

RPTS BLAZEJEWSKI

DCMN MAGMER

MARKUP OF COMMITTEE PRINT OF  
MATERIAL TO BE TRANSMITTED TO THE  
COMMITTEE ON THE BUDGET PURSUANT  
TO SECTION 201 OF H.CON.RES. 112

Tuesday, April 17, 2012

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

The committee met, pursuant to call, at 3:18 p.m., in Room 2141, Rayburn House Office Building, Hon. Lamar Smith [chairman of the committee] presiding.

Present: Representatives Smith, Coble, Goodlatte, Lungren, Chabot, Issa, King, Franks, Jordan, Poe, Chaffetz, Griffin, Gowdy, Ross, Adams, Quayle, Amodei, Conyers, Nadler, Scott, Watt, Jackson Lee, Waters, Johnson, Pierluisi, Quigley, Chu, Deutch, and Sanchez.

Staff Present: Richard Hertling, Staff Director and Chief

Counsel; Travis Norton, Parliamentarian; Sarah Kish, Clerk; Perry  
Apelbaum, Minority Staff Director; and Aaron Hiller, Minority Counsel.

Chairman Smith. The Judiciary Committee will come to order.

Without objection, the chair is authorized to declare recesses of the committee at anytime, and the clerk will call the roll to establish a quorum.

The Clerk. Mr. Smith.

Chairman Smith. Present.

The Clerk. Mr. Sensenbrenner.

[No response.]

The Clerk. Mr. Coble.

[No response.]

The Clerk. Mr. Gallegly.

[No response.]

The Clerk. Mr. Goodlatte.

[No response.]

The Clerk. Mr. Lungren.

[No response.]

The Clerk. Mr. Chabot.

[No response.]

The Clerk. Mr. Issa.

Mr. Issa. Here.

The Clerk. Mr. Pence.

[No response.]

The Clerk. Mr. Forbes.

[No response.]

The Clerk. Mr. King.

[No response.]

The Clerk. Mr. Franks.

[No response.]

The Clerk. Mr. Gohmert.

[No response.]

The Clerk. Mr. Jordan.

[No response.]

The Clerk. Mr. Poe.

[No response.]

The Clerk. Mr. Chaffetz.

[No response.]

The Clerk. Mr. Griffin.

[No response.]

The Clerk. Mr. Marino.

[No response.]

The Clerk. Mr. Gowdy.

[No response.]

The Clerk. Mr. Ross.

[No response.]

The Clerk. Ms. Adams.

[No response.]

The Clerk. Mr. Quayle.

[No response.]

The Clerk. Mr. Amodei.

[No response.]

The Clerk. Mr. Conyers.

[No response.]

The Clerk. Mr. Berman.

[No response.]

The Clerk. Mr. Nadler.

[No response.]

The Clerk. Mr. Scott.

[No response.]

The Clerk. Mr. Watt.

[No response.]

The Clerk. Ms. Lofgren.

[No response.]

The Clerk. Ms. Jackson Lee.

[No response.]

The Clerk. Ms. Waters.

[No response.]

The Clerk. Mr. Cohen.

[No response.]

The Clerk. Mr. Johnson.

Mr. Johnson. Present.

The Clerk. Mr. Pierluisi.

[No response.]

The Clerk. Mr. Quigley.

Mr. Quigley. Here.

The Clerk. Ms. Chu.

Ms. Chu. Here.

The Clerk. Mr. Deutch.

[No response.]

The Clerk. Ms. Sanchez.

[No response.]

The Clerk. Mr. Polis.

[No response.]

Chairman Smith. The gentleman from Michigan, Mr. Conyers.

Mr. Conyers. Present.

Chairman Smith. The gentleman from New York, Mr. Nadler.

Mr. Nadler. Here.

Chairman Smith. The gentlewoman from California, Ms. Sanchez,  
have you been recorded?

Ms. Sanchez. I have not been recorded.

Chairman Smith. The gentlewoman from California.

Ms. Sanchez. I pass.

Chairman Smith. Could you be present, too?

Ms. Sanchez. I was just warming up.

Chairman Smith. Okay. You are warming up for later on.

Ms. Sanchez. What are we voting on, a quorum?

Chairman Smith. The quorum. You weren't willing to commit  
there, I could tell.

Mr. Nadler. Mr. Chairman? Mr. Chairman?

Chairman Smith. The gentleman from New York.

Mr. Nadler. I vote no.

Chairman Smith. Just getting warmed up, I know.

Voice. Mr. Chairman, it was an existential vote that she was taking: Are we all here?

Chairman Smith. Who else do we have?

The gentleman from Ohio.

Mr. Chabot. Present.

Chairman Smith. I am not sure I want to start now anyway.

The gentleman from Virginia.

Mr. Scott. Present.

Mr. Watt. Present.

Chairman Smith. The gentleman from Utah.

Mr. Chaffetz. Present.

Chairman Smith. The gentleman from Iowa.

The Clerk. Mr. King.

Mr. King. Present.

Chairman Smith. The clerk will report. The clerk will report.

The Clerk. Mr. Chairman, 13 members responded present.

Chairman Smith. A working quorum is present.

Pursuant to notice, I now call up Judiciary Committee Print 112-6, the proposed reconciliation submission to the Budget Committee, for purposes of markup, and the clerk will report the matter.

