The current language does not
403 apply to an imminent attack on our allies.

404 Again, we have a responsibility to protect our allies
405 when possible. Shouldn't we consider language that would

406 include threats to our allies? The current bill provides an
407 exception to trade secrets, but not to national security
408 secrets. Shouldn't we work to ensure that trade secrets are
409 not elevated above our national security?

410 The current bill does not cover criminal investigations
411 after the attack. If there is a terrorist attack against
412 Americans that has already occurred, the imminent threat no
413 longer exist, so law enforcement officials cannot compel a
414 reporter's source of information. Shouldn't we ensure that
415 law enforcement officials have the necessary tools they need
416 to investigate crimes and further protect the American
417 people?

418 Despite the changes contained in the manager's
419 amendment, I am concerned that the department will be
420 constrained as it goes about the business of conducting
421 investigations and prosecuting criminals, but DOJ should do
422 more than just complain. They should negotiate in good faith
423 and provide the committee with language that addresses their
424 concerns.

425 And I might say here that we have been trying to get the
426 Department of Justice over the course of the last couple of
427 weeks to suggest specific language to us that we could
428 incorporate in the bill that would address their concerns.
429 And I would hope in the future the Department of Justice will
430 be more forthcoming and more willing to try to help us amend

431 or modify the bill to satisfy their needs, rather than just
432 say there is no way that we can improve the bill.

433 Mr. Chairman, while this is a close call, I cannot vote
434 for H.R. 2102 at this time. I simply believe we must err on
435 the side of caution and not support legislation that could
436 make it harder to apprehend criminals and terrorists or deter
437 their activities.

438 The Department of Justice can do a much better job of
439 working with the committee to improve the bill between now
440 and floor consideration of H.R. 2102. Progress was made in
441 the manager's amendment, and we should continue to improve
442 this bill before we go to the House floor.

443 I thank you, Mr. Chairman.

444 Chairman Conyers. Thank you very much.

445 The chair would now recognize for an opening statement
446 the distinguished gentleman from Virginia, Rick Boucher.

447 Mr. Boucher. Well, thank you very much, Mr. Chairman.
448 And I want to express my appreciation to you, also, for your
449 co-authorship of the bill before us and for the excellent
450 work that both you and your staff have done in bringing us to
451 the point of today's markup.

452 I also want to express the appreciation to the 11 other
453 members of this committee, who on a bipartisan basis are co-
454 sponsoring the bill. And I want to commend the outstanding
455 work of our committee colleague, the gentleman from Indiana,

456 Mr. Pence, who has tremendous personal time and effort to
457 advancing this cause.

458 We are joined by 43 other House co-sponsors who, on a
459 bipartisan basis, believe that the time has arrived for
460 Congress to extend to journalists a privilege to refrain from
461 revealing their confidential information sources in federal
462 court proceedings. The privilege our bill provides is
463 similar to those that are currently in effect by statute in
464 32 states and in the District of Columbia.

465 The ability to assure confidentiality to people who
466 provide information is effective to and is at the very core
467 of news gathering and dissemination, and that is particularly
468 true on highly sensitive subjects of public importance.
469 Typically, the best information about corruption in
470 government or about misdeeds within a large organization,
471 such as a major corporation or a large public charity, will
472 come from someone on the inside who senses a public
473 responsibility to pick up a telephone and to call a reporter
474 in order to bring that sensitive and critical information to
475 public scrutiny.

476 But that person has a lot to lose if his or her identity
477 becomes known. In many cases, the person who is responsible
478 for the corruption or the misdeeds is the very person to whom
479 that source reports. And if the source's identity is
480 revealed, the source can be punished by dismissal or by other

481 subtle but very painful forms of retaliation by the person
482 who is responsible for the misconduct.

483 And so in the most sensitive cases, it is only by
484 assuring anonymity to the inside person that this information
485 will be revealed and the public will be given an opportunity
486 to act upon on it. And by promoting that ability, this
487 legislation promotes the public's right to know.

488 This is really less about news organizations and
489 promoting the effective news gathering than it is promoting
490 the public's right to know. And while the legislation has
491 been endorsed by major news organizations—and we are grateful
492 for those endorsements—what Mr. Pence and I are really doing
493 is protecting the public's right to know.

494 In fact, I have long thought that the ability to protect
495 the confidentiality of sources is so efficient to news
496 gathering and reporting and so important to revealing these
497 sensitive areas for public scrutiny that I have always
498 thought the First Amendment to the Constitution should be
499 interpreted to provide this privilege. But to date, the
500 First Amendment has not been so interpreted.

501 And so, in my view, the time has come, given the
502 increasing use of subpoenas in recent years directed to
503 reporters with requirements that they reveal their
504 confidential sources that we should adopt a statute similar
505 to what exists now in the majority of states, providing this

506 kind of privilege for federal court proceedings.

507 While extending a broad privilege, we have included some
508 exceptions in our legislation for instances in which source
509 information can be disclosed where a strong public interest
510 compels the disclosure. The exceptions are: to prevent an
511 act of terrorism or other act of imminent and actual harm to
512 national security; to prevent imminent death or significant
513 bodily injury; or to determine who has disclosed trade
514 secrets or personal health or financial information in
515 violation of law.

516 An exception to the privilege will only apply if the
517 court performs a balancing test and determines that the
518 public interest in compelled disclosure is greater in the
519 public interest in protecting news gathering and news
520 dissemination. The bill is a carefully balanced measure that
521 will provide a needed privilege, and its passage will protect
522 the public's right to know.

523 I again want to thank Mr. Pence for his longstanding
524 effective advocacy of this measure. It has been a privilege
525 and pleasure working with him, as we have brought this bill
526 to markup this morning.

527 And I point out for the benefit of members that numerous
528 journalistic organizations ranging from the association of
529 newspaper publishers, to the National Association of
530 Broadcasters, to the Society of Professional Journalists have

531 urged passage of this bill.

532 Your assistance, Chairman Conyers, has truly been
533 invaluable, and I want to thank you and your excellent staff
534 for working with us and for your very helpful suggestions, as
535 we have structured the measure to be considered this morning.

536 I will shortly have a manager's amendment for
537 consideration by the committee. And pending that, I yield
538 back the balance of my time.

539 Chairman Conyers. I thank the gentleman.

540 The chair recognizes, before we go to the floor to vote
541 on a point of order, the distinguished gentleman from
542 Indiana, Mike Pence, the chief Republican sponsor of this
543 bill, and the sponsor of similar legislation in the last
544 Congress.

545 Mr. Pence. Thank you, Chairman. I would ask unanimous
546 consent that my entire statement be included in the record.

547 Chairman Conyers. Without objection.

548 Mr. Pence. And I would like to reiterate the previous
549 comments made. Today's markup is an important step forward
550 in the drive to enact the Free Flow of Information Act.

551 I am especially grateful, Mr. Chairman, for your
552 leadership and, as the gentleman from Virginia simply said,
553 your co-authorship of this legislation.

554 And as I have been throughout our two-and-a-half-year
555 partnership, allow me to return the compliments to my partner

556 in this endeavor, the gentleman from Virginia, Congressman
557 Rick Boucher, who is the author of this year's version of the
558 bill. He has demonstrated that, while I intended this bill
559 to be the Pence-Boucher bill, the American people chose
560 otherwise, and I think it was greatly to the benefit into
561 bringing us to this point that it became the Boucher-Pence
562 bill, and I commend the gentleman for his extraordinary
563 leadership bringing us to this day.

564 I also would mention Congressman Howard Coble, original
565 co-sponsor, a senior member of this committee. And while he
566 will not be able to support the legislation today, let me say
567 how humbled and grateful I am for the spirit and engagement
568 that the ranking Republican member has brought to this issue.
569 And I very much look forward to continuing to work with him.

570 It would be Colonel Robert McCormick, the grandson of
571 the founder of the Chicago Tribune, who said, "The newspaper
572 is an institution developed by modern civilization to present
573 the news of the day and to furnish that check upon government
574 which no Constitution has ever been able to provide." As a
575 conservative who believes in limited government, I know the
576 only check on government power in real time is a free and
577 independent press.

578 The Free Flow of Information Act brought by Mr. Boucher
579 and myself today is not about protecting reports; it is about
580 protecting the public's right to know. Our founders

581 enshrined this principle in the First Amendment, writing and
582 adopting that Congress shall make no law abridging the
583 freedom of speech or of the press. Today we are heeding
584 those words and taking this important step toward repairing
585 what I believe has become a tear in the fabric of the First
586 Amendment freedom of the press.

587 Not long ago, a reporter's assurance of confidentiality
588 was unquestionable. The assurance led to sources who
589 provided information to reporters that brought forward
590 important news of great consequence to the nation. The
591 Watergate scandal comes to mind, where government corruption
592 and misdeeds were brought to light by the dogged persistence
593 of a free and independent press.

594 However, today the press cannot make the same assurance
595 to confidentiality of sources, and we face a real danger that
596 there may never be another Deep Throat. In recent years,
597 reporters like Judith Miller have been jailed, Jim Taricani
598 placed on house arrest, Mark Fainaru-Wada and Lance Williams
599 threatened with jail. The protections provided by the Free
600 Flow of Information Act I believe are necessary so that
601 members of the media can bring forward information to the
602 American public without fear of retribution or prosecution
603 and, more importantly, that sources will continue to come
604 forward.

605 Compelling reporters to testify—and in particular,

606 compelling them to reveal the identity of their confidential
607 sources—is a detriment to the public interest. Without the
608 promise of confidentiality, many important conduits of
609 information about our government will simply be shut down,
610 which is not to say, Mr. Chairman, that the press is never
611 without fault or always gets the story right.

612 James Madison wrote famously, "To the press alone,
613 checkered as it is with abuses, the world is indebted for all
614 the triumphs which have been gained by reason and humanity
615 over error and oppression." As a conservative, I believe the
616 concentration of power should always be subject to great
617 scrutiny, and integrity in government is not a Democrat or
618 Republican issue. Corruption cannot be laid at the feet of
619 any one party.

620 It is imperative that we preserve, therefore, the
621 transparency and integrity, however flawed, however
622 occasionally failing in the press, that we preserve the
623 integrity and transparency of American government. And the
624 only way to do that is through a free and independent press.

625 A few quick notes. Number one, it is important to note
626 this bill is not a radical step. Thirty-two states and the
627 District of Columbia has various statutes that protect
628 reporters from being compelled to testify; 17 states have
629 protections for reporters as a result of judicial decisions.

630 The Free Flow of Information Act has been carefully

631 drafted. It puts forth a qualified privilege, which I
632 believe strikes an appropriate balance between the public's
633 need for information and the fair administration of justice.
634 As Mr. Boucher just described, the privilege is not absolute
635 or unlimited, and I cannot add to his very careful and
636 authoritative description of the exceptions in this
637 legislation. The manager's amendment, also, that will be
638 considered later provides further clarification to these
639 exceptions, and I believe it greatly improves the bill.

640 It is also important to note what the bill does not do.
641 It does not give reporters a license to break the law in the
642 name of gathering news. It doesn't give them the right to
643 interfere with police or prosecutor who are trying to prevent
644 crimes. It leaves laws on classified information unchanged.
645 It simply gives journalists certain rights and abilities to
646 seek sources and report appropriate information without fear
647 of intimidation or imprisonment.

648 With such a qualified privilege, reporters will be
649 ensured the ability to get the American people the
650 information they need to make choices as an informed
651 electorate. A free and independent press is the only agency
652 in America that has complete freedom to hold government
653 accountable, and I heartily support it.

654 Let me conclude again by commending the gentleman from
655 Virginia, Mr. Boucher, for his extraordinary leadership and

656 the great spirit of partnership that he is brought to this
657 project during the course of this Congress and the last.

658 And, again, to commend the chairman of this committee
659 for moving this legislation so expeditiously.

660 I couldn't help in my devotions, Mr. Chairman, this
661 morning to light on a Bible verse that I would close with
662 today, one that was greatly cherished by our founders. From
663 the book of Galatians, it simply writes, "It is for freedom
664 that Christ has set us free. Stand firm then, and do not let
665 yourselves be burdened again by the yoke of slavery."

666 It was for freedom, Mr. Chairman, our founders enshrined
667 the freedom of the press in the First Amendment. I humbly
668 submit that Congress should seize this legislative moment to
669 stand firm and not let ourselves be burdened by any yoke or
670 any action that infringes on our fundamental freedoms as
671 Americans.

672 I urge my colleagues to support this bill and join me in
673 what I hope will be a strong bipartisan vote to renew our
674 commitment to America's free and independent press.

675 And I yield back.

676 [The statement of Mr. Pence follows:]

677 ***** COMMITTEE INSERT *****

678 Chairman Conyers. The chair thanks the gentleman, one
679 of the finest conservative statements that a progressive's
680 ears have ever heard.

681 Without objection, other members' statements will be
682 included in the record.

683 And, without objection, the chair is authorized to
684 declare a recess, which I declare at this moment.

685 [Recess.]

686 Chairman Conyers. The committee will come to order.

687 The chair recognizes the gentleman from Virginia, Mr.
688 Boucher.

689 Mr. Boucher. Thank you very much, Mr. Chairman.

690 I have an amendment at the desk. It is the manager's
691 amendment.

692 Chairman Conyers. The clerk will report.

693 The Clerk. "Amendment in the nature of a substitute to
694 H.R. 2102, offered by Mr. Boucher of Virginia—"

695 [The amendment by Mr. Boucher follows:]

696 ***** INSERT *****

697 Mr. Boucher. Mr. Chairman, I ask unanimous consent that
698 the amendment be considered as read.

699 Chairman Conyers. Without objection, so ordered.

700 The amendment was delivered, and every member has one.
701 And if anyone doesn't, please indicate.

702 And the gentleman is recognized in support of his
703 amendment.

704 Mr. Boucher. Thank you very much, Mr. Chairman.

705 We have at least one member indicating that—two who do
706 not have copies of the amendment. And we will try to correct
707 that very quickly.

708 Chairman Conyers. They are in the member's packet.

709 Mr. Boucher. Thank you very much, Mr. Chairman.

710 This manager's amendment makes a number of changes that
711 were suggested by members of the committee, either during the
712 course of our hearing on the bill in June or between the time
713 of the hearing and today. And I will take a few moments to
714 highlight the changes that the amendment makes.

715 The amendment clarifies that the federal shield law will
716 apply only in cases that arise in federal courts under
717 federal law. It will not apply in cases that are litigated
718 in federal court, where jurisdiction is based on diversity of
719 citizenship, in which instance state law applies. And in
720 such a case, it would be any applicable state shield law that
721 would apply and not the statute we have under consideration

722 today.

723 The amendment further clarifies that nothing in the act
724 will affect state law-based defamation claims or defenses
725 that are litigated in federal court.

726 The amendment provides that the shield only extends to
727 information obtained or created by a person while engaging in
728 a journalistic pursuit, and this change would prevent a
729 journalist from claiming a privilege for information that he
730 obtained prior to becoming a journalist.