The Clerk. Judiciary Committee Print 112-6.

Chairman Smith. Without objection, the matter is considered as read and open to amendment at any point.

[The information follows:]

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

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

Today, in stark contrast to a Senate that has not passed a budget in 3 years, the Judiciary Committee takes a concrete step to help the House pass a budget. We will consider a measure to prevent massive cuts in military spending and social programs that would undoubtedly harm the security of our Nation.

Last year, when the super committee failed to report legislation to reduce the size and scope of the Federal Government, a \$1.2 trillion automatic cut in military spending and further cuts in other social programs were triggered. This so-called sequester threatens our national security.

Defense Secretary Leon Panetta recently testified that the sequester takes a meat ax to the military budget alone. That is why this year, like last year, the House passed a budget that replaces the sequester with common-sense initiatives that reduce the size and scope of the Federal Government. The House-passed budget attracted 228 votes. The President's budget lost by a vote of 414-0.

Pursuant to the fiscal year 2013 budget resolution, this committee has been instructed to report legislation that reduces mandatory spending by \$39 billion over the next 10 years. This committee has further been instructed to transmit such legislation to the Budget Committee by April 27.

In order to meet our reconciliation instruction, we proposed reporting the HEALTH Act to the Budget Committee. The Congressional

Budget Office estimates that this legislation will reduce mandatory Federal spending by \$41 billion over the next 10 years.

It is imperative that this committee do its part to reduce the Federal Government's escalating budget deficits and avoid automatic cuts to funding for our armed services and social programs. As General Martin Dempsey, chairman of the Joint Chiefs of Staff, recently observed, if Congress doesn't act and the Budget Control Act's automatic cuts stand, we won't be the global power that we know ourselves to be today, end quote.

America's broken medical liability system is a good place to start to reduce Federal spending and to avoid cuts Secretary of Defense Panetta has called put a gun to the head of the country and weaken our defense system for the future.

By reporting the HEALTH Act to the Budget Committee, we can begin the process of reducing Federal deficits and avoiding automatic spending cuts that will cause irreparable harm to our national security. The HEALTH Act meaningfully reforms our medical liability system. It is modeled after California's decades old and highly successful health care litigation reforms. According to the National Association of Insurance Commissioners, the rate of increase in medical professional liability premiums in California since 1976 has been one-third -- only one-third as much as the rate of increase experienced in other States on the average.

By incorporating California's time-tested reforms at the Federal level, the HEALTH Act saves taxpayers billions of dollars, encourages

health care providers to maintain their practices, and reduces health care costs for patients. It especially helps traditionally underserved rural and inner city communities and women who seek obstetrics care. This bipartisan medical liability reform legislation cuts health care costs, spurs medical investment, creates jobs, and increases access to health care for all Americans.

The HEALTH Act reforms include a \$250,000 cap on noneconomic damages and limits on the contingency fees lawyers can charge. The HEALTH Act also includes provisions that create a fair share rule by which damages are allocated fairly in direct proportion to fault, and it provides reasonable guidelines on the award of punitive damages.

The HEALTH Act allows for the payment of 100 percent of plaintiffs' economic losses. These unlimited economic damages include all their medical costs, their lost wages, their future lost wages, rehabilitation costs, and any other economic out-of-pocket loss suffered as a result of a health care injury. It also does not preempt any State law that otherwise caps damages. This bill is a common sense and constitutional approach to reducing the cost of health care.

The HEALTH Act also reduces the cost of health care as it decreases the waste in our system caused by defensive medicine. This practice occurs when doctors are forced by the threat of lawsuits to conduct tests and prescribe drugs that are not medically required.

According to a Harvard University study, 40 percent of medical malpractice lawsuits filed in the United States lack evidence of medical error or any actual patient injury. Many of these suits amount

to legalized extortion of doctors and hospitals. But because there are so many lawsuits, doctors are forced to conduct medical tests simply to avoid a lawsuit in which lawyers claim that not everything possible was done for a patient. This wasteful defensive medicine adds to all our health care costs without improving the quality of patient care.

In his 2011 State of the Union address, President Obama said, quote, I am willing to look at other ideas to bring down costs, including one that Republicans suggested last year, medical malpractice reform to rein in frivolous lawsuits, end quote.

Once again, that is the President of the United States. Let's help the President keep his word and put this common-sense liability reform on his desk. These reforms save the taxpayers billions of dollars and help avoid automatic defense cuts that threaten our national security and help avoid other cuts that threaten our social programs. Let's send this proposal to the Budget Committee.

That concludes my opening statement; and the gentleman from Michigan, the ranking member of the Judiciary Committee, is recognized for his.

[The statement of Chairman Smith follows:]

\*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

Mr. Conyers. Thank you, Mr. Chairman and members.

There is only one problem, is that this measure, H.R. 5, will undoubtedly be dead on arrival when it reaches the Senate. So I believe a more reasonable question is for us to examine some other outcome, and I would be willing and I am sure some of my colleagues on this side would be willing to join with you and others to fashion such an instrument.

This is not the one. This is the second time that this committee is marking up the bill. In February of last year, the committee held a 2-day markup of this same measure; and, unfortunately, it is no more inspiring now than it was then.

Instead of undertaking reforms to our Nation's immigration laws or responding to the ongoing home foreclosure crisis that continues to cripple our Nation's recovery, we use our resources to visit a measure that the House passed just last month; and in light of the fact that both of these measures will undoubtedly be unsuccessful in the Senate, I suggest another strategy, and I hope that you will work with me on that.

The first objection to this measure is that it does too much for big business. The legislation is literally a financial wish list for the pharmaceutical companies and the insurance companies; and so, rather than helping the doctors and the patients, the measure before us today would guarantee a windfall for the health care businesses. It pads the pockets of insurance companies, HMOs, and insulates manufacturers and distributors of defective medical products and

pharmaceuticals from liability at the expense of the innocent: women, children, the elderly, and always, as usual, the poor.

Today's exercise, which will be ultimately futile, is the result of Section 201 of the Republican budget resolution that includes reconciliation instructions requiring our committee to submit recommendations on how to reduce the deficit by nearly \$40 billion by fiscal year 2022. This amounts to -- mirrors, coincidentally, CBO's analysis of H.R. 5. By repackaging H.R. 5 in terms of a reconciliation recommendation, the supporters of this legislation apparently hope to benefit insurance companies at the expense of victims of medical malpractice.

Today's markup is part of the endless opposition to President Obama's landmark Affordable Care Act. With the passage of that Act, we were proud to have taken an important step in realizing the goal of making health care available to all Americans. In contrast, today's measure perfectly aligns with the aim of the conservative budget proposal, which is simply to protect tax cuts for the wealthy while placing the burden of those tax cuts on the backs of senior citizens and the poor.

The malpractice liability provisions before us today would supersede the law in all 50 States by limiting noneconomic damages, restricting punitive damages, limiting access to the courts for poorer victims of medical malpractice by shortening the statute of limitations for claims, eliminating protections for children, and prohibiting joint and several liability.

Mr. Chairman, I would submit the rest of my statement for the record and thank you for your consideration.

[The statement of Mr. Conyers follows:]

\*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

Chairman Smith. Thank you, Mr. Conyers.

Are there any amendments?

Mr. Nadler. Mr. Chairman.

Chairman Smith. The gentleman from New York.

Mr. Nadler. Is it customary for the subcommittee chairman and ranking --

Chairman Smith. Okay, I think we are going to pass on this side. I was hoping we could go straight to amendments, since we have been here before, but if the gentleman wants to be recognized.

Mr. Nadler. I will be brief.

Chairman Smith. I am sorry?

Mr. Nadler. I said I will be brief.

Chairman Smith. Okay. The gentleman from New York is recognized.

Mr. Nadler. Thank you.

I will submit my statement for the record. Let me just say a couple things.

Number one, the reason we are here is because of fundamental dishonesty, and that fundamental dishonesty is in the budget that this House passed. We are instructed to reduce the deficit by \$40 billion, but the first thing that budget -- over 10 years. But the first thing that budget does is increase the deficit by \$4.6 trillion by reducing taxes on the wealthy by \$4.6 trillion with unspecified countervailing tax reforms to be made later. Tax loopholes unspecified to be closed, tax loopholes that will never be specified, because in order to get

anywhere near that figure you would have to eliminate every single politically popular tax loophole that the middle class depends on, which is never going to happen.

So the first thing we are asked to do is to reduce the deficit by \$40 billion as a partial offset to a \$4.6 trillion deficit increase.

The second thing is that we are asked here -- the sequester is terrible. And it is terrible. We never should have voted that sequester. We voted it as part of the Budget Control Act last year in order to avoid -- in order to get around the extortion of being threatened with the government defaulting on its debts by not increasing the debt ceiling.

We voted for -- or Congress voted for, I didn't -- Congress voted for \$900 billion in cuts in domestic spending plus the sequester of \$2.2 trillion, half from domestic, half from defense. And now you want to come and say that defense should be held sacrosanct. We don't want to make those cuts in defense, but let's add to the \$1.1 trillion plus the \$900 billion in domestic expenditures, and let's murder every middle class and low-income support program that we have. Let's murder student aid. Let's murder housing aid. Let's murder transportation. You name it. And then we are left with a minor provision of \$40 billion which we are going to solve through medical malpractice.

Suffice it to say that no study has ever shown that if we were to enact the \$250,000 limit on noneconomic damages that it would, in fact, prevent defensive medicine. In fact, the witnesses for the majority when asked at a hearing whether they could quantify or whether

they, in fact, practiced defensive medicine vehemently denied it, and there is no statistical evidence as to the amount of it, if at all.

We are told a 2009 study by WellPoint said that malpractice cost isn't what is driving up the cost of health care premiums. It is a combination of other factors, including increasing utilization, excessive price inflation for medical services, an overall unhealthier America.

Finally, let me say one other thing, which I mentioned before and I will mention again, and that is a \$250,000 cap on noneconomic damages, that is on all damages other than loss of salary, loss of wages, and medical costs, pain and suffering, compensation for the fact that you have lost a limb, that you are a paraplegic, God forbid, whatever, \$250,000 for some of this is grossly inadequate. But in addition to which, if \$250,000 was adequate in 1975 or 1976 when California enacted it, that is worth \$38,000 in today's money.