731 Several changes are made to the definition of covered
732 person, so as to address a range of concerns about the scope
733 of the privilege.

734 First, to be a journalist entitled to the protection,
735 the person must engage in journalism for financial gain or
736 livelihood, excluding the casual blogger who could easily
737 create a blog just for the purpose of claiming the benefit of
738 the shield. Genuine bloggers who are regularly engaged in
739 information gathering normally would gain some financial
740 benefit from their activities and would therefore meet the
741 test.

742 To extend the shield beyond them to casual and non-
743 regular bloggers would create an avenue for virtually anyone
744 to avoid compelled testimony by creating a simple blog that
745 carries the information in question, and it is not our intent
746 to create a coverage that is that broad. The financial gain

747 or livelihood language prevents that from happening.

748 Secondly, to further address national security concerns,
749 the definition of covered person will not include any person
750 who is a foreign power or agent of a foreign power, as
751 defined by FISA, or who is a foreign terrorist organization,
752 as designated by the secretary of state, pursuant to law.

753 Some minor changes have been made to the sections
754 relating to compelled disclosure of source information,
755 following publication of trade secrets or personal health or
756 financial information, for which the law affords privacy, and
757 these changes make it somewhat easier to obtain disclosure of
758 the source information.

759 And, finally, the balancing test that must be applied
760 before any information can be compelled from a covered person
761 is simplified: to provide that the court consider whether
762 the public interest in compelling disclosure outweighs the
763 public interest in news gathering and dissemination.

764 I want to thank the members of the committee who have
765 shared suggestions with us. We have done our best to
766 incorporate in the language of the manager's amendment their
767 recommended solutions for the matters they signaled as
768 concerns. And, Mr. Chairman, I urge adoption of the
769 manager's amendment.

770 And at this time, I yield back.

771 Chairman Conyers. I thank you.

772 The chair recognizes Lamar Smith, the ranking member.

773 Mr. Smith. Thank you, Mr. Chairman.

774 I support the manager's amendment to H.R. 2102. And I
775 commend Chairman Conyers, Representative Boucher, and
776 Representative Pence for incorporating changes that improve
777 the bill.

778 Specifically, they have narrowed the definition of a
779 covered person to include only professional journalists.
780 They have attempted to address some of the Department of
781 Justice's concerns by denying protection to persons covered
782 by the Foreign Intelligence Surveillance Act, as well as
783 those affiliated with terrorist organizations.

784 The manager's amendment also deletes the imminent and
785 actual harm language from the section of the bill that lists
786 exceptions to source protection. The new text would deny
787 protection when disclosure is necessary to prevent "an act of
788 terrorism against the United States or other significant
789 specified," harm to national security.

790 In addition, the manager's amendment broadens the trade
791 secret exception by linking it to specific statutory
792 violations. The existing language restricts the exception to
793 disclosed trade secrets "of significant value."

794 Further, the manager's amendment specifies that the
795 protections afforded transactions between a covered person
796 and a communication service provider do not apply to a non-

797 covered people.

798 And, finally, the manager's amendment includes new
799 limitations on information content that is compelled. It
800 must not be over-broad, unreasonable or oppressive and, where
801 appropriate, be limited to the purpose of verifying published
802 information or describing any surrounding circumstances
803 relevant to the published information's accuracy.

804 Mr. Chairman, these changes respond to some of the
805 concerns registered by the business community and law
806 enforcement authority, and I appreciate this effort to narrow
807 differences, and I urge members to support the manager's
808 amendment.

809 That said, I believe we have a ways to go to improve the
810 bill. I still intend to oppose the bill on final passage
811 because it will complicate crime fighting in our country. As
812 noted in my opening statement, the bill as introduced, even
813 with the manager's amendment, creates hurdles for the
814 Department of Justice to overcome as they try to protect the
815 American people.

816 The exceptions language governing source disclosure is
817 still troubling. A great deal of everyday crime is not
818 covered. And while the text purports to compel discovery of
819 sources with knowledge of a terrorist on native soil, the
820 application remains prospective. This makes it harder for
821 law enforcement officials to investigate attacks that have

822 already occurred.

823 Mr. Chairman, I ask unanimous consent to have the letter
824 opposing the bill with the manager's amendment made a part of
825 the record.

826 Chairman Conyers. Without objection.

827 [The letter follows:]

828 ***** INSERT *****

829 Mr. Smith. And to the extent that I have time
830 remaining, I will yield it to the gentleman from Florida, Mr.
831 Keller. And he may want to get his own time in addition, if
832 there is not sufficient time remaining.

833 Mr. Keller. Thank you. I will get my own time later,
834 Mr. Smith.

835 Mr. Smith. Okay.

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

837 Chairman Conyers. Let's see. I saw Adam Schiff raise
838 his hand first and Artur Davis second.

839 Mr. Schiff. Thank you, Mr. Chairman. I move to strike
840 the last word.

841 Chairman Conyers. Without objection, so ordered.

842 Mr. Schiff. Mr. Chairman, I want to thank you and Mr.
843 Boucher and Mr. Pence for the superb work that you have done
844 on this bill. And I certainly support the manager's
845 amendment and appreciate all of the improvements that have
846 been made in the manager's amendment as a result of feedback
847 from many of us on the committee.

848 I do, though, continue to share concerns about the bill,
849 some of which Mr. Smith articulated. And I wanted to
850 elaborate on them a little further.

851 I appreciate, for example, the attempt to narrow the
852 definition of a covered journalist, but I think it is still
853 extraordinarily broad. This would not have been an issue 10

854 or 20 years ago, but I think it is an issue now. The
855 definition of a journalist involves someone who obtains or
856 creates—well, the protected information is information
857 obtained or created by someone engaged in journalism. A
858 journalist is defined as someone, among other things, who
859 writes about local events and does so for financial gain.

860 By that standard, probably all of us on this dias could
861 be considered journalists. Most of the people in the
862 audience, if they have a blog and they hope that that blog
863 will at some point lead to financial gain, would be
864 considered journalists, as well. Moreover, someone that has
865 information that they wish to protect by a privilege could
866 start a blog and request advertising on that blog and,
867 whether they get it or not, would be considered a journalist
868 under the definition of this bill.

869 So this would, I think, take what we would
870 conventionally think of a privilege to protect journalists
871 and a shield law which—and, by the way, I support a federal
872 shield law. But it would make it much broader than that and
873 protect whole segments of the population by a broad privilege
874 and I think do so in a way that we aren't intending to do,
875 but would have the effect of doing.

876 A couple other concerns I have about the bill is that it
877 gives more protection in civil cases than in criminal cases.
878 The standard for civil cases is fairly low. The privilege

879 can be pierced if it would help lead to a successful
880 completion of the matter. That is very broadly defined and
881 much more broadly defined than the higher standard you would
882 need to meet to pierce the privilege in a criminal case.

883 Moreover, as Mr. Smith pointed out, the standard for
884 protection of commercial information seems to be higher than
885 that for protecting national security information. If, for
886 example, you have a commercial satellite and someone
887 discloses a trade secret connected with that satellite, you
888 can pierce the privilege. But if it were a spy satellite,
889 you would not be able to pierce the privilege without a much
890 higher showing, and I don't think we should protect a trade
891 secret in the commercial sector more than classified national
892 security information that might be important to the country.

893 So we have set, I think, a standard that protects
894 commercial interests higher than a standard that protects
895 some of our national security interests, and I don't think
896 that strikes quite the right balance.

897 Finally, I am concerned about scenarios, for example,
898 where we have an exception now in the manager's amendment,
899 which I think is proper, to exclude people who are agents of
900 foreign powers or are foreign terrorist organizations.

901 But in a situation, for example, where Zawahiri provides
902 a tape to someone who provides it to Al Jazeera—and I don't
903 know if Al Jazeera is considered an agent of a foreign power.

904 They are probably--well, I don't know if they are considered
905 that. They are not listed a foreign terrorist organization.
906 But I would hope that nothing in this bill or any other would
907 make it more difficult for us to track down Zawahiri's
908 whereabouts by tracking that tape and its delivery to Al
909 Jazeera.

910 So these are some of the concerns that I think can be
911 worked out in the bill, but I don't think the bill is there
912 yet. And I am not sure that they can be worked out prior to
913 the floor. It might be preferable to continue working on it
914 in committee. But these are some of the concerns I have.

915 And, again, I feel awkward raising them. I am chair,
916 along with Mr. Pence, of the caucus on freedom of the press,
917 and I do strongly support a shield law, but I don't think we
918 are quite there yet. And I just think the bill needs some
919 more work.

920 And with that, I yield back, Mr. Chairman.

921 Chairman Conyers. Thank you.

922 The gentleman from Indiana, Mike Pence.

923 Mr. Pence. I move to strike the last word, Mr.
924 Chairman.

925 Chairman Conyers. The gentleman is recognized.

926 Mr. Pence. Thank you, Chairman. I would like to speak
927 for a few moments in strong support of the amendment in the
928 nature of a substitute, Mr. Boucher's amendment.

929 I believe it is a significant improvement on the Free
930 Flow of Information Act that we originally filed. It is the
931 product of many weeks' worth of negotiations and hard work,
932 and I wish to express my appreciation to you, Mr. Chairman,
933 and of course to the leadership Mr. Boucher has provided on
934 this issue to bring this significant improvement to the
935 floor.

936 I also want to express my gratitude to Ranking Member
937 Smith for his support of the manager's amendment. I think it
938 gives tangible evidence of what those of us closely involved
939 in this legislation have seen firsthand, and that is the
940 direct, engaged involvement that the ranking member has had
941 in this process. And while he has expressed opposition to
942 the bill as amended, I am grateful with his support of this
943 amendment, and look forward to working with him.

944 Mr. Chairman, a couple of items I would highlight for
945 colleagues about this amendment. I believe it vastly
946 improves the provisions of the bill relating to our nation's
947 security and efforts to fight terrorists. I understand the
948 Department of Justice continues to have objection, but I
949 strongly believe that the revised language in the bill
950 addresses the concerns put forth at the hearing, particularly
951 that terrorists could use this bill in their favor and that
952 the bill perhaps would stifle law enforcement's ability to
953 stop terrorism.

954 The national security exception has been modified in the
955 manager's amendment. It originally required a showing of
956 imminent and actual harm to national security. Now the
957 shield can be pierced in order to "prevent an act of
958 terrorism against the United States or other significant and
959 specified harm to national security."

960 These changes address the concerns raised at the hearing
961 legitimately by many others that requiring a showing of
962 imminent harm was too high of a bar. In addition, the bill
963 now clearly allows compelled disclosure of a source, if
964 necessary, to prevent an act of terrorism, something I think
965 was an important addition to the bill.

966 Also, the definition of a covered person has been
967 amended in a number of ways. Particularly, it has been
968 amended to deny any protections of the bill to foreign
969 powers, agents of foreign powers, and foreign terrorist
970 organizations, as those defined by existing statutes like
971 FISA and the provisions of the Immigration and Naturalization
972 Act that allow the secretary of state to designate terrorist
973 organizations. That list currently lists 42 terrorist
974 organizations, including Al Qaida, Hamas, Hezbollah, Islamic
975 Jihad, and others.

976 Other exceptions to the bill have been modified, as
977 well, having to do with commercial interests. And they
978 represent a very careful process of negotiations over the

979 past several weeks.

980 The limitations on the content of what can be compelled
981 were clarified so that content will not only be limited to
982 verifying published information in appropriate cases, as
983 well. This is greatly to the credit of Congressman Adam
984 Schiff, who just spoke previously. Thanks to his leadership,
985 we made it clear that information could not just be possessed
986 by a covered person, but had to be obtained or created by the
987 covered person in order to be protected by the shield.

988 This was an extremely important addition that I think
989 Mr. Schiff brought his background in federal law enforcement
990 to bear and greatly improved the bill. And I would
991 acknowledge that publicly.

992 Congressman Keller also assisted us greatly in making a
993 clarification about defamation law. The bill was never
994 intended to cover a defamation suit, because that is a state
995 action. But Congressman Ric Keller of Florida brought forth
996 language to make this explicit, and I think it is an
997 important improvement of the bill, and I commend the
998 gentleman from Florida for his work.

999 Finally, a change has been made to the definition of a
1000 covered person that would require that covered persons be
1001 engaged in journalism for financial gain or livelihood. This
1002 is similar to the requirement in the Texas shield bill, and I
1003 think it a good requirement to tighten up the definition, but

1004 I would associate myself with colleagues who have expressed
1005 concern about the definition of journalism.

1006 We have endeavored in this bill not to make it overly
1007 broad or overly narrow and would look forward to continuing
1008 to work with you, Mr. Chairman, with other members of the
1009 committee and of the body to see if we might dial that in
1010 even further in a way that is in the interest of the First
1011 Amendment freedom of the press.

1012 A lot of work has gone into this amendment. And let me
1013 say again: I think it improves the bill while, at the same
1014 time, maintaining the core principle of the bill, that it is
1015 drafted such that the free flow of information to the public
1016 is protected.

1017 I want to encourage all of my colleagues on my side of
1018 the aisle and all of my colleagues on the committee to
1019 support the amendment in the nature of a substitute,
1020 reiterating Mr. Boucher's core point in his opening
1021 statement.

1022 I have often had journalists come up to me, Mr.
1023 Chairman, look to the left and look to the right, and say,
1024 "Thanks," to which I have responded, "Well, as an American,
1025 you are welcome, but this bill is not about protecting
1026 reporters. This is about protecting the public's right to
1027 know."

1028 I believe the amendment in the nature of a substitute

1029 advances us further down that core objective, and I heartily
1030 support it.

1031 Chairman Conyers. I thank the gentleman.

1032 The gentleman from Alabama, Mr. Artur Davis.

1033 Mr. Davis. Thank you, Mr. Chairman.

1034 Let me begin by certainly complimenting Mr. Boucher and
1035 my good friend from Indiana, Mr. Pence, for the work they
1036 have done on this shield act. And I concur with what others
1037 have said. I think that we need a federal shield act. I
1038 think this is an important step.

1039 I do want to raise two concerns about the bill. One
1040 concern I have, frankly, is that the bill goes too far in one
1041 sense, and then, in yet another important sense, it doesn't
1042 go far enough.

1043 To begin with the first concern, I absolutely want to
1044 associate myself with what Mr. Schiff has said and I think
1045 others have raised prior to today about the definition of
1046 covered persons, definition of journalism. I think the Al
1047 Jazeera example is an excellent point that members of the
1048 committee should pay heed to.

1049 And I hear Mr. Pence's observation that someone—that it
1050 is relevant whether or not the person generated the
1051 information or is simply reporting on it. Frankly, I think
1052 that it is likely to be a subject of deep factual dispute in
1053 many circumstances and that we may often not be able to

1054 pierce the veil to even know the answer and know what
1055 standard to apply.

1056 I think that one suggestion that I would make is that
1057 perhaps, instead of focusing exclusively on the definition,
1058 which is whether or not an act of journalism has occurred or
1059 whether or not someone fits the term covered person, that
1060 there might be room to make an inquiry into whether the kind
1061 of activity consistently serves a public purpose or whether
1062 it doesn't.

1063 And I understand that is amorphous in its own right, but
1064 it would at least give a court an ability to flesh out
1065 exactly what Mr. Schiff described, someone who, for purposes
1066 of disseminating information, sets up a blog, engages in
1067 commercial activity to meet the financial gain test, and then
1068 plans to shut down once all of it is over. I think it is
1069 possible to craft some third standard that looks at whether
1070 the kind of journalism consistently serves a public purpose.

1071 Now, let me turn to the way in which I think the bill
1072 doesn't go far enough. Mr. Boucher, one of my concerns, if
1073 you look at section two of the compelled disclosure section
1074 of the civil and criminal standards, I would submit that,
1075 even under the very rigorous criminal section or the very
1076 rigorous criminal standard, a lot of judges are still going
1077 to fine that it is satisfied.

1078 I think if you go back and you look at the pleadings in

1079 the Scooter Libby case, frankly, I think that the special
1080 prosecutor, Mr. Fitzgerald, would argue, if he were sitting
1081 here, that the rigorous standards contained in section two
1082 were satisfied with respect to Judith Miller. I think that
1083 the pleadings and the affidavits he submitted in court argued
1084 something very, very close to what is contained in section
1085 two.

1086 The court ruled in his favor. Criminal contempt
1087 sanctions were imposed, and Ms. Miller went to jail. So I
1088 have a concern that, as long as criminal contempt remains a
1089 possibility in these cases, that there is going to be a very
1090 important and very disturbing, chilling effect. I wonder if
1091 we could consider possibility limiting contempt cases to
1092 civil contempt.

1093 I wonder if we would consider doing away with criminal
1094 contempt sanctions all together in the context of instances
1095 that are found to be exceptions to the shield act. What all
1096 of us worry about is that, frankly, as long as there is a
1097 genuine possibility that a reporter could be sent to jail,
1098 however remote, that that reporter is going to be
1099 constrained, that it could shield the very free flow of
1100 information that this act seeks to secure.

1101 And if we are truly serious about this, I wonder if we
1102 might not take criminal contempt off the table. Civil
1103 contempt is still powerful; it would still provide an

1104 incentive for an employer to encourage responsible conduct.
1105 But I wonder if there is ever an instance, even within the
1106 exceptions to the shield act, when criminal contempt would be
1107 in the public interest, if invoked against someone who is in
1108 the practice of journalism.

1109 So those are concerns I raise, that however we define
1110 covered persons in journalism, we are still going to create
1111 an incentive in this modern age, when you can create a blog
1112 or a Web site overnight for mischief. And the second concern
1113 is that, as long as criminal contempt is left on the table,
1114 that we are not going far enough, and I would suggest that we
1115 consider taking it off the table and making civil contempt
1116 the only available sanction for exceptions to the shield act.

1117 And I will yield back the balance of my time.

1118 Chairman Conyers. Thank you so much.

1119 Before we vote on it, I wanted everyone to know that I
1120 plan to recognize Ms. Jackson Lee, but before her Mr.
1121 Goodlatte, but before her Mr. Sherman.

1122 And now I recognize Ric Keller of Florida.

1123 Mr. Keller. Well, thank you, Mr. Chairman.

1124 Mr. Chairman, I support the manager's amendment and the
1125 underlying media shield legislation. This media shield
1126 legislation is important, because off-the-record,
1127 confidential sources are needed to help journalists to get to
1128 the truth. And I don't want reporters thrown in jail.

1129 Thomas Friedman, the famous New York Times columnist and
1130 author, recently wrote an insightful column about
1131 understanding the difference between government officials in
1132 Washington versus the Middle East. He wrote, "In Washington,
1133 officials lie in public and tell the truth off the record.
1134 In the Mideast, officials say what they really believe in
1135 public and tell you what they want you to hear in private."

1136 The point is, these reporters need these off-the-record,
1137 confidential sources in America to help get to the truth. As
1138 to his statement about in Washington officials lie in public,
1139 I am certain that he must not be talking about the esteemed
1140 members of the House Judiciary Committee who are about to
1141 vote on the media shield legislation so important to his
1142 employer, the New York Times.

1143 There was one flaw in this legislation, I thought as I
1144 originally read it, and that is it did not have a defamation
1145 exception for civil actions, even though you could have this
1146 type of claim brought in a federal court under federal
1147 diversity jurisdiction subject to federal rules of civil
1148 procedure and federal court orders. Various states, such as
1149 Oklahoma and Tennessee, had this defamation exception for
1150 civil actions.

1151 And rather than give you a long legal analysis of why
1152 that is important, I will just give you a simple example.
1153 Let's suppose a paper writes this: "Well, it turned out that

1154 the article we wrote about the governor being a drunken
1155 pedophile was false, but we had two sources, so we didn't
1156 violate the reckless disregard standard on the New York Times
1157 v. Sullivan, since he was a public figure, and we didn't know
1158 it was false at the time."

1159 The governor says, "Well, who were these bogus sources?
1160 Wasn't it just a couple of political opponents spreading
1161 false info about me to try to discredit me?" The newspaper:
1162 "We don't have to tell you the sources. We have the new
1163 media shield law."

1164 Well, that is not the kind of public policy that we
1165 want. And so rather than just vote no on this bill, my staff
1166 and I decided to find a way to improve it. And I don't mind
1167 telling you that my hard-working Judiciary staffer and I
1168 spent over 40 hours on this single issue.

1169 We reviewed the media shield laws in 32 separate states.
1170 We reviewed the case law. We met with experts. We even met
1171 with the Congressional Research Service. And I came up with
1172 an amendment that has been accepted as part of the manager's
1173 amendment to address this issue.

1174 It is on page four, lines 13 through 17, and it says
1175 simply this: "Nothing in this act shall be construed as
1176 applying to civil defamation cases or defenses under state
1177 law, regardless of whether or not such claims or defenses
1178 respectively are raised in a state or federal court."

1179 Normally, I would not have the energy or the time,
1180 frankly, to spend 40 hours ultimately writing a five-line
1181 paragraph on one piece of legislation, in light of the many
1182 pieces of legislation we consider in Congress, but I thought
1183 it was worthwhile to invest the time and effort in this
1184 particular case, one, because the First Amendment issues
1185 implicated as so serious, and, two, frankly, because I was so
1186 impressed by all the time my good colleague, Mike Pence, put
1187 into this bill that I felt a good-faith effort was needed to
1188 try to make it right.

1189 Chairman Conyers. Would the gentleman yield?

1190 Mr. Keller. I will, Mr. Chairman.

1191 Chairman Conyers. Would he be willing to joining a
1192 group that is developing around considerations that have been
1193 raised by Lamar Smith, Adam Schiff, Artur Davis, so that we
1194 begin to try to get some fixes in on some of the bigger
1195 pieces? I am sure Mike Pence will be a part of that.

1196 Mr. Keller. Reclaiming my time, Mr. Chairman, I would,
1197 but my issue has been fixed. It is in the manager's
1198 amendment, so I am happy. But I will continue to work—

1199 Chairman Conyers. I am talking about the other matters
1200 that have been—you have done great work.

1201 Mr. Keller. Absolutely. Absolutely, so let me just say
1202 this. To put it in perspective, the 40 hours of time that my
1203 staff and I have put into this is absolutely a drop in the

1204 bucket compared to the 3 years of hard work my colleague,
1205 Mike Pence, put into this, and I just want to thank him for
1206 all his hard work in getting the ball across the goal line,
1207 and especially also thank Mr. Boucher for his leadership on
1208 the issue.

1209 And I will yield back the balance of my time.

1210 Chairman Conyers. I thank you, sir. And thanks for
1211 your cooperation.

1212 The chair recognizes Brad Sherman from California.

1213 Mr. Sherman. Thank you. I see the reason for a bill
1214 like this, but I have a number of concerns about how it is
1215 drafted. And I hope that Mr. Boucher will help me here,
1216 because in section two, we have four subdivisions under
1217 subdivision A, one, two, three and four.

1218 And the key word is on line 20, page three, the word
1219 "and," which seems to mean that, in order to disclose—to get
1220 the court to disclose the information, you have to show all
1221 four. And I believe Mr. Boucher is indicating that is
1222 intentional.

1223 So we could have a circumstance where you have a violent
1224 murder. The murderer is unlikely to repeat the crime. He
1225 may have become physically disabled and unable to commit a
1226 violent murder in the future. And the prosecutor can
1227 establish point one, that compulsion is necessary that they
1228 have exhausted their other sources of information. They may

1229 be able to establish point four, that the public interest, in
1230 compelling the testimony, exceeds the disadvantage to the
1231 public.

1232 But I don't know whether they would ever be able to
1233 establish number three, because the crime has nothing to do
1234 with national security, there is not a risk of future bodily
1235 harm, and there is nothing involved with either trade secrets
1236 or Gramm-Leach-Bliley.

1237 Is it our intention to say that, even if the court
1238 determines that the only way to prove this violent murderer
1239 is guilty, after exhausting everything else, and even when
1240 the court determines that the public interest in revealing
1241 exceeds the public interest in keeping it concealed, that we
1242 are not going to allow it, because there wasn't a trade
1243 secret or Gramm-Leach-Bliley.

1244 Is it the intention that all four of these items would
1245 have to apply?

1246 Mr. Boucher. Would the gentleman yield?

1247 Mr. Sherman. I will yield.

1248 Mr. Boucher. Would the gentleman inform me once again
1249 about the parameters of the hypothetical? He said it was a
1250 heinous murder. This is a typical murder case, even though
1251 aggravated. Typically, I think that would be prosecuted
1252 under state law and would not be in federal court in any
1253 event, and so this shield statute would have no application.

1254 Mr. Sherman. Well, then let me recast it and say it is—
1255 and we had this in my district—the heinous murder of a letter
1256 carrier, or it could be a heinous murder in a national park,
1257 or on a military base, or an assassination from someone who
1258 is unlikely to commit that crime again.

1259 Mr. Boucher. Would the gentleman yield?

1260 Mr. Sherman. Yes.

1261 Mr. Boucher. Well, in that instance, the gentleman is
1262 correct: All of the elements that he has identified, each of
1263 the four prongs of this test, would, in fact, have to be
1264 satisfied, and that is completely intentional, and it is for
1265 this reason.

1266 We have identified certain areas where there is a clear
1267 need to have source information revealed, and the gentleman
1268 can see those listed here in the statute. It is matters
1269 relating to preventing acts of terrorism; it is matters
1270 pertaining to preventing imminent harms to national security
1271 beyond terrorism; it is situations where the revelation of
1272 the source is necessary to prevent imminent threats of bodily
1273 injury or death; it is provided that the source will be
1274 revealed where there is a disclosure of personal financial
1275 information, personal health information, or trade secrets,
1276 where that disclosure itself is in violation of some state or
1277 federal privacy protection.

1278 Beyond that, our view is that the prosecutor should rely

1279 upon normal prosecutorial resources, including, in the
1280 example the gentleman cited, because it would be a federal
1281 offense, the FBI. And the FBI should be called on to
1282 investigate this heinous murder and, through the regular
1283 prosecutorial processes, evidence should be garnered, and
1284 that evidence should then be used in order to carry the
1285 prosecution forward.

1286 It is a value judgment. And our value judgment is that,
1287 even though it is a heinous murder, this is a matter that
1288 should be handled in the regular prosecutorial course. And
1289 the U.S. attorney should not be levying upon the journalist,
1290 who perhaps revealed this murder because of the confidential
1291 source, in order to carry the prosecution forward. In this
1292 instance, we just make a value judgment at the starting gate,
1293 that the public interest in protecting—

1294 Mr. Sherman. Reclaiming my time, what I thought this
1295 bill was, was a bill that provided for a balancing test, and
1296 the key test is the public interest in compelling the
1297 information or document is in the opinion of the judge, that
1298 that outweighs the public interest in gathering or
1299 disseminating news or information. It now appears that this
1300 is a very absolute bill that, in the absence of a defendant
1301 who is likely to—

1302 Chairman Conyers. The gentleman is granted an
1303 additional minute.

1304 Mr. Sherman. Thank you.

1305 That in many circumstances, even if the judge is
1306 convinced that revealing the information is in the public
1307 interest, the judge is not allowed to do so, except,
1308 peculiarly, where trade secrets or Gramm-Leach-Bliley is
1309 involved.

1310 I also want to join with Mr. Schiff and others in the
1311 concern in the definition of journalist. Somebody may get a
1312 slight financial gain, get a check for \$100 for publishing an
1313 article. I may offer an amendment to say that one-fifth of
1314 one's livelihood would have to come from journalism to be
1315 considered a journalist.

1316 Finally, I hope that the report language will clarify
1317 the definition of journalism where we say that the
1318 information has to be for the dissemination to the public of
1319 matters of public interest and so that, in the report, we
1320 could make it clear that baseball scores are of public
1321 interest but dogfighting magazines are not. And I don't know
1322 whether we need any clarification of law. We can perhaps
1323 handle that—

1324 Mr. Boucher. Would the gentleman yield to me?

1325 Mr. Sherman. If I have any time, I yield.

1326 Mr. Boucher. Mr. Chairman, I ask that the gentleman be
1327 accorded 1 additional minute.

1328 Chairman Conyers. Without objection.

1329 Mr. Boucher. I think based on comments that a number of
1330 members have made on both sides of the aisle, there is an
1331 obvious need for us, between the time that this bill is
1332 reported from committee and the time that it is considered on
1333 the House floor, to further address the question of who is a
1334 covered person and who is a journalist. And I want to thank
1335 all of the members who have raised concerns, many of which I
1336 personally agree with, that this definition can perhaps be
1337 improved.

1338 We have worked very hard in order to achieve a balance,
1339 on the one hand to make sure that we don't have such a broad
1340 definition of covered person as to enable the casual blogger,
1341 for example, to set up a one-time blog that contains this
1342 information and gain the benefit of the protection, while at
1343 the same time making sure that people who are real
1344 journalists who we want to protect, whether they disseminate
1345 electronically or in the print media or in other forms, do
1346 receive this protection.

1347 And while that is easily enunciated, it is very
1348 difficult to write in statutory language words that meet that
1349 test. And so what I would say to the gentleman is, I look
1350 forward to working with him, with Mr. Schiff, with Mr. Davis,
1351 with others, including Mr. Smith on the Republican side—

1352 Mr. Sherman. If I could reclaim my time—

1353 Mr. Boucher. —who have raised this concern, between now

1354 and the time that the bill is reported.

1355 Mr. Sherman. I would hope very much that we work on
1356 this in committee, and I think harmony and discussion may get
1357 us most of the way, but we may actually have to have the
1358 committee take a look at two or three different rival
1359 definitions of journalists, rather than move the bill today
1360 and then hope that we can all work things out. But that is
1361 something we will have to discuss.