If we pass this or anything like it without an inflation adjustment, what you are saying is that there shall eventually be no compensation. Because eventually that \$250,000 will be worth nothing or almost nothing as inflation continues.

So what you are really saying to people is that the loss of your consortium, the loss of your ability to walk, the loss of your ability to whatever is worth nothing; and I submit that that is simply wrong and immoral.

And I would oppose this for that reason if for no other but also because it is just wrong to do. It doesn't solve the problem. Medical

malpractice reform of this type doesn't solve the problem. And in terms of eliminating a \$40 billion cost, which it won't do, we ought to deal with the real problem in the budget, which is a \$4.6 trillion cost we will be imposing by those tax cuts.

Thank you. I yield back.

Chairman Smith. Thank you, Mr. Nadler.

Mr. Franks. Mr. Chairman?

Chairman Smith. Without objection, the rest of Mr. Nadler's opening statement will be made a part of the record.

[The statement of Mr. Nadler follows:]

\*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

Chairman Smith. The gentleman from Michigan is recognized.

Mr. Franks. Mr. Chairman?

Mr. Conyers. Mr. Chairman, I have a --

Chairman Smith. Will you suspend for just a minute?

Mr. Conyers. I will.

Chairman Smith. The gentleman from Arizona, Mr. --

Mr. Franks. Mr. Chairman, I just would like to submit an opening statement for the record.

Chairman Smith. Without objection.

[The statement of Mr. Franks follows:]

\*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

Chairman Smith. The gentleman from Michigan.

Mr. Conyers. Mr. Chairman, I have an amendment at the desk, and I ask that it be reported.

Chairman Smith. The clerk will report the amendment.

The Clerk. Amendment to Judiciary Committee Print 112-6 offered by Mr. Conyers of Michigan.

Page 11, insert after line 21 the following and redesignate succeeding sections accordingly.

Mr. Conyers. I ask unanimous consent the amendment be considered as read.

[The information follows:]

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

Mr. Franks. Mr. Chairman.

Chairman Smith. The gentleman from Arizona.

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

Chairman Smith. Point of order is reserved, and the gentleman is recognized for 5 minutes to explain his amendment.

Mr. Conyers. Thank you.

This amendment corrects one of the major flaws in the legislation. It would extend antitrust enforcement over the business of health insurance, which currently enjoys a broad antitrust immunity under the McCarran-Ferguson Act. There is no longer justification to exempt the health insurance industry from antitrust laws and Federal Government oversight, and the reasons for the necessity of what we call the McCarran-Ferguson amendment is as follows:

It will stop health insurers from avoiding charges of price fixing and other collusive activity in violation of the Federal antitrust laws by hiding behind an antiquated antitrust exemption that has outlived its purpose. The McCarran-Ferguson Act provides insurance companies with broad immunity from antitrust laws. As a result, courts have been forced to dismiss cases involving allegations of price fixing or other types of collusion falling short of an outright boycott.

Now, the House Judiciary Committee held a series of hearings on the effect of the insurance industry's antitrust exemption throughout the 1980s and the early 1990s where it became very clear that the insurance industry didn't need the exemption and that policyholders and the economy in general would benefit from increased competition.

As a result of my amendment, health insurance will be subject to the same competition laws that apply to almost all the other companies doing business in the United States.

Secondly, the amendment is needed to protect consumers. That is an important responsibility of this committee. Our Nation's competition laws are powerful tools that ensure that consumer welfare is the benchmark for fair and accountable industry practices. Consumers benefit through lower prices, more choices, and better services. Making health care available to American families at affordable cost depends on ensuring that there is true competition in the choices that they have for health insurance; and antitrust laws, as we know, are key in ensuring that there is true competition.

My amendment will help root out unlawful activity in an industry that has grown complacent by decades of protection from antitrust oversight. In doing so, we aim to make health insurance more affordable to more Americans. Doctors and health care providers will also benefit from increased competition because of the lowered costs for malpractice insurance.

And, finally, my amendment would be accepted because it simply restores a provision that has repeatedly enjoyed overwhelming support. Last month -- or less than a month ago, the House accepted a similar provision by voice vote during debate on H.R. 5, and my amendment is also similar to a provision included in H.R. 4596, the Health Insurance Industry Fair Competition Act, which passed in the House of Representatives on a recorded vote of 406-19.

So my amendment enjoys broad bipartisan support, makes a necessary, long-overdue revision to current law, and I hope that the committee will revisit this issue again today.

Thank you.

Chairman Smith. Thank you, Mr. Conyers.

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

Mr. Franks. Mr. Chairman, respectfully, I must insist on the point of order.

Mr. Watt. Mr. Chairman.

Chairman Smith. The gentleman is recognized to explain the point of order.

Mr. Franks. Yes, sir.

Mr. Chairman, the matter under consideration is strictly limited to addressing civil tort liability resulting from medical malpractice. The McCarran-Ferguson Act, which this amendment seeks to amend, provides that insurance companies are not subject to Federal antitrust laws. Nothing in the committee print relates at all to antitrust, to its enforcement, or to liability under the McCarran-Ferguson Act. The extent to which health insurers are affected by the matter under consideration is strictly limited to their ability in the civil tort system.