1362 Chairman Conyers. I hope that the gentleman restrains
1363 his inclination to offer an amendment, and I hope he trusts
1364 that all of these people that will be working on this
1365 measure, including yourself, will be sufficient enough not to
1366 have another committee hearing. Just a suggestion.

1367 Mr. Gohmert. Mr. Chairman?

1368 Chairman Conyers. The chair has Mr. Gohmert down, but
1369 unfortunately he is at the bottom of the list.

1370 The chair recognizes now the distinguished gentleman
1371 from Virginia, Bob Goodlatte.

1372 Mr. Goodlatte. Thank you, Mr. Chairman.

1373 I want to associate myself with the growing list of
1374 those who want to support a federal shield law and who
1375 commend both my good friend and colleague from Virginia, Mr.
1376 Boucher, and Mr. Pence, who has worked on this—I think both
1377 of them have worked on this for a number of years, in terms
1378 of the manager's amendment, which is an improvement in the

1379 bill.

1380 But I would also associate myself with those who have
1381 expressed some deep concerns about provisions in the bill
1382 that I think need to be more carefully examined. I am in
1383 particular concern about some of the national security issues
1384 that have been raised by the Justice Department, have been
1385 alluded to by the gentleman from California, Mr. Schiff, and
1386 others.

1387 But I would like to particularly emphasize—and I share
1388 this interest with the gentleman from Virginia, Mr. Boucher.
1389 We are the co-chairs of the Congressional Internet Caucus and
1390 both very strong supporters of the Internet. It is a
1391 wonderful tool, including a wonderful tool for blogging.

1392 However, it has changed the very nature of what
1393 journalism means in the time that has evolved since Mr. Pence
1394 first began working on this bill a few years ago. And the
1395 reason is that the Internet makes everyone capable of being a
1396 publisher. The costs that were a barrier to that in the past
1397 have—and I think this is good—been removed, and therefore an
1398 individual who wants to become a journalist has an
1399 opportunity to do that, because both the cost of publishing
1400 and the cost of distributing are virtually eliminated when
1401 you are broadcasting your information on the Internet.

1402 By the same token, I agree very strongly with the
1403 gentleman from California—Mr. Schiff in particular, but the

1404 other gentleman, as well—that this opens up, I think, a very
1405 large loophole. And the language used here, "for financial
1406 gain or livelihood," is a very, very broad coverage that will
1407 encompass many, many people.

1408 As the gentleman from Virginia knows, to have a blog on
1409 the Internet and have that include for financial gain is very
1410 simple. You place a few ads on your blog and, based upon the
1411 number of hits that you receive, Google or other major
1412 companies that are aggregators of these ads will compensate
1413 you for the number of hits. So you might get a few dollars a
1414 month in compensation, but that is, nonetheless, financial
1415 gain, which would, I think, encompass potentially millions of
1416 people who are engaged in blogging or will change the manner
1417 in which they blog in order to avail themselves of this
1418 benefit.

1419 Now, what are the ramifications of that? Obviously,
1420 some of those people are deserving of a federal shield law,
1421 just like a reporter at a newspaper would be, but I think
1422 this is far too broad and far too easily to be gained for me
1423 to support that language.

1424 So, Mr. Chairman, I would hope that, given the
1425 bipartisan nature of this debate, on both sides, and the fact
1426 that I haven't heard anybody say they don't want to enact a
1427 federal shield law, that we avoid the kind of problem that we
1428 just encountered in the committee that I am the ranking

1429 member on, the Agriculture Committee, and not let go of this
1430 legislation until we have it right.

1431 I respect the desire of the gentleman from Indiana, the
1432 gentleman from Virginia to move the legislation forward, but
1433 I think it would be better if this committee worked in the
1434 collaborative fashion that the chairman described and then
1435 report the bill out, rather than have a situation develop
1436 where it has been reported out of committee and the kind of
1437 attacks on the effort to write the legislation properly occur
1438 on the floor, when it is beyond the control of the committee.

1439 And I certainly respect the intention to work together
1440 to accomplish that, going to the floor, but that is very
1441 different than the committee having the full input prior to
1442 it leaving the committee.

1443 Mr. Lungren. Will the gentleman yield?

1444 Mr. Goodlatte. I would be happy to.

1445 Mr. Lungren. Back here behind you.

1446 The gentleman talked about the definition of financial
1447 gain, but as I read it, it says, "who for financial gain or
1448 livelihood."

1449 Mr. Goodlatte. Well, that is correct.

1450 Mr. Lungren. And so livelihood, I presume, would mean
1451 you do it as a vocation but without financial gain, and so
1452 you don't even have that. It is broader than having to prove
1453 that you have it as a commercial enterprise in any way.

1454 Unless I misread this, because otherwise I don't know why you
1455 have "or livelihood."

1456 Mr. Goodlatte. Well, the gentleman's point is well-
1457 taken. The fact that it is "or" is a problem and that the
1458 meaning of livelihood, I think, is also an expansive term.

1459 Mr. Davis. Will the gentleman yield?

1460 Mr. Goodlatte. I would be happy to yield.

1461 Mr. Davis. If I could follow up on the gentleman's
1462 point with one observation, there is another problem that you
1463 remind me of.

1464 A retired journalist, someone who practiced for all of
1465 his career but who is no longer earning a living from
1466 journalism, that individual might be a Walter Cronkite, a
1467 highly respected reporter. Right now, it appears that that
1468 person would not be covered, as they would not be included as
1469 a covered person. And I would think there would be a public
1470 interest in protecting someone like that.

1471 And I yield back to the gentleman.

1472 Mr. Goodlatte. I thank the gentleman, and the
1473 gentleman's point is well-taken.

1474 Mr. Chairman, I would hope that we would add a little
1475 more deliberation before letting this out of the committee.

1476 Chairman Conyers. I thank the gentleman for his
1477 comment.

1478 Ms. Jackson Lee. Mr. Chairman?

1479 Chairman Conyers. The chair recognizes the gentlelady
1480 from Texas, Sheila Jackson Lee.

1481 Ms. Jackson Lee. Let me thank the proponents of the
1482 proponents of the legislation and the chairman. And I have
1483 listened, I hope carefully, to the discussion, and I have
1484 several points that I want to pose. And I also offer
1485 concerns, my own concerns, about the definition of
1486 journalist.

1487 I have been a strong proponent of a qualified privilege
1488 for journalists. Indeed, as early as 2001, I spoke out in
1489 favor of a need for such a privilege when I visited the
1490 Federal Detention Center in Houston to support the efforts of
1491 Professor Vanessa Leggett, a 33-year-old at that time
1492 freelance, non-fiction writer, who had been jailed without
1493 bond since July 20, 2001, for asserting her journalistic
1494 privilege and First Amendment right not to reveal
1495 confidential source information in the writing of a non-
1496 fiction story on one of our most infamous and famous murder
1497 stories in the state of Texas.

1498 After visiting Professor Vanessa Leggett, I became
1499 convinced of the justice of our cause and the importance of
1500 our case. Professor Leggett had spent 4 years researching
1501 the 1997 murder of Doris Angleton when she refused to give
1502 into threats and intimidation by an overzealous prosecution
1503 and asserted her First Amendment rights in a grand jury

1504 investigation. She was forced in contempt and jailed.

1505 The interesting aspect of her work is that it appears
1506 that all of her work might have already been in the hands of
1507 those prosecutors. So I believe the First Amendment is the
1508 most important amendment in the Bill of Rights, and it is not
1509 a coincidence that the freedom of speech and press are the
1510 first freedoms listed in the First Amendment. And I believe
1511 allowing journalists the right to maintain the
1512 confidentiality of their sources when doing research must be
1513 protected.

1514 However, as I read the language in the bill, the
1515 language that defines journalism does not give me comfort or
1516 a sense of understanding that a non-fiction writer is
1517 included, particularly when it says "reporting or
1518 publishing," which one could make the argument, I assume,
1519 that a non-fiction book is reporting, but it not may not
1520 necessarily be convincing.

1521 And I might imagine that enthusiasts who would want to
1522 present the opposite view could make the point that a book or
1523 that research resulting in a book is not reporting. So I
1524 raise the question—I, too, am interested in an amendment on
1525 this issue, would like not to offer an amendment, Mr.
1526 Chairman, but I believe it is extremely important that the
1527 language be more defined. I know that we are working with a
1528 fragile coalition, but a fragile coalition should welcome the

1529 strengthening of a bill that will cover those who may be in
1530 harm's way or in the eye of the storm way after this bill is
1531 passed and fined.

1532 The other issue that I do want to raise is making it
1533 clear, because I believe Mr. Boucher and Mr. Pence, you have
1534 worked very hard on this issue, that as it relates to the
1535 security of this nation that we are not in any way
1536 compromising our security and that any element of information
1537 that may be necessary that contributes to the securing of
1538 this nation in the war on terror—I am speaking specifically
1539 to that aspect as opposed to a criminal aspect—but that we
1540 have protected it in this legislation.

1541 I would yield to Mr. Boucher for response on the
1542 journalism question, the journalism book-writing question
1543 regarding the definition of journalism in the legislation.

1544 Mr. Boucher. Thank you very much, Ms. Jackson Lee.

1545 Let me assure you that it certainly is our intent that
1546 non-fiction writers be covered within the definition of
1547 journalists. My belief is that they are, and I think the
1548 gentlelady can take confidence in the way that language is
1549 drafted, which is quite broad in terms of news gathering and
1550 reporting by a variety of different means.

1551 And I would hope that the lady would agree that the non-
1552 fiction writers are covered. That certainly is our intent.

1553 Ms. Jackson Lee. Reclaiming my time, I would ask

1554 whether the gentleman would—if I am still not convinced, I
1555 would hope that we would have an opportunity to work on this
1556 matter, as this bill moves to the floor, because, at this
1557 juncture, though I appreciate the gentleman's leadership and
1558 that of Mr. Pence, I am not convinced that we are at that
1559 posture right now.

1560 Mr. Boucher. Would the gentlelady yield?

1561 Ms. Jackson Lee. I would be happy to yield, and I would
1562 like to yield to my distinguished friend, Mr. Sherman, if—

1563 Mr. Boucher. Let me just quickly—

1564 Ms. Jackson Lee. —if the chairman would give me an
1565 additional 1 minute.

1566 Chairman Conyers. One minute is granted, yes.

1567 Ms. Jackson Lee. Yes, sir, I yield to Mr. Boucher.

1568 Mr. Boucher. Thank you very much, Ms. Jackson Lee.

1569 I will be happy to discuss with you any language you
1570 would like to suggest which would assure that non-fiction
1571 writers are covered. It is my belief that they are. It
1572 certainly is our intent to do it. We will talk with you
1573 between now and the time the bill goes to the floor to
1574 satisfy any concerns that you have.

1575 Ms. Jackson Lee. I appreciate it. Would you give a
1576 quick answer that the bill expresses the premise of homeland
1577 security and providing any information as it relates to that?

1578 Mr. Boucher. Will the gentlelady yield?

1579 Ms. Jackson Lee. Yes.

1580 Mr. Boucher. We have a number of exceptions to the
1581 privilege set forth that address issues relating to national
1582 security, to terrorism. In fact, source information can be
1583 revealed where necessary to prevent a harm to national
1584 security or a terrorist act.

1585 Ms. Jackson Lee. Thank you.

1586 Mr. Boucher. That is well-covered.

1587 Ms. Jackson Lee. I wanted that to be on the record.

1588 I will yield to the gentleman from California.

1589 Mr. Sherman. I would point out, as we work out the
1590 definition of journalist, that if we are focusing on
1591 journalists who are publishing by the day or week that it is
1592 easier to apply the standard in the bill "for financial gain
1593 or livelihood," in that you would expect them to get a
1594 paycheck at the end of the week. Everybody I know is working
1595 on a non-fiction book who they haven't made a penny on yet,
1596 never made a penny as an author, but expect to make a million
1597 dollars on.

1598 So the financial gain standard has to mesh with the "I
1599 am working on a book" standard if we are going to include
1600 non-fiction authors.

1601 Chairman Conyers. The gentlelady's-

1602 Ms. Jackson Lee. My time is up. I look forward to
1603 working with the proponents of the bill to clear up some of

1604 these issues of concern.

1605 I yield back.

1606 Chairman Conyers. Judge Louie Gohmert?

1607 Mr. Gohmert. Thank you, Mr. Chairman.

1608 I have one of my two amendments at the desk, actually
1609 two total, but first one is Gohmert 1 at the desk.

1610 And I can tell you what it says very quickly. It is
1611 just adding the word "slander or libel" after the word-

1612 Chairman Conyers. The gentleman is amending the
1613 manager's amendment?

1614 Mr. Gohmert. That is correct.

1615 Chairman Conyers. All right. The clerk will report the
1616 amendment.

1617 The Clerk. "Amendment to the amendment in the nature of
1618 a substitute to H.R. 2102, offered by Mr. Gohmert. On page
1619 four, line 14, after 'defamation,' insert 'slander or libel'-
1620 "

1621 [The amendment by Mr. Gohmert follows:]

1622 ***** INSERT *****

1623 Chairman Conyers. Without objection, the gentleman's
1624 amendment is considered as read and is recognized in support
1625 of it.

1626 Mr. Gohmert. Thank you, Mr. Chairman.

1627 Obviously, this is a very basic amendment—

1628 Mr. Boucher. Would the gentleman from Texas yield to me
1629 for a friendly comment?

1630 Mr. Gohmert. Certainly.

1631 Mr. Boucher. I thank the gentleman for yielding.

1632 What the gentleman has done through this amendment is
1633 add to defamation, which we already specified will be handled
1634 under state law and any applicable state shield statute which
1635 exist. Slander and libel actions and that addition is
1636 entirely consistent with our intent that these matters be
1637 handled under state law and any applicable state shield
1638 statute.

1639 And so we are pleased to accept the gentleman's
1640 amendment and thank him for offering it.

1641 Mr. Gohmert. And thank you.

1642 As I understand it, most states include slander and
1643 libel under defamation. Texas does not. I was concerned,
1644 but you cut me off and didn't give me a chance to thank the
1645 gentleman for the work with Mr. Pence. And, obviously, you
1646 all have done a great deal of work. This is a needed area.
1647 Judith Miller's case made that very evident.

1648 There needs to be some protection afforded, and I
1649 appreciate the efforts in that regard. And I appreciate your
1650 willingness to accept it.

1651 There have been some good points made about tightening
1652 up the definition of journalist, and that was one of my
1653 concerns, too, whether it is a one-fifth income, and I look
1654 forward to finding out what each gentleman and gentlewoman's
1655 non-fiction book is. I might want to read them before they
1656 are published anyway.

1657 But, also, what I saw as a judge would often be
1658 reporters who were subpoenaed in both civil and criminal
1659 cases because we had a lazy attorney who didn't want to go do
1660 the research themselves and felt like they could just
1661 subpoena that and it would save them a great deal of money
1662 and effort. And I think this will also help in that
1663 situation, as well.

1664 But since that amendment is being accepted, I don't want
1665 to kick against the goad, so if—Mr. Chairman, I would yield
1666 back on this amendment, but I do have another amendment at
1667 the desk, as well.

1668 Chairman Conyers. I thank the gentleman.

1669 All those in favor of the Gohmert amendment, indicate by
1670 saying, "Aye," please.

1671 All those opposed, say, "No."

1672 The amendment is agreed to.

1673 And Gohmert 2 is recognized and called up. The clerk
1674 will report.

1675 The Clerk. "Amendment to the amendment in the nature of
1676 a substitute to H.R. 2102, offered by Mr. Gohmert. On page
1677 four, line 17, after 'court,' insert 'nor does it-'"

1678 [The amendment by Mr. Gohmert follows:]

1679 ***** INSERT *****

1680 Chairman Conyers. Without objection, the amendment is
1681 considered as read, and the gentleman from Texas is
1682 recognized in support of his amendment.

1683 Mr. Gohmert. Thank you, Mr. Chairman.

1684 And once again, I won't take my full time, but on this
1685 issue concern was that perhaps you could have someone who was
1686 engaged in treason, and I wasn't sure, and I would be
1687 interested in Mr. Boucher or Mr. Pence's comments, but I
1688 wasn't sure that it was being covered such that we protected
1689 potentially treasonous acts.

1690 So I do have this amendment to address that and to make
1691 clear to anyone that the tight definition of treason that
1692 defined in 18 U.S.C. 2381 is an area into which this shield
1693 would not go. And so Krypton would allow—this would be the
1694 Krypton that would get around the shield and weaken and allow
1695 the reporter to be vulnerable.

1696 And I yield to my friend from Indiana, Mr. Pence.

1697 Mr. Pence. Would the gentleman yield?

1698 Let me first thank my good friend from Texas for his
1699 great work and his previous successful amendment and the
1700 spirit that you brought to this legislative process. I am
1701 personally grateful for it, one cheerful right-winger to
1702 another.

1703 Let me see, as to this amendment, I would like to
1704 suggest that—I think treasonous offenses by definition would

1705 impact our national security and cause significant and
1706 specific harm. Therefore, I think it is likely that treason
1707 is covered by the bill's existing language about national
1708 security.

1709 However, the gentleman from Texas raised, I think, a
1710 very important point: We should not protect those who commit
1711 treason. I would hope the gentleman would be willing to
1712 withdraw his amendment and work with the group the chairman
1713 referenced and see if we can't work off of your concerns and
1714 further define that national security provision in the bill
1715 prior to when we bring the bill onto the floor.

1716 I would assure the gentleman that none of us want to
1717 allow treason to be protected. And I would personally commit
1718 to working with him on this specific issue. I will yield
1719 back.

1720 Mr. Boucher. Would the gentleman from Texas yield to
1721 me?

1722 Mr. Gohmert. Certainly, Mr. Boucher.

1723 Mr. Boucher. I want to associate myself with the
1724 commitment just made by the gentleman from Indiana. And we
1725 look forward to discussing this matter with the gentleman
1726 from Texas between now and the time the bill is taken up on
1727 the floor. None of us wants to protect treason; that is
1728 certainly not our intent. And we need to find an appropriate
1729 way to get the gentleman assurance that treason, in fact,

1730 will not be protected.

1731 Mr. Gohmert. And I very much appreciate that. It
1732 appeared to me that, if it were after the fact and the
1733 treason needed to be investigated, that that shield might be
1734 placed in the way.

1735 And having heard the chairman's list of names of
1736 individuals who would be working to try to tighten up the
1737 language, I would very much appreciate being in that group,
1738 but I would obviously be like the donkey in the Kentucky
1739 Derby. Comparatively, I wouldn't stand a chance, but the
1740 company would be very nice, and I would love to be in that
1741 group.

1742 Chairman Conyers. Well, thank you. By your persuasive
1743 eloquence, you are included in the group.

1744 [Laughter.]

1745 If there are no other amendments—

1746 Mr. Franks. Mr. Chairman? Mr. Chairman?

1747 Chairman Conyers. Who seeks recognition?

1748 Mr. Franks. Arizona.

1749 Chairman Conyers. Ah, Trent.

1750 Mr. Franks. Mr. Chairman, thank you. Mr. Chairman, I
1751 have an amendment at the desk.

1752 Chairman Conyers. Well, the clerk will report the
1753 amendment.

1754 The Clerk. "Amendment to the amendment in the nature of

1755 a substitute to H.R. 2102, offered by Mr. Franks of Arizona.

1756 In section 2(a)3(c), number one, strike at the end of clause

1757 ii--"

1758 [The amendment by Mr. Franks follows:]

1759 ***** INSERT *****

1760 Chairman Conyers. I ask unanimous consent the amendment
1761 be considered as read.

1762 And the gentleman, Mr. Trent Franks, Arizona, is
1763 recognized in support of this amendment.

1764 Mr. Franks. Well, thank you, Mr. Chairman.

1765 Mr. Chairman, I will try to be very brief here.

1766 Some of the concerns brought up here related to always
1767 protecting security as we go forward to do everything we can
1768 to protect the First Amendment, I think have been articulated
1769 better here than I will try to do. But the amendment that I
1770 have would simply carve out an exception to spell out in
1771 unequivocal terms that information that the government has
1772 determined would impact national security deserves protection
1773 under this bill.

1774 We have specific carve-outs already under the section
1775 2(a)3(c) for trade secrets, individually identifiable health
1776 information, and nonpublic personal information of any
1777 consumer. And I am just wondering why trade secrets and
1778 health information would be elevated above information that
1779 protects our national security.

1780 We don't want to be in a position of making ingredients
1781 of the special sauce used on a Big Mac more important than
1782 the identity of covert agents. You know, the majority just
1783 brought in Joe Wilson here to explain how important that was
1784 to us. And so I would certainly welcome any questions.

1785 But in the interests of brevity, I will yield to Mr.
1786 Pence of Indiana.

1787 Mr. Pence. I thank the gentleman for yielding.

1788 And while I would respectfully request the gentleman
1789 consider withdrawing this amendment, I am aware of another
1790 amendment that he intends to bring that I look forward to
1791 heartily supporting, which I think will add a significant
1792 scope to this legislation that will serve our national
1793 security interests.

1794 Let me just say, the legislation in the substitute
1795 amendment—let me say definitively. This privilege will not
1796 protect those who leak security secrets. The legislation
1797 will not protect, as some at DOJ have suggested, a person who
1798 leaks classified war plans or nuclear secrets. DOJ testimony
1799 has suggested the same.

1800 If a government employee were leaking war plans or
1801 nuclear secrets, I would say respectfully to my friend my
1802 Arizona the potential for future leaks from that employee
1803 would likely reflect significant and specified harm to
1804 national security, and thus would cause the privilege to
1805 yield and the shield to be pierced.

1806 Moreover, any information unrelated to confidential
1807 sources could be subpoenaed, under the bill, if the testimony
1808 or documents sought is critical to the investigation or
1809 prosecution. So let me just say, the only reason I would ask

1810 the gentleman to consider withdrawing the amendment is simply
1811 because I think the spirit of this amendment is embodied in
1812 the statute, but I greatly appreciate his intense focus on
1813 the question of national security, and yield back.

1814 Mr. Boucher. Would the gentleman from Arizona yield?

1815 Mr. Franks. Certainly.

1816 Mr. Boucher. Let me also add my comments to those just
1817 delivered by Mr. Pence. It seems to me that unequivocally if
1818 someone is releasing classified information that that
1819 embodies an ongoing threat to national security. If the
1820 person has done it once, there is every prospect that the
1821 person will do it again, and that would trigger the
1822 disclosure on the grounds of an imminent threat to national
1823 security.

1824 So I really believe this is covered, and I will join the
1825 gentleman from Indiana is asking that, upon that assurance,
1826 the gentleman from Arizona would withdraw the amendment.

1827 Mr. Franks. Mr. Chairman, reclaiming my time, my one
1828 concern here is—and if we are talking about national secrets,
1829 I don't want to place my confidence in what any random
1830 federal judge might decide is likely or unlikely. That is my
1831 biggest concern. Judges have no crystal ball into the
1832 future, and the guessing probabilities I think fall short of
1833 the specified harm to national security that this action
1834 requires.

1835 And I would hate to roll the dice on that. What I will
1836 do, Mr. Chairman, if I withdraw this amendment, I would like
1837 to ask the sponsor and the sponsor of the amendment to help
1838 address this before it gets to the floor. If it doesn't, I
1839 reserve the right to offer the amendment on the floor.

1840 Chairman Conyers. Would you promise to join the working
1841 group? Would you promise to join the working group on this?

1842 Mr. Franks. Everybody else, Mr. Chairman, has. I
1843 suppose I should be no exception.

1844 Chairman Conyers. That is a good idea.

1845 Without objection, the gentleman withdraws his
1846 amendment.

1847 Ladies and gentlemen, we have two further amendments to
1848 consider when we come back, that of Brad Sherman and Hank
1849 Johnson.

1850 And, okay, thank you, Mr. Johnson.

1851 I would like to thank Mr. Brad Sherman, too, but
1852 apparently—

1853 [Laughter.]

1854 Mr. Sherman. The one amendment I have doesn't relate to
1855 the definition of journalism and does go to the heart of what
1856 this bill does.

1857 Chairman Conyers. We will come back and consider that.

1858 The committee stands recessed.

1859 [Recess.]

1860 Chairman Conyers. The committee will come to order.

1861 The chair recognizes the gentleman from California, Brad
1862 Sherman, who has an amendment that we will ask the clerk to
1863 report.

1864 Mr. Sherman. I have an amendment at the desk. This
1865 would be number seven.

1866 The Clerk. "Amendment to the amendment in the nature of
1867 a substitute to H.R. 2102—"

1868 [The amendment by Mr. Sherman follows:]

1869 ***** INSERT *****

1870 Mr. Sherman. Mr. Chairman, I ask that the reading be
1871 dispensed with.

1872 Chairman Conyers. Without objection. The gentleman is
1873 recognized.

1874 Mr. Sherman. Thank you.

1875 This bill is complex in what protection is provides to a
1876 journalist, and it basically provides two levels of
1877 protection, depending upon what is being protected. If what
1878 you are protecting is they have the videotape of the traffic
1879 accident and they just didn't happen to broadcast, or
1880 anything other, anything a journalist might have other than
1881 the name of a confidential source, this bill provides what I
1882 think is a very high level of protection.

1883 It says, first, those wanting the information are going
1884 to have to go try to find it elsewhere. Then, if it is a
1885 criminal investigation, it better be a real crime has been
1886 committed, et cetera, and all the standards in subdivision
1887 two.

1888 And, finally and most importantly, the judge has to make
1889 a balancing test and decide the compelling disclosure
1890 outweighs the public interest of those gathering information.
1891 And I would say that that balancing test is going to be very
1892 hard for those seeking information to meet because all of our
1893 judges are steeped in the First Amendment and are unlikely to
1894 say that the public interest in gathering or disseminating

1895 information is anything but extremely high interest.

1896 What the bill also does, though, if the name of a source
1897 is at issue is pretty much provide an absolute bar, except in
1898 some rather peculiar circumstances, one dealing with future
1899 terrorism, the other dealing with some imminent risk. The
1900 sniper is there, and he is about to shoot somebody. And the
1901 third dealing with certain commercial—what I am dubbing
1902 commercial—information, trade secrets, and certain
1903 information deal with in the Social Security Act or the
1904 Gramm-Leach-Bliley act.

1905 But aside from those exceptions, if a reporter has a
1906 document that reveals the name of a source, that reporter is
1907 pretty much not going to ever have to reveal that,
1908 notwithstanding the balancing test, notwithstanding the
1909 public interest, notwithstanding the person seeking to get
1910 the information has exhausted all other sources.

1911 And so we had the example, what if a murder of, say, a
1912 letter carrier was a federal matter and the only way to get
1913 the critical information was from a reporter? And here it is
1914 just a difference in philosophy. I would say, under those
1915 circumstances, we ought to force the prosecution to exhaust
1916 their other sources of information. And if they do, and it
1917 is a real criminal investigation of a very serious crime,
1918 then we ought to have a balancing test.

1919 The bill as I understand it says, no, in that

1920 circumstance, the reporter might have a balancing test with
1921 regard to their other information, but with regard to
1922 anything that would identify a source, it is an absolute
1923 rule. And Mr. Boucher have spent some time trying to figure
1924 out whether there was anything halfway between our positions,
1925 and in the short amount of time available to us didn't find
1926 that.

1927 And I don't know where the rest of the members of the
1928 committee are on this. Is this something to be worked out as
1929 the bill goes forward or something that people want to
1930 address here in committee? And what my amendment does is
1931 strike subdivision three of section 2(a) from the bill and
1932 leave the rest of section two, so that a court would not
1933 compel the disclosure of information unless three tests are
1934 met.

1935 First, the person seeking to cause the information to be
1936 divulged has to exhaust their other sources. Second, if it
1937 is a criminal investigation, there has to be a reasonable
1938 grounds that a crime has, in fact, occurred and that the
1939 document is critical. In a civil matter, it has to be
1940 critical to the successful completion of the matter.

1941 And we would also leave in, most importantly,
1942 subdivision four that says, even with all that, even if the
1943 information is critical, even if it cannot be obtained
1944 elsewhere, even if the matter is serious, the court has to

1945 make a balancing test. So I think, even with my amendment,
1946 we would have a very strong shield for reporters, but we
1947 would not have really that absolute shield for divulging
1948 their sources.

1949 I think I have summarized the amendment, and I yield
1950 back.

1951 Chairman Conyers. I thank the gentleman.

1952 Mr. Boucher. Mr. Chairman?

1953 Chairman Conyers. Who seeks recognition?

1954 Mr. Boucher. Over on your right, Mr. Chairman.

1955 Chairman Conyers. Mr. Boucher?

1956 Mr. Boucher. Thank you. That wasn't a political
1957 comment. Thank you very much, Mr. Chairman.

1958 I rise in opposition to this amendment. The gentleman
1959 from California and I have discussed his amendment at great
1960 length. In fact, we spent the better part of the time we had
1961 on the floor during the last vote discussing this amendment,
1962 and I think the gentleman properly characterizes our
1963 differences as a fundamental policy difference.

1964 What the gentleman's amendment would do is strike
1965 section three of the bill, that begins on line 16 of page
1966 two, and this is the portion of the bill that requires a
1967 higher standard in the event that information that would
1968 reveal a confidential source or lead to the revelation of
1969 that confidential source is compelled to be disclosed. For

1970 other kinds of testimony or document production from a
1971 journalist that does not relate to confidential sources, a
1972 lower standard is required.

1973 And what the gentleman's amendment would do is
1974 essentially apply that lower standard to all testimony from
1975 journalists, whether or not that testimony would reveal a
1976 confidential source. So under the gentleman's amendment,
1977 there would be no higher standard for the revelation of
1978 confidential sources or for the production of documents or
1979 other materials that might lead to that revelation.