The matter does address whether the State or Federal Government gets to regulate their market, which this amendment does. Therefore, I submit that this amendment, Mr. Chairman, is not germane.

Chairman Smith. Thank you, Mr. Franks.

In the opinion of the chair, the amendment --

Mr. Watt. Mr. Chairman, Mr. Chairman.

Chairman Smith. -- is not --

Mr. Watt. Mr. Chairman.

Chairman Smith. For what purpose does the gentleman from North Carolina seek recognition?

Mr. Watt. I wish to be recognized on the point of order.

Chairman Smith. The gentleman is recognized.

Mr. Watt. I thank the gentleman for recognizing me.

And, ordinarily, the gentleman from Arizona would be absolutely correct. But this is a markup of a reconciliation bill, as I understand it, pursuant to Section 201 of the -- and those rules of germaneness do not apply in that circumstance under the House rules. So I understand clearly what the gentleman is saying, but he is citing a rule that does not apply in this context.

Chairman Smith. I am advised that this matter is subject to Rule 11, and therefore the customary rules of the House apply. That is simply what I am told.

Mr. Watt. Well, I think you, Mr. Chairman, should check with the Parliamentarian of the House. Because we were specifically told in the Financial Services Committee briefing that we had earlier today --

Chairman Smith. Okay.

Mr. Watt. -- or yesterday afternoon that these rules, the rules of germaneness, do not apply to --

Chairman Smith. Okay. I am told we did check with the House

Parliamentarian, and he agreed with our reading of the amendment. But let me double-check, if the gentleman will suspend.

Mr. Watt. All right.

Mr. Conyers. Mr. Chairman -- Mr. Chairman, I have not presented a case against the challenge to -- all right. It has been suggested that we withdraw without prejudice until this is checked out.

Chairman Smith. Okay. Without objection, the gentleman has asked unanimous consent to withdraw the amendment, and it will be withdrawn. We are double checking with the House Parliamentarian to see --

Mr. Watt. I thank the chairman. I have no interest in the outcome of the withdrawal or pursuit of the amendment, but I do respect the House rules, and I think we are obligated to comply.

Chairman Smith. If the gentleman will yield, let me just say we all want the correct ruling, and we will double-check and get back to it shortly.

Are there other individuals who wish to offer amendments?

The gentleman from Virginia, Mr. Scott.

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

Chairman Smith. The clerk will report the amendment.

The Clerk. Amendment to Judiciary Committee Print 112-6 offered by Mr. Scott of Virginia.

Page 3, beginning on line 10, strike subsection (d).

[The information follows:]

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

Chairman Smith. The gentleman is recognized to explain his amendment.

Mr. Scott. Thank you, Mr. Chairman.

Mr. Chairman, I would like to just begin with an observation that one legislative strategy that is frequently used is to cite a problem and then offer legislation without any meaningful explanation of how the legislation actually solves the problem, but passage of the legislation is often achieved because people believe the problem needs to be solved. Even when the legislation fails to solve the articulated problem, the goal of passage is achieved.

As I see it, there are three problems that have been articulated, which are defensive medicine, high malpractice premiums, and frivolous lawsuits. First, on defensive medicine, the provisions of this bill will not eliminate lawsuits, so there is no credible expectation that any defensive medicine will be affected. Second, premiums. In States where the provisions of this bill are in effect, no pattern of effect on premiums has been found. And, third, frivolous lawsuits. A study from the Institute of Medicine estimates that as many as 100,000 hospital patients are killed every year because of avoidable medical errors, yet only 15,000 medical malpractice payments were made the year the study was released. So even if the bill is passed, the problems will not be solved.

Let's consider one part of it. That is the fair share legislation, the fair share provision. This amendment that I have offered would restore joint and several liability in States where it

still exists and thereby ensures that an injured party is fully compensated for his or her injuries. The bill that we are considering will eliminate the joint and several liability.

Now, joint and several liability is a common law principle that enables an injured patient to seek compensation from any or all of the parties responsible for the patient's injuries. Joint liability forces each of the multiple defendants, such as the surgical team and a negligent hospital, to be jointly responsible for the total damages; and, if they want, they can apportion the fault amongst themselves. Thus, they can purchase and share the cost of insurance based on that agreement. The present process does not burden the injured party with the requirement of assigning proportional fault.

The HEALTH Act creates a bizarre and impossible standard for a patient by eliminating joint and several liability. It requires that the plaintiff, who is the patient, demonstrate each person's portion of responsibility. This is often impossible for the plaintiff, because frequently all the plaintiff knows is that he woke up as a victim of malpractice. Why should he then be required to find out what each and everyone did and how does he do that anyway if everybody is denying any liability at all?

But, unfortunately, the bill requires -- essentially requires the plaintiff to file a separate lawsuit against each defendant. Each of those lawsuits, separate lawsuits, requires the finding of duty of care, a breach of that duty, proximate cause, finding of damages, and then a determination of what part of the damages are attributable to

what malpractice. Each case also requires an expensive expert witness, depositions, and the full expense of complicated litigation. Additionally, the bill complicates any settlement that might take place because a patient can't take a chance of settling with one defendant without knowing what ultimately the other defendants might have to pay.