1980 And this is where our fundamental difference arises. We
1981 think that a very high standard should be required in the
1982 event that law enforcement, in the case of a criminal action
1983 or a civil litigant in civil cases, compels or seeks to
1984 compel the disclosure of confidential source information.

1985 For all of the reasons that I have mentioned, Mr. Pence
1986 has mentioned, other members of the committee have referred
1987 to in their statements during the course of the day, I would
1988 note that, among the approximately 32 states I believe it is
1989 now and the District of Columbia that have state shield
1990 statutes, fully 14 of those have absolute privileges. So
1991 there are no circumstances under which confidential source
1992 information could be revealed.

1993 Now, we have not decided to go quite to that edge. We
1994 do have explicit circumstances under which the confidential

1995 source information can be required to be divulged, and those
1996 are specified also here in section three incidences where it
1997 is necessary to prevent an act of terrorism or other
1998 significant or specified harm to national security, where the
1999 disclosure is necessary to prevent imminent death or
2000 significant bodily harm, or in the instance where there has
2001 been a disclosure of a trade secret or individually
2002 identifiable health information, or personal financial
2003 information, where that disclosure is in violation of law.

2004 In those instances, we would enable the compelling of
2005 source information disclosure, but in no others. And I
2006 frankly don't think the difference between what the gentleman
2007 from California proposes and the position certainly that I
2008 have is bridgeable.

2009 And so with all respect for the gentleman—who really
2010 understands this bill well and has done a tremendous amount
2011 of work in reviewing it and offering some thoughtful ideas,
2012 particularly on ways that we might addressing the questions
2013 of who is covered, who is a covered person, who is a
2014 journalist, and I look forward to those conversations with
2015 the gentleman henceforth—but on this subject, he is right.
2016 It goes to the heart of the bill. It goes too far.

2017 And, Mr. Chairman, I yield back.

2018 Mr. Pence. Mr. Chairman?

2019 Chairman Conyers. The gentleman from Indiana, Mr.

2020 Pence?

2021 Mr. Pence. Move to strike the last word, Mr. Chairman.

2022 Chairman Conyers. The gentleman is recognized.

2023 Mr. Pence. I will be brief. I rise in very respectful
2024 opposition to Mr. Sherman's amendment. And I would like to
2025 associate myself very strongly with Mr. Boucher's statement.

2026 In fact, as I think about the number of states that have
2027 an absolute privilege, I believe California is among the
2028 states that has an absolute privilege pertaining to revealing
2029 sources. I could be corrected on that, but I believe it is
2030 among those states.

2031 Now, let me just amplify one point, if I may, because I
2032 know that Mr. Sherman has brought this amendment very well-
2033 intentioned, but I think Mr. Boucher makes the point that is
2034 very important here. I was very intrigued by what the
2035 gentleman from Alabama, Mr. Davis, said about maybe simply
2036 obviating criminal contempt all together.

2037 I am terribly fascinated by that, but that is taking the
2038 bill in a direction of providing greater protections
2039 specifically to the free flow of information, and it does
2040 seem to me that, by creating one standard here for both
2041 information and information that would lead to the
2042 identification of a source, we take the bill in the opposite
2043 direction.

2044 And in a very real sense, I think Mr. Boucher would

2045 admit, when we first introduced this bill more than 2 years
2046 ago, we actually had an unqualified privilege. We kind of
2047 began there and have been working our way backwards. I think
2048 I am about as willing to work on all the issues the chairman
2049 has pointed to, and I am about as far away from protecting
2050 the identity of a source as I am willing to get, because I
2051 really think that ensuring that, other than in the cases that
2052 are carved out, imminent threat of bodily harm and national
2053 security exceptions and trade secrets, that we ought to deal
2054 very carefully with any time law enforcement has the ability
2055 to compel the identity of someone who has shared information
2056 about government with a member of the fourth estate.

2057 I think that, to the extent that we erode the
2058 protections in this bill, we will further the chilling effect
2059 that has been descending on our nation's capital over the
2060 last 15 years, where individuals become less and less likely
2061 to talk to reporters off the record for fear that
2062 specifically their name and their identity can be revealed in
2063 a court of law.

2064 So I think gentleman from California's analysis
2065 exceptional. There is additional protection with regard to
2066 source disclosure, but I believe that it is warranted. And
2067 so I would respectfully oppose the gentleman's amendment.

2068 I yield back.

2069 Chairman Conyers. The question—

2070 Mr. Nadler. Mr. Chairman?

2071 Chairman Conyers. Mr. Nadler?

2072 Mr. Nadler. To the right of Mr. Boucher.

2073 Chairman Conyers. Yes, unlikely, but we will
2074 acknowledge him anyway.

2075 Mr. Nadler. Yes, thank you, Mr. Chairman. On this
2076 occasion, perhaps.

2077 I rise in support of Mr. Sherman's amendment.

2078 Having thought about this, I am a very strong supporter
2079 of a shield law, but the law abhors absolutes or ought to
2080 abhor absolutes, and the way the bill is written, when it
2081 comes to disclosing identities, it is pretty much an
2082 absolute, except when you are talking about a future act,
2083 such as an act of terrorism that could be prevented or a
2084 murder that will occur. But with regard to the investigation
2085 of crimes or of any civil matters, to anything past tense it
2086 is pretty much an absolute bar.

2087 Now, most of us on this committee are familiar with
2088 constitutional tests. And we know that, when the Supreme
2089 Court says that something will withstand constitutional
2090 scrutiny if you can show a rational relationship to a
2091 legitimate state interest, most things will pass, most laws
2092 will pass that test. And when the Supreme Court says that we
2093 want to use strict scrutiny, that you have to show a
2094 compelling state interest, and that applying the law as

2095 indicated is necessary to vindicate that compelling state
2096 interest as the least restricted means of doing so, that most
2097 things will fail that test.

2098 But it is not an absolute test. And when we want to
2099 really protect liberty, and we want to protect the First
2100 Amendment, when you want to protect religious liberty, we
2101 say, "You have to meet the strict scrutiny test." If you
2102 were going to ban speech, you have to meet the strict
2103 scrutiny test. If you are going to ban a religious ritual—
2104 let's say a religious ritual that involves setting fire to a
2105 building—you have to meet the strict scrutiny test.

2106 But we don't absolutely protect it. And I think the
2107 same test should apply here. And maybe the language should
2108 be a little tighter, although I think it is fairly tight, but
2109 it seems to me that the bill as written—that is to say, the
2110 language of the amendment—it seems to me the bill as written
2111 is too absolute and that Mr. Sherman's tests comes much
2112 closer to a strict scrutiny test, which is what we ought to
2113 have.

2114 And therefore, I support the amendment.

2115 I yield back.

2116 Mr. Davis. Mr. Chairman?

2117 Chairman Conyers. I thank the gentleman.

2118 Artur Davis?

2119 Mr. Davis. Thank you, Mr. Chairman. I move to strike

2120 the last word.

2121 Chairman Conyers. The gentleman is recognized.

2122 Mr. Davis. Mr. Chairman, I don't think I will take the
2123 5 minutes, but I wanted to make a couple of quick
2124 observations.

2125 One of the interesting things that this exchange reminds
2126 me, if you look at subsection three as its currently written,
2127 if you look at the delineated categories, I see a reference
2128 to information related to national security, I see a section
2129 related to imminent bodily harm, I see a section related to
2130 trade secrets, health information, nonpublic personal
2131 information.

2132 I don't see a provision related to classified
2133 information that may be held by the Central Intelligence
2134 Agency. I don't see a provision that relates to classified
2135 information in general. And, again, it raised this
2136 interesting question. In the context of the Scooter Libby
2137 case, in the context of Judith Miller, in the context of the
2138 disclosure of Valerie Plame's identity, I don't believe—
2139 unless I am not understanding the way section three works—I
2140 don't believe that that case and the disclosure of Plame's
2141 identity would be covered in three as it is currently
2142 written.

2143 So while I would not vote for Mr. Sherman's amendment, I
2144 think, once again, this exchange reminds us we do have some

2145 work to do with tightening the definition that exist. I
2146 don't know if it would make a lot of sense for this committee
2147 to have the two-tiered structure that we have, but to leave
2148 out classified information in general. And I am not sure if
2149 it would make sense to leave out classified information
2150 around the identity of a confidential informant.

2151 And, again, I will make the additional point, it would
2152 be hard to argue, frankly, that Ms. Plame's situation was one
2153 where there was an imminent threat of bodily injury. So,
2154 once again, I am not sure that her scenario, where frankly I
2155 would think we would have wanted to protect the Judith
2156 Millers of the world, I am not sure her scenario is even
2157 covered by the bill as it stands now.

2158 The other observation that I would make, while I
2159 understand what my very able friend from California, Mr.
2160 Sherman, is trying to do, we have very few absolute
2161 privileges. As I understand it, even the marital privilege
2162 is subject to some breach in the context of criminal trials.
2163 Certainly, the attorney-client privilege is subject, as I
2164 understand, in some instances to either a waiver intended or
2165 not or to some piercing by the state in some circumstances.

2166 So I don't think we want to move in the direction of
2167 creating a near-absolute privilege for reporters. I think
2168 the two-tiered scheme in this bill works well, but I think,
2169 once again, there is room to strengthen the two-tiered scheme

2170 by including information that is classified.

2171 Mr. Berman. Would the gentleman yield?

2172 Mr. Davis. I will yield.

2173 Mr. Berman. I thank the gentleman for yielding.

2174 I was a little unclear about one thing you said. You
2175 don't think this bill would protect Judith Miller?

2176 Mr. Davis. Reclaiming my time, as I understand it—

2177 Mr. Berman. Could you explain why you come to that
2178 conclusion?

2179 Mr. Davis. Well, if I am looking at the heightened
2180 protection section, which begins on page two, section three,
2181 "Disclosure of the identity of a source necessary to prevent
2182 an act of terrorism," I don't think that applies.

2183 "Disclosure of the identity of a source"—

2184 Mr. Berman. But that is for piercing.

2185 Mr. Davis. Well, but this—reclaiming my time—

2186 Mr. Berman. In other words, the exemptions are what
2187 wouldn't protect her. If she is not covered by those
2188 exemptions, why wouldn't she be protected?

2189 Mr. Davis. Well, reclaiming my time, my understanding—
2190 and, again, I am happy to be corrected on this point—but my
2191 understanding is that the bill creates relatively light
2192 protection for the disclosure of non-source information. It
2193 creates very heightened protections for certain kinds of
2194 information related to informant.

2195 And I read all of these subsections, contained on page
2196 three and four, as essentially working independently. I
2197 don't read them all working in tandem. I think it is "or."
2198 And because of that, I don't see where the Plame disclosure
2199 falls.

2200 Mr. Sherman. Will the gentleman yield?

2201 Mr. Davis. Yes.

2202 Mr. Sherman. It is funny, because Mr. Boucher and I
2203 were just talking about this very circumstance on the floor.
2204 This bill provides an absolute shield for sources, subject to
2205 a very few, very narrow exceptions.

2206 Mr. Berman. And that helps Judith Miller.

2207 Mr. Sherman. No, it helps—oh, yes, it helps Judith
2208 Miller not reveal—

2209 Mr. Davis. Well, reclaiming my time, tell me which of
2210 these sections covers Judith Miller.

2211 Mr. Pence. Will the gentleman yield?

2212 Mr. Davis. I will yield to Mr. Pence from Indiana.

2213 Mr. Pence. I thank the gentleman.

2214 I think your point is extremely well-taken, Mr. Davis.
2215 I think the Free Flow of Information Act as amended would
2216 actually have made it possible for Judith Miller not to have
2217 to spend 85 days in jail. I think it would have created a
2218 shield whereby there would not have been the exceptions that
2219 would have given the prosecutor the ability to force her to

2220 reveal the name of her confidential source.

2221 Mr. Davis. But reclaiming my time, is it—and I guess,
2222 for the record, to Mr. Boucher—is it the intent of the
2223 statute to say that there are basically three kinds of
2224 information, there is information that doesn't relate to
2225 sources, there is information that relates to these
2226 categories, and there is yet some third category that is
2227 floating out there?

2228 And I yield to Mr. Boucher.

2229 Mr. Boucher. Well, I thank the gentleman for yielding.

2230 But we have two basic categories. The first category is
2231 where the reporter is subpoenaed into court and is asked to
2232 testify with regard to incidents the revelation of which
2233 would not result in the revelation of a source. Also, a part
2234 of that category is where a subpoena requests the production
2235 of documents, the production of which would not result in the
2236 revelation of a source. That is category number one.

2237 Category number two is the material that would be
2238 stricken by the gentleman from California's amendment, and
2239 that is for the production of either testimony or documents
2240 which would reveal a confidential source. And that
2241 revelation is prohibited in all but three instances, and that
2242 is a, b, and c, contained on the beginning on line 21 on page
2243 two. So it is terrorism, harm to national security, bodily
2244 harm or death, and then trade secrets, health information,

2245 financial information.

2246 In those instances, there can be a compulsion, a
2247 revelation of confidential information, but subject to the
2248 balancing test at number four. And that balancing test would
2249 apply to both categories. I hope that answer helps the
2250 gentleman.

2251 Let me simply add, too, since the gentleman called on
2252 me, that I have never, frankly, though the Judith Miller case
2253 was a great example of why we need this statute. And so I
2254 have somewhat equivocal views with regard to whether it even
2255 ought to apply in that case.

2256 I am not entirely personally sure what the outcome would
2257 be, if there were a suggestion that, under this bill, if
2258 enacted into law, she should be required to disclose her
2259 confidential source. It is presumably information about the
2260 identity of a CIA agent. That is certainly classified
2261 information, as the gentleman defined it, and the argument I
2262 think would be made that perhaps the revelation of that
2263 information might be necessary in order to prevent a
2264 specified harm to national security, on the theory that, if a
2265 person has made this kind of revelation, there is—

2266 Chairman Conyers. The gentleman's time is expired.

2267 Mr. Boucher. —might do so again.

2268 Mr. Berman. Mr. Chairman, I seek recognition.

2269 Chairman Conyers. All right, the gentleman from

2270 California, Mr. Berman, is recognized.

2271 Mr. Berman. It wasn't about Valerie Plame's identity.
2272 That was already known. It was who told her about her
2273 identity and whether or not that act constituted a violation
2274 of law. As I understand it, just from listening to this
2275 discussion, Mr. Davis lists the objections, and it sounds
2276 like that particular information would not come within any of
2277 those exceptions.

2278 And, therefore, I conclude the absolute bar subject to
2279 the sort of balancing test is the operable language and that
2280 she is more protected from revealing who told her this
2281 information, and thereby may have committed a crime—or not,
2282 but that is a separate issue—than if Mr. Sherman's amendment
2283 were to pass. And that if it is more likely the bill as
2284 before us would protect her, than the bill if Mr. Sherman's
2285 amendment passes.

2286 Am I wrong about that?

2287 Mr. Davis. Would the gentleman yield?

2288 Mr. Sherman. Would the gentleman yield?

2289 Mr. Berman. Sure.

2290 Mr. Davis. Let me make a brief inquiry, if I can. And
2291 I probably will briefly try to yield back to Mr. Boucher for
2292 clarification. What section of this bill creates this third
2293 category?

2294 Because as I understand Mr. Berman's argument, his

2295 position is that you have three classes of information, one
2296 class that is very lightly protected, non-source information,
2297 and then two categories of source information. We have the
2298 categories of source information on page three and four,
2299 which are subject to a balancing test ultimately, and
2300 apparently there is some third category that is not even
2301 subject to a balancing test. I am just not seeing that in
2302 the bill.

2303 Mr. Boucher. Would the gentleman yield to me?

2304 Mr. Davis. Yes.

2305 Mr. Boucher. I would say to the gentleman that there is
2306 no third category. There are only two, and it is as I
2307 described them before. There is non-source information, and
2308 there is source information, and we treat them differently.

2309 Mr. Davis. So where would confidential information be
2310 that does not fit any of the subsections on page three?

2311 Mr. Boucher. There is no confidential information that--

2312 Mr. Davis. Classified information.

2313 Mr. Sherman. Would the gentleman yield? Would Mr.
2314 Davis yield?

2315 Mr. Boucher. Well, I think the gentleman yielded to me.

2316 Mr. Davis. Yes. Yes.

2317 Mr. Boucher. Do I still have--

2318 Mr. Davis. It is Mr. Berman's time.

2319 Mr. Berman. Oh, since it is, let me just get in here

2320 one split. There are two classes, and one of the classes has
2321 some exceptions. And those exceptions, we think, don't cover
2322 Judith Miller, and therefore she is in the source-protected,
2323 more highly protected area. Mr. Sherman's amendment would
2324 reduce that protection.

2325 Mr. Davis. Well, if the gentleman would yield for that
2326 question, that is what I am trying to get at. You are
2327 suggesting that there is a third category—

2328 Mr. Berman. No—

2329 Mr. Davis. —that is even more protected, and that is
2330 what I am not seeing.

2331 Mr. Berman. No, it is the source protection that
2332 doesn't fall within the exceptions is the basic protection
2333 and I think the fundamental thrust of what Mr. Boucher and
2334 Mr. Pence are trying to achieve.

2335 Mr. Sherman. Will the gentleman yield?

2336 Mr. Berman. Sure.

2337 Mr. Sherman. I think the bill creates two categories.
2338 One is for non-source information in certain very limited
2339 categories of source information, and that lower standard
2340 provides for—you have to exhaust your other sources, it is to
2341 be a legitimate investigation, and a balancing test. So that
2342 is a pretty substantial level of protection. The other level
2343 is absolute shield.

2344 Now, source information is subject to absolute shield

2345 unless it flunks due to one of the tests contained in
2346 subdivision three and bounces down to that still substantial
2347 level of protection—

2348 Mr. Davis. Well, if the gentleman would yield, I
2349 understand that point, but that seems to be a point that
2350 needs to be stated in the statute instead of a point that we
2351 simply need to rely on to some common law interpretation of
2352 the federal rules of evidence.

2353 I would seem that someone could argue that this shield
2354 act means to be exhaustive as to the scope of protection.
2355 And if you are not covered by the lesser standard or if you
2356 are not covered by the categories delineated on page three, I
2357 think a prosecutor can make an argument that there is no
2358 protection.

2359 Mr. Sherman. It is my understanding under the bill—that
2360 you get that what I am calling relatively high-level
2361 protection for everything the reporter has. And the question
2362 is, do you get that absolute protection for source
2363 information?

2364 Chairman Conyers. Mr. Berman has 10 seconds left, and
2365 then we will probably be going to a vote.

2366 Mr. Sherman. The argument would be whether revealing
2367 Judith Miller's sources would be necessary to prevent some
2368 future harm to national security, because those sources were
2369 so pernicious that weeding them out of the federal government

2370 was necessary to protect us, and that would depend pretty
2371 much on what you think of Scooter Libby and-

2372 Chairman Conyers. Time has expired.

2373 Does Adam Schiff want a very brief period of time?

2374 Mr. Schiff. Mr. Chairman, I only need about 30 seconds,
2375 and I thank you.

2376 I just wanted to say I guess two very quick points. One
2377 is I don't think Judith Miller, the case of Judith Miller, is
2378 the best sales point for a shield law. I support a shield
2379 law, but I wouldn't want to draft it around the facts of her
2380 case.

2381 The second point I wanted to make is, I don't why we are
2382 elevating the protection of a trade secret above and
2383 commercial interests above other interests, like national
2384 security. And in that respect, I favor what Brad is trying
2385 to do in this amendment, but at the same time the amendment
2386 takes out other language that provides some piercing of the
2387 privilege, even as the sources in national security
2388 situations, that would be pulled out by Brad's amendment,
2389 too, which I don't favor.

2390 I do think that sources ought to be given greater
2391 protection than the information itself. There are cases
2392 where you can disclose the information without disclosing the
2393 source of the information, and I think the sources are
2394 deserving of greater protection.

2395 But I think the Sherman amendment illustrates the
2396 difficulty of us trying to do a rewrite of the bill when
2397 there are still several provisions, I think, that need work.
2398 And on that, Mr. Chairman, I will yield back.

2399 Chairman Conyers. Thank you.

2400 The question now occurs on the Sherman-

2401 Mr. Sherman. Mr. Chairman?

2402 Chairman Conyers. -amendment.

2403 Mr. Sherman. Can I withdraw my amendment?

2404 Chairman Conyers. I am not even sure if-do you know how
2405 much time we have consumed here?

2406 [Laughter.]

2407 Mr. Sherman. But it has been valuable time, time we
2408 have enjoyed and learned.

2409 Chairman Conyers. Invaluable. Well, the gentleman's
2410 unanimous consent is quickly agreed to, without any
2411 prejudice, and I thank the gentleman for his cooperation.

2412 We are going to vote on the manager's amendment-

2413 Mr. Franks. Mr. Chairman? Just a very brief amendment
2414 that I think has been pre-cleared.

2415 Chairman Conyers. Okay.

2416 Mr. Franks. Mr. Chairman, I have the amendment at the
2417 desk.

2418 Chairman Conyers. You have an amendment at the desk?

2419 The clerk will report the amendment from Mr. Franks from

2420 Arizona.

2421 The Clerk. "Amendment to manager's amendment to H.R.
2422 2102, offered by Mr. Franks of Arizona. In section 2(a)3(a),
2423 on line 23, after 'United States' add 'or its allies.'"

2424 [The amendment by Mr. Franks follows:]

2425 ***** INSERT *****

2426 Mr. Franks. Mr. Chairman, in the briefest explanation,
2427 all this does is to add our allies to those places where the
2428 United States is referenced for their national security
2429 purposes, as well.

2430 Chairman Conyers. I thank the gentleman.

2431 Could I ask the authors of this measure to indicate
2432 their agreement to the gentleman from Arizona?

2433 Mr. Boucher. Would the gentleman from Arizona yield to
2434 me?

2435 Mr. Franks. Certainly.

2436 Mr. Boucher. I want to commend the gentleman for
2437 bringing this measure before us. It would simply add
2438 "allies" to the "United States," and I think this is highly
2439 appropriate, and we are prepared to accept the amendment.

2440 Mr. Franks. Mr. Chairman, thank you. And thank the
2441 gentleman. We are prepared to take yes for an answer.

2442 Chairman Conyers. Well, I thank both of you. The
2443 amendment shall be agreed to by unanimous consent.

2444 And we now can turn to the question that occurs on the
2445 manager's amendment.

2446 All those in favor of the manager's amendment as amended
2447 will indicate by signifying, "Aye."

2448 All those opposed, indicate by saying, "No."

2449 The ayes have it, and so ordered.

2450 We now move to the question on reporting the bill as

2451 amended favorably to the House.

2452 All those in favor will signify by saying, "Aye."

2453 Those opposed, "No."

2454 In the opinion of the chair, the ayes have it. The ayes
2455 have it, and the bill as amended is reported.

2456 And, without objection, the bill will be reported
2457 favorably to the House in the form of a single amendment in
2458 the nature of a substitute.

2459 And all members will have 2 days as provided by House
2460 rules to submit additional views. And the staff is directed
2461 to make any technical and conforming changes.

2462 Let me say, ladies and gentlemen of the committee, this
2463 working group was not illusory. We really need to be working
2464 on that, as Mr. Gohmert has reminded me. And I would like
2465 Brad Sherman, because of his generosity, to please join us on
2466 this working group. I think there are considerable things
2467 that can be accomplished as a result of that. And Mr. Hank
2468 Johnson, Judge Johnson, will be included, as well.

2469 Anybody not in the working group, subject a letter in
2470 writing before midnight tonight, and we will see what we can
2471 do for you.

2472 Pursuant to notice, the chair calls up H.R. 3013, the
2473 Attorney-Client Privilege Protection Act, and asks the clerk
2474 to report the bill.

2475 The Clerk. "H.R. 3013, a bill to provide appropriate

2476 protection to attorney-client privileged communications and
2477 attorney work product—"

2478 [The bill follows:]

2479 ***** INSERT *****

2480 Chairman Conyers. Without objection, the bill will be
2481 considered read and open to amendment at any point.

2482 And I ask the chairman of Crime Committee, Bobby Scott
2483 of Virginia, to introduce a description of this measure.

2484 Mr. Scott. Thank you, Mr. Chairman.

2485 Mr. Chairman, the Subcommittee on Crime, Terrorism and
2486 Homeland Security reports favorably the bill H.R. 3013 and
2487 moves its favorable recommendation to the full House.

2488 And I want to thank you, Mr. Chairman, for holding
2489 today's markup on this important bill.

2490 H.R. 3013, the Attorney-Client Privilege Protection Act
2491 of 2007, was introduced July 12th, and I was joined by eight
2492 original co-sponsors, including yourself, Mr. Chairman,
2493 Ranking Member Smith, Subcommittee Ranking Member Forbes,
2494 Representatives Coble, Davis, Lungren, Feeney and Roskam. I
2495 would like to take a moment to personally thank each one of
2496 them for their support.

2497 The purpose of the bill is fairly simple and
2498 straightforward. It is designed to prevent a practice that
2499 has regrettably become far too common in many of the federal
2500 government's recent investigations into corporate wrongdoing.
2501 I am specifically referring to the government's use of
2502 coercion to gain access to sensitive communications that
2503 otherwise would remain private and protected under the
2504 doctrine of attorney-client privilege.

2505 Coercive waivers of corporate attorney-client privilege
2506 has not always been a practice among federal prosecutors.
2507 Formerly, a company could evidence its cooperation with such
2508 prosecutors by providing insight and relevant corporate
2509 information, as well as providing general access to the
2510 company's workplace and its employees. After all, back then,
2511 the standard for establishing meaningful cooperation didn't
2512 require production of legally privileged communication or
2513 access to an attorney's work product materials.

2514 Unfortunately, since that time, however, memoranda
2515 issued by the Department of Justice suggests that a clear
2516 change in policy has taken place, namely one that now exposes
2517 corporations to an increased risk of prosecution and
2518 increased punishment if they claim constitutionally protected
2519 privilege.

2520 The first such memorandum was issued in 1999, and other
2521 memorandums have been issued since then. Today, the current
2522 department policies relating to corporation attorney-client
2523 privilege and work product privilege waivers are embodied in
2524 the McNulty memorandum issued in December 2006. And while
2525 this new memorandum does state that waiver requests should be
2526 the exception rather than the rule, it continues to threaten
2527 the viability of the attorney-client privilege in business
2528 organizations.

2529 I fully recognize that the department faces many hurdles

2530 when undertaking the investigation and prosecution of
2531 corporate malfeasance, but, Mr. Chairman, I think this is a
2532 reasonable response to what has been going on.

2533 I would ask, Mr. Chairman, unanimous consent to offer
2534 into the record the Washington Post editorial Tuesday, July
2535 24th, in support of legislation in this matter.

2536 Chairman Conyers. Without objection.

2537 [The information follows:]

2538 ***** COMMITTEE INSERT *****

2539 Mr. Scott. I yield back.

2540 Chairman Conyers. I thank the gentleman.

2541 The ranking member, Lamar Smith.

2542 Mr. Smith. Thank you, Mr. Chairman.

2543 H.R. 3013 would bar federal prosecutors from requiring a
2544 waiver of attorney-client privilege by corporations. H.R.
2545 3013 would not prohibit a corporation from voluntarily
2546 waiving the attorney-client privilege, though it is designed
2547 to remedy overreaching by federal prosecutors and will
2548 protect the attorney-client privilege, which is deeply rooted
2549 in our jurisprudence and the legal profession.

2550 I yield my remaining time to the ranking member of the
2551 Crime Subcommittee, the gentleman from Virginia, Mr. Forbes.

2552 Mr. Forbes. Thank you, Ranking Member Smith.

2553 And as mentioned by Chairman Scott, I am an original co-
2554 sponsor of H.R. 3013, the Attorney-Client Privilege
2555 Protection Act of 2007. The subcommittee held two hearings
2556 on this issue, one in the 109th Congress and another in this
2557 Congress. Our main concern is that prosecutors may be
2558 overreaching by routinely demanding the corporations waive
2559 their attorney-client privilege as a condition of cooperation
2560 and a decision not to indict a company.

2561 The attorney-client privilege encourages frank and open
2562 communication between clients and their attorneys so that
2563 clients, hopefully, can receive effective advice and counsel.

2564 I know that cooperation in the criminal justice system is an
2565 important engine of truth. To me, the critical question is
2566 whether prosecutors seeking to investigate corporation crimes
2567 can gain access to the information without requiring a waiver
2568 of the attorney-client privilege. There is simply no reason
2569 for prosecutors to require privilege waivers as a routine
2570 matter.

2571 The proposed legislation will prevent prosecutors from
2572 overreaching by demanding waivers from corporations. Of
2573 course, corporations will continue to have the ability to
2574 waive the privilege if they voluntarily decide to do so.

2575 I urge my colleagues to support the bill, and I yield
2576 back to the ranking member.

2577 Mr. Smith. Mr. Chairman, I yield back.

2578 Chairman Conyers. Thank you.

2579 Are there any amendments to this bill?

2580 Mr. Schiff?

2581 Mr. Schiff. Mr. Chairman, I move to strike the last
2582 word.

2583 Chairman Conyers. The gentleman is recognized.

2584 Mr. Schiff. I thank the chairman. I know I am probably
2585 begging his indulgence today. I have talked enough. But I
2586 will be brief, and I don't have an amendment, but I would
2587 like to comment on some of the concerns I have about the bill
2588 that go to the unique nature of prosecuting a corporate

2589 defendant.