What is most disturbing about this legislation is that it eliminates joint and several liability for all types of damages, including economic damages. This is more extreme than most States' laws. Economic laws compensate the injured party for their out-of-pocket expenses, such as hospital and doctor bills and lost wages. Even though the proponents of this bill claim to use California's Medical Injury Compensation Reform Act as a model, not even California eliminates joint and several liability for economic damages.

Mr. Chairman, over the centuries, each State has balanced judicial procedures between plaintiffs and defendants. Some provide longer and others shorter statutes of limitation. Some have large, some small, some no caps on damages at all. Some deny recovery in cases of contributory negligence, while others allow recovery based on comparative negligence. Most have joint and several liability. A few do not.

But the interest of plaintiffs and defendants have been balanced over the years in each State. We should not override centuries of State level balancing of these interests by preempting some parts of tort law with this Federal bill.

And so this bill will do nothing to reduce defensive medicine; and because it increases expenses for defendants, it might actually increase total malpractice premiums.

And, finally, the bill does nothing to target frivolous lawsuits. Now, it will increase the cost of litigation and impose procedural barriers that will make it more difficult to achieve the recovery to which a plaintiff is entitled, so it may reduce all lawsuits, but it will not target frivolous lawsuits.

So, Mr. Chairman, I would hope that we would not abolish joint and several liability, and I urge my colleagues to support the amendment.

I yield back.

Chairman Smith. Thank you, Mr. Scott.

I will recognize myself in opposition to the amendment.

Now this amendment strikes the fair share rule and therefore should be defeated. This amendment should be opposed because it would eliminate the HEALTH Act's fair share rule that provides the defendants should only pay for the damages they cause. The alternative is unfair because it puts full responsibility on those who may have only been marginally at fault.

Respect for the law is fostered when it is fair and just and punishments are proportionate to the wrongs committed. Joint and several liability, although motivated by a desire to ensure that plaintiffs are made whole, leads to a search by plaintiffs' attorneys for deep pockets and to a proliferation of lawsuits against those

minimally liable or not liable at all.

The HEALTH Act, by providing for a fair share rule that apportions damages in proportion to a defendant's degree of fault, prevents unjust situations in which hospitals, for example, can be forced to pay for all damages resulting from an injury, even when the hospital is minimally at fault. So I urge my colleagues to oppose this amendment, though I certainly respect and acknowledge that the gentleman from Virginia has made some good points.

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

Mr. Watt. Mr. Chairman.

Chairman Smith. If not -- the gentleman from North Carolina, Mr. Watt.

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

Chairman Smith. The gentleman is recognized for 5 minutes.

Mr. Watt. I rise in support of Mr. Scott's amendment.

The concern I have, in addition to the points that the gentleman from Virginia has made, is that basically what we are doing is preempting all State law. And there are multiple States that have comparative negligence standards, joint and several liability standards. I mean, States are all over the lot on these issues. And I, for the life of me, can't understand why this becomes a Federal issue.

All of these people on your side of the aisle, Mr. Chairman, in particular, who are always talking about the right of protecting the interests of States, just go away into darkness when they have a chance to bash lawyers, apparently. I don't understand that.

Tort law and the standards for assessing damages in tort cases have always been a matter of State law. In medical negligence, there is no interstate commerce involved in it. I have never seen a medical procedure take place across State lines. Even in my community, which is the city of Charlotte, which is right on the South Carolina line, there is not a hospital that straddles the State line where one could have an operating room and be operated on straddling a State line.

There is just no -- there is no argument for applying a Federal standard in this context, and yet all of you who say you believe so much in the Constitution and the prerogatives of the State seem to forget that when we get to this issue. I just don't understand how you reach a different conclusion on these matters than your own basic political philosophy says you believe in. I don't understand it, and nobody has been able to explain it to me.

So here I am, the person who would least likely be standing up advocating for States' rights in this Judiciary Committee, always having to defend States' rights against these attacks that you all make on the State, on the prerogatives of the State. And tell me how this is a Federal issue. Tell me why we ought to tell States -- whether they apply comparative negligence, joint and several liability, contributory negligence, those are all issues that have been historically, throughout the whole existence of this country, been matters of State law, and all of a sudden we jump up --

And we are not restricting this to even areas in which the Federal Government pays for the medical care. I mean, you know, there might

be an argument if you restricted it to Medicare cases or Medicaid cases where there is a Federal dollar involved. This is private money, private actions between litigants, all within a single State, and all of a sudden people who say they believe in States' rights are jumping up and down and saying, let's adopt a Federal standard that preempts all the State laws.

I don't understand that. Just like we are back in law school here. Tell me what the rationale is, somebody, for applying a Federal standard in a tort case, all of which takes place within the State.

I yield back.

Chairman Smith. Okay. Thank you, Mr. Watt.

Are there any other members who wish to be heard on the amendment?

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

Chairman Smith. The gentleman from Arizona is recognized.

Mr. Franks. Mr. Chairman, this is probably the best time -- it may save time later to go ahead and address Mr. Watts' question as directly as possible, because it is likely to come up. It has come up several times, and he deserves an honest response.

Regarding the constitutional basis for the bill, James Madison was clear in the Federalist Papers that the very purpose of the commerce clause was to allow Congress to reduce barriers to the free flow of goods and services nationwide, including barriers that were part of State law, Mr. Chairman. Today, tort law is prohibiting doctors and other medical practitioners from practicing in certain States because

of the litigation abuse that occurs in those States.