2590 A defendant only acts through its officers, directors
2591 and employees. The corporation itself doesn't act. But the
2592 corporation is the holder of a privilege. It is not the
2593 employees that are the holders of the privilege. And in most
2594 corporations, when a corporation wants to protect its
2595 communications, it will routinely send those communications
2596 to the corporate counsel. They then become attorney-client
2597 privileged or work product.

2598 So you can cover basically almost all the communications
2599 within a company if you want to by sending them to the legal
2600 counsel. They then become arguably, if not in fact,
2601 attorney-client work product. So when an employee does
2602 something wrong and the investigators and prosecutors look at
2603 whether they charge just the employee or they charge the
2604 corporation, the corporation will often want to cooperate
2605 with that investigation.

2606 They may have disciplined the employee. They may have
2607 fired the employee. They may not have agreed at all with
2608 what the employee did. But it is own internal investigation
2609 is considered work product. Any communications they got from
2610 the errant employee could be arguably attorney-client
2611 privileged or work product. And a corporation that wants to
2612 cooperate, that doesn't want to be indicted, the board of
2613 directors of that corporation that want to protect the

2614 company and the shareholders and don't agree with what the
2615 errant employee did will have a hard time, I think,
2616 cooperating if this prohibition is written too broadly.

2617 It is one thing to want to make sure that prosecutors
2618 aren't abusing it. And I know our chairman of the
2619 subcommittee is really trying to do this, and I really
2620 appreciate and compliment his efforts in this regard, but I
2621 want to make sure that we don't prohibit corporations from
2622 cooperating when they choose to.

2623 And in a circumstance when a corporation says to a
2624 prosecutor, "Hey, look, we didn't know this was going on. As
2625 soon as we found out, we did something about it. We did an
2626 investigation on it. We want to cooperate; we are happy to
2627 cooperate in any way." If the prosecutor then says, Well,
2628 will you give us the results of your internal investigation?"
2629 that would, I think, violate this section, because it hasn't
2630 been offered and the prosecutor has asked for it.

2631 Now, in point of fact, prosecutors ask individual
2632 defendants to waive rights all the time, constitutional
2633 rights. In the case of a corporation, it is not a
2634 constitutional right. A corporation as an artificial person
2635 doesn't have constitutional rights. But in the case of an
2636 individual, a prosecutor will often ask them to cooperate.
2637 And if they are willing to cooperate and waive their Fifth
2638 Amendment rights and testify, they can often get a reduced

2639 sentence by that cooperation.

2640 So it is not unique to ask a corporate defender to
2641 cooperate; in fact, it is really less of an issue with the
2642 corporate defendant since they don't have a constitutional
2643 right. It is a statutorily created right. So I think we
2644 need to be careful.

2645 I am not sure that we have exactly the right balance
2646 here, in terms of not discouraging corporate cooperation, not
2647 making it harder to pursue these investigations. I know the
2648 chairman of the subcommittee had a hearing in subcommittee on
2649 the McNulty memo. I think the full committee would benefit
2650 from having more input about whether this is really being
2651 abused and whether we need to take action and, if so, whether
2652 we have struck the right balance here.

2653 But my concern is that we don't deter corporations that
2654 want to cooperate with law enforcement and we don't hamstring
2655 prosecutors who want to ask for that cooperation. But where
2656 a corporation does say they want to cooperate, and where a
2657 prosecutor says, "Well, that is great. You know, can we have
2658 your internal investigation or your work product?"

2659 It seems to me this language would then empower the
2660 individual actor, the individual employee or officer, the
2661 errant officer, to say that that evidence cannot be used
2662 against him because the corporation was coerced into giving
2663 it under an offer of more lenient treatment or the

2664 corporation not be indicted.

2665 And I think this could pose a real impediment to the
2666 prosecution of white-collar cases. And with that, I yield
2667 back.

2668 Chairman Conyers. Thank you.

2669 The chair recognizes—

2670 Mr. Lungren. Mr. Chairman?

2671 Chairman Conyers. Okay, Dan Lungren of California, you
2672 are recognized.

2673 Mr. Lungren. Thank you very much. I move to strike the
2674 requisite number of words.

2675 Chairman Conyers. The gentleman is recognized.

2676 Mr. Lungren. Mr. Chairman, I rise in support of this
2677 bill.

2678 The common law privilege between attorney and client
2679 should be sacrosanct. It is one of those issues which should
2680 transcend partisanship. And it is for that reason that my
2681 colleague from Massachusetts, Mr. Delahunt, and I began
2682 working on this issue with respect to the United States'
2683 sentencing guidelines.

2684 And although it was satisfying that the sentencing
2685 commission reversed its earlier decision to factor the waiver
2686 of the privilege into the sentencing guidelines, the
2687 Department of Justice, the Securities and Exchange
2688 Commission, and other federal agencies continue to pursue

2689 policies which encourage the erosion of this privilege.

2690 Unfortunately, I must say that the attempt by the
2691 Department of Justice to cut the proverbial baby in half is
2692 less than satisfactory. Allowing the waiver to be considered
2693 as a plus factor under the McNulty memorandum does not
2694 assuage those of us who believe the attorney-client privilege
2695 must be protected.

2696 Ironically, I believe that interference with the
2697 privilege will have the opposite effect that those who
2698 support the current process seek; that is, it will have the
2699 effect of undermining internal legal compliance programs. We
2700 should remember that an ounce of prevention is worth a pound
2701 of cure, and we must keep in mind that lawyers play a key
2702 role in helping companies understand the complex legal
2703 environment in which they operate.

2704 As the United States Supreme Court observed, the
2705 privilege encourages "full and frank communication between
2706 attorneys and their clients and thereby promotes broader
2707 public interest in the observance of law and the
2708 administration of justice." I would think we would want to
2709 encourage corporations to seek appropriate legal counsel from
2710 their counsel such that they do not run afoul of the law.

2711 The current Department of Justice guidelines, even after
2712 the McNulty memorandum, do not serve this important public
2713 policy objective. Furthermore, manipulation of the attorney-

2714 client privilege is entirely unnecessary to successful
2715 prosecution. As Attorney General Dick Thornburgh testified
2716 before us, in his 9 years at the Department of Justice,
2717 including that time when he was the attorney general, he
2718 could not remember a single case where the government felt it
2719 was necessary to obtain attorney-client privileged material.

2720 In fact, the committee has received a letter supporting
2721 H.R. 3013 from a bipartisan group of former attorneys
2722 general, solicitor generals, and top Justice Department
2723 officials signed by Ed Meese, Dick Thornburgh, Seth Waxman,
2724 Kenneth Starr, Ted Olsen, Walter Dellinger, Jamie Gorelick,
2725 and Stuart Gerson.

2726 They acknowledge the need "to restore the proper balance
2727 between the tools that the government needs to fight
2728 corporate crime and the rights of individual and corporate
2729 citizens." They ask us further "to support the prompt
2730 enactment of the Attorney-Client Privilege Protection Act of
2731 2007 or other similar legislation."

2732 I might just mention that, in *Hickman v. Taylor*, the
2733 United States Supreme Court talked about what the gentleman
2734 from California has referred, that is attorney work product.
2735 At page 510, the Supreme Court said this: "Not even the most
2736 liberal discovery theories can justify unwarranted inquiries
2737 into the files and mental impressions of an attorney. It is
2738 essential that a lawyer work with a certain degree of

2739 privacy, free from unnecessary intrusion by opposing parties
2740 and their counsel."

2741 "Proper preparation of a client's case demands that he
2742 assembles information, sift what he considers to be the
2743 relevant from the irrelevant facts, prepare his legal
2744 theories and plan his strategy without undue or needless
2745 interference. That is the necessary way in which lawyers act
2746 within the framework of our system of jurisprudence to
2747 promote justice and to protect their client's interests.
2748 This work is reflected, of course, in interviews, statements,
2749 memoranda, correspondence, briefs, mental impressions,
2750 personal beliefs, and countless other tangible and intangible
2751 ways, aptly though roughly terms by the Circuit of Appeals in
2752 this case as the work product of a lawyer."

2753 And the court continues, "But the general policy against
2754 invading the privacy of an attorney's course of preparation
2755 is so well-recognized and so essential to an orderly working
2756 of our system of legal procedure that a burden rests on the
2757 one who would invade that privacy to establish adequate
2758 reason to justify production through a subpoena or court
2759 order."

2760 It is for this reason that I support this bill. We have
2761 seen the Justice Department attempt to come back from the
2762 precipice on which they have found themselves with the
2763 original memorandum, but as they have gone in the various

2764 iterations, they still come to this position of undermining
2765 the essential attorney-client privilege and work product
2766 doctrine.

2767 And as I say, I think we would want corporations to rely
2768 on legal counsel rather than avoid legal counsel because of
2769 the developments that we have seen. It went through the
2770 Justice Department, and then we saw it in the sentencing
2771 commission. We managed to bring the sentencing commission
2772 back. We have been unable to bring the Justice Department
2773 back to a sufficient level to protect this interest, and I
2774 think it is up to this Congress to restore the attorney-
2775 client privilege, which has served the Anglo-American legal
2776 system from time immemorial.

2777 And with that, I yield back.

2778 Chairman Conyers. I thank the gentleman. Could I ask
2779 him if this issue came up when he was working in California
2780 in a law enforcement—

2781 Mr. Lungren. I do not recall this being a specific
2782 request by my attorneys saying that we needed the demand,
2783 this as a means of showing cooperation. And also, when the
2784 gentleman from California is concerned about voluntary
2785 disclosures, we have tried to address that on page six of the
2786 bill, lines 21 to 25.

2787 I understand the gentleman's concern, but I thought by
2788 the definition of voluntary disclosures, we go about as far

2789 as we possibly can on that. And I would think the Justice
2790 Department would be clever enough to be able to come within
2791 the ambit of the voluntary disclosures in the circumstance
2792 that the gentleman mentioned.

2793 Chairman Conyers. I thank the gentleman.

2794 The chair recognizes the gentleman from Virginia, Mr.
2795 Boucher.

2796 Mr. Boucher. Thank you very much, Mr. Chairman.

2797 I would like to yield my time to the gentleman from
2798 Virginia, Mr. Scott.

2799 Mr. Scott. Thank you, Mr. Chairman.

2800 Just very briefly, I would like to respond to the
2801 comments from the gentleman from California. I think the
2802 other gentleman from California made most of the comments
2803 that needed to be made. I would just point out that it is I
2804 think unreasonable to punish people for exercising their
2805 constitutional rights.

2806 The Justice Department indicates that they are not
2807 punishing people for exercising their rights; they are just
2808 not giving them a discount for waiving their rights. And
2809 that creates one sentence if you insist on your rights,
2810 another sentence if you don't. You can call that discount;
2811 you can call that punishment. There is a difference, and you
2812 are punished for exercising your rights.

2813 They can waive their rights if they want, but they

2814 shouldn't be coerced into waiving their rights. And I think
2815 the Justice Department has just gone too far, and that is why
2816 The Washington Post wrote the editorial that legislation was
2817 needed.

2818 Mr. Schiff. Would the gentleman yield for a moment?

2819 Mr. Scott. It is my colleague from Virginia's time.

2820 Mr. Schiff. Would Mr. Boucher yield?

2821 Mr. Boucher. I would be pleased to yield.

2822 Mr. Schiff. I appreciate the comments of my friend from
2823 Virginia, and I agree with him, certainly. I am not
2824 suggesting that I think that anyone should be coerced into
2825 giving up their privilege or their rights.

2826 But I don't see as different in kind when you ask a
2827 defendant, an individual, to cooperate with law enforcement
2828 and you ask them to testify. They have a Fifth Amendment
2829 right not to testify. You ask them to cooperate and testify,
2830 they do so, they waive that right. They get better treatment
2831 as a result of cooperating.

2832 Now, you could say that they have been coerced into
2833 giving up a right or you could say that they have agreed to
2834 cooperate and then given a benefit. The same is true in the
2835 case of a corporation that agrees to give up its work
2836 product. You can say that they are being coerced into it, or
2837 you can say they are being given better treatment because of
2838 it. But I think, frankly, I would be more concerned about

2839 coercion when you are talking about an individual giving up
2840 their right against self-incrimination than I would the
2841 artificial person of a corporation given up their statutory
2842 work product privilege.

2843 So I agree, and I think that, if there is coercion going
2844 on, we shouldn't allow coercion. But I also don't want to
2845 prohibit companies that in good faith want to cooperate from
2846 being able to do so.

2847 And I would yield back my time.

2848 Ms. Waters. Would the gentleman yield, Mr. Boucher?

2849 Mr. Boucher. I will be happy to yield to the
2850 gentlelady.

2851 Ms. Waters. Yes, I listened very carefully to Mr.
2852 Schiff talking about voluntary cooperation. What I think I
2853 am concerned about is encouraging individuals or
2854 organizations to waive their attorney-client privileges in
2855 exchange for not getting indicted. And that is hard to
2856 resist, I am sure, in many cases, and that is the kind of
2857 coercion that I am really concerned about. That is why this
2858 bill is very important.

2859 I yield back the balance of my time.

2860 Mr. Boucher. Thank you very much.

2861 No one else seeking recognition?

2862 Thank you, Mr. Chairman, I yield back.

2863 Chairman Conyers. Thank you.

2864 Ladies and gentlemen, we are going to vote on this
2865 matter, and then I wish to remind all members of the
2866 committee that, at 3:30, we have a FISA briefing for the
2867 members of the House of Representatives. Many of you had
2868 been at yesterday for the exclusive briefing for the
2869 Judiciary Committee. At 3:30, that committee will be meeting
2870 in 2118, the Armed Services Committee, and all are invited to
2871 join it. It is very important, and Lamar Smith and I will be
2872 there, and we will be going through this material yet again.

2873 Mr. Coble. Mr. Chairman?

2874 Chairman Conyers. Yes, sir?

2875 Mr. Coble. Mr. Chairman, will this be a repeat of
2876 yesterday or something in addition to yesterday?

2877 Chairman Conyers. No, it will be essentially a repeat.
2878 But depending on who is there, you always get different
2879 questions.

2880 Mr. Coble. All right, thank you, sir.

2881 Chairman Conyers. Thank you.

2882 If there are no amendments and a reporting quorum is
2883 present, the question on reporting this bill favorably to the
2884 House will now take place.

2885 All those in favor of the bill will signify by saying,
2886 "Aye."

2887 Those opposed, say, "No."

2888 The ayes have it, and the bill is ordered reported

2889 favorably to the House.

2890 We now have a bill in which the staff will be directed
2891 to make any technical and conforming changes, and all members
2892 have 2 days to submit additional views.

2893 That concludes our business for today, and we stand in
2894 recess until—well, subject to the call of the chair. We have
2895 notified the ranking member, Lamar Smith, and we will
2896 reconvene to finish our pending business, of which there is
2897 an agenda of three measures. I will be back to you to advise
2898 you as to when the committee will be meeting.

2899 And for now, I thank you for your cooperation.

2900 And the committee stands in recess, subject to the call
2901 of the chair. Thank you.

2902 [Whereupon, at 3:22 p.m., the committee was recessed,
2903 subject to the call of the chair.]