The original understanding of the commerce clause gives Congress a clear basis for breaking down barriers to trade, including barriers caused by abusive lawsuits that prevent doctors from practicing where they are willing to serve and where their services may be most needed nationwide.

Mr. Chairman, President Ronald Reagan was a big proponent of Federal tort reform. Indeed, his Attorney General at the time, Ed Meese, was sent to Congress to support Federal tort reform in 1986. Attorney General Meese, at pages 3 to 4 of this written testimony, notes that the Reagan administration supported specific reforms that are almost identical to what is in the HEALTH Act today.

Ronald Reagan also established a task force to study the need for tort reform that concluded that the Federal Government should address the modern tort liability crisis in a variety of ways. That task force, which was called the Tort Policy Working Group, consisted of representatives of 10 Reagan administration agencies and the White House. The final report of that task force concluded as follows: Quote, In sum, tort law appears to be a major cause of the insurance availability/affordability crisis which the Federal Government can and should address in a variety of sensible and appropriate ways, unquote.

Indeed, the Reagan task force specifically recommended, quote, eliminating joint and several liability, close quote, provide for periodic payments of future economic damages, schedule or limit contingency fees of attorneys, and limit noneconomic damages to a fair

and reasonable amount.

Regarding the limit on noneconomic damages, the report concluded: Recommendation number 4, limit noneconomic damages to a fair and reasonable amount.

Noneconomic damages, such as pain and suffering, mental anguish, and punitive damages, are inherently open ended, Mr. Chairman. They are entirely subjective and often defy quantification. Moreover, because such damages are essentially subjective, awards for similar juries can vary immensely from case to case, leading to highly inequitable lottery-like results. Accordingly, such damages are particularly suitable for specific limitation.

Further, President Reagan gave a supporting speech on Federal tort reform on his remarks to the members of the American Tort Reform Association on May 30th. In that speech Ronald Reagan specifically endorsed the findings of the Tort Policy Working Group, stating, quote, Earlier this year, I endorsed the report of my Domestic Policy Council's Tort Policy Working Group. This report contains a number of recommendations, recommendations that include fixed dollar limitations for certain kinds of awards and the establishment of assurances that liability judgments go to those actually wronged or injured and not to the lining of their attorneys' pockets, close quote.

Reagan also used the following anecdote in his speech, quote, On one of the Hawaiian islands, all the doctors on that island who had once delivered babies have stopped doing so because their malpractice premiums are outstripping their fees. Pregnant women must now travel

elsewhere to other islands for their needs.

Today that problem has gotten far worse, Mr. Chairman, and it extends throughout the United States. It was appropriate for Ronald Reagan to propose Federal tort reform while he was President, and it is even more appropriate for Congress today to address the problem of lawsuit abuse, which has only worsened over time. Indeed, the increasing problem of lawsuit abuse is what led the Congressional Budget Office for the first time ever, Mr. Chairman, to score Federal tort reforms as saving tens of billions of Federal taxpayers' dollars.

And I would yield back.

Chairman Smith. Would the gentleman yield -- the gentleman from Arizona yield to me for just a minute?

Mr. Franks. I would be happy to yield.

Chairman Smith. I just want to add, since I know the subject may come up numerous times today, that I always appreciate Mr. Watt's strong arguments in favor of States' rights, and I am not unaware of his current or previous efforts to try to pick up votes as a result of those arguments, and that is all legitimate. I do want to point out that I have a list that I will be happy to share with him of about 20 Federal tort reform laws, so this effort to try to have a Federal law apply in this situation is certainly not unprecedented.

I will yield back to the gentleman from Arizona, whose time has expired.

Mr. Franks. Thank you, Mr. Chairman.

Mr. Conyers. Mr. Chairman.

Chairman Smith. The gentlewoman from California is recognized.

Ms. Waters. Thank you very much, Mr. Chairman.

I am going to yield to Mr. Watt, and I would hope that he would address that part of the gentleman's presentation that referred to the Constitution where he said the Constitution spoke to breaking down abusive lawsuits. I am not aware of that in the Constitution; and, as a good constitutional lawyer, Mr. Watt, you may be able to help me with this.

I yield to the gentleman from North Carolina.

Mr. Watt. First of all, let me thank the gentlelady for yielding.

I listened very intently to what my friend from Arizona had to say. Unfortunately, I didn't take constitutional law in law school from Ronald Reagan. I happened to take it from Bob Bork, who had a slightly different philosophy on this. He was a conservative jurist, too, you know, and the best I can tell, although Ronald Reagan was a pretty good cowboy and actor and maybe a reasonably good President, I don't know that he has any substantial background in constitutional law.

Second of all, if you accept the arguments that the gentleman has advanced, I don't know why we spent all this time arguing about whether we should or should not have done health care reform. If this is a legitimate subject for us at the Federal level, then certainly whatever we did under health care reform you should never even be raising any question about.

Third, the State of California is pretty adamant about this.

They oppose what you all are trying to do, and specifically for one of the reasons that Mr. Scott has raised in his underlying amendment. They don't want the Federal Government taking over their whole tort system, and I have got the letter right here in front of me to the Speaker and to the Minority Leader expressing that. So I am not sure what California people in particular would be doing here trying to undercut their own State law.

So, I mean, I read my Constitution sometimes. It says that everything that we didn't specifically reserve to the Federal Government or give in authority to the Federal Government we reserve to the States. That is what my Constitution says. And unless you can show me some interstate commerce here, I don't know of anybody who is undergoing a medical procedure or a medical operation or engaging in an automobile accident -- perhaps maybe right on the State line you could have an automobile accident, but there is no medical procedure that takes place across State lines that I am aware of.

I just don't understand -- I do not still, even with the treatise that the gentleman from Arizona has given me and the strong support that his hero President Reagan has advanced, I just am not persuaded that this overtakes the constitutional provision. And nobody has told me what the Federal interest here is, and the fact that there are other exceptions to it, as the chairman has pointed out to me, as numerous as they may be, I still do not understand.

Ms. Waters. Reclaiming my time.

Mr. Watt. I yield back to the gentlelady.

Ms. Waters. Thank you.

I may ask the gentleman that -- are you saying that all that was quoted by the gentleman from Arizona regarding past President Reagan and his task force and his speeches, all that he used basically most of his 5 minutes for has nothing to do with the Constitution?

Mr. Watt. Well, it depends on whether Ronald Reagan is reading it or Bob Bork is reading it, I suppose.

Ms. Waters. Well, if I may, reclaiming my time, he did not say that Ronald Reagan had read the Constitution. What he did was advance an argument to make it seem as if it had more validity if, in fact, it had been part of a task force effort or a speech by the past President, which has nothing to do with the Constitution. May I ask the gentleman if that is correct. I mean, was there anything in his presentation to us about Mr. Reagan that led us to believe that it was constitutional?

Chairman Smith. The gentlewoman's time has expired.

Mr. Watt. I ask unanimous consent for 10 additional seconds so I can respond.

Chairman Smith. Without objection, the gentleman is recognized for 20 seconds.

Mr. Watt. I can't resist the chance to just quote Ronald Reagan from his Republican National Convention speech, attempting to quote John Adams, when he said, facts are stupid things, close quote. So, obviously, you all are not listening to the facts that Ronald Reagan was listening to over there.

Chairman Smith. It is always nice to hear a quote from Ronald

Reagan.

The gentleman from South Carolina, Mr. Gowdy, is recognized.

Mr. Gowdy. Thank you, Mr. Chairman.

The gentleman from North Carolina, whom I like and respect as an attorney very much, studied under a brilliant constitutional mind who was treated very shabbily, I might add, Mr. Chairman, by those in the more deliberative body many years ago.

I also am a fan of Professor Bork, which is why, when I was struggling with this issue, the interplay between Federalism and States' rights, I Googled him. He wrote two law review articles in support of Federalized tort reform. One in -- let me make sure I pronounce this name right. Is it Harvard? Harvard? So there were two --

Mr. Watt. We pronounce it Ha-vad. Ha-vad.

Mr. Gowdy. Not a law school as good as the one that Mr. Watt went to, but nevertheless well regarded. He actually came down on the side of federalization, Mr. Chairman, and he did so for a couple of different reasons. Of course, with medical devices and instrumentalities, they are inherently interstate in nature. If you look at the commerce clause, to the gentlelady from California's point, Congress can regulate the channels, the carriers, the instrumentalities of commerce. In addition, things that impact commerce not so much in isolation but in the aggregate, such as a wheat farmer, for instance, can also be regulated.

But I can't help but think -- and again I tell the gentleman from

North Carolina, I struggled with it as others did when we were voting on this on the floor, but the reality, Mr. Chairman, is 88 percent of all med mal cases already involve a Federal payment, either in the form of Medicaid, Medicare, TRICARE.

RPTS STRICKLAND

DCMN MAGMER

[4:15 p.m.]

Mr. Gowdy. So the notion that the Federal Government is all of a sudden stepping into tort reform -- they stepped in 20 something years ago. EMTALA is a law that requires hospitals to treat people. That is not a State law. That is a Federal law.

So if Congress is going to require hospitals to treat people, the least we can do is provide them some measure of protection.

Mr. Watt. Will the gentleman yield?

Mr. Gowdy. Be delighted to.

Mr. Watt. I appreciate the gentleman yielding, and I could follow that if we were restricting this to what the Federal Government pays for. But this bill is not restricted in any way to what the Federal Government pays for.

And just as an aside, the reason he wrote that in the Harvard Law Review is we wouldn't let him write it in the Yale Law Review.

Mr. Gowdy. That is probably correct. But, you know, you had a distinguished career in law. The gentleman beside you had a very distinguished career in law. If there were a candy bar stolen from a Stop and Rob convenience store in North Carolina, Virginia, South Carolina, the FBI could charge a Hobbs Act violation simply because that one candy bar traveled in interstate commerce.

So if we were going to go back 20 years and start protecting this

line between State and Federal, I would be more sympathetic, but we crossed that line many, many decades ago.

Mr. Watt. Will the gentleman yield?

Mr. Gowdy. Sure.

Mr. Watt. I hope he is going to apply the same to medical reform. That is all.

Mr. Gowdy. I would commend both those law review articles to the reading of our friends on the other side and yield back.

Chairman Smith. Thank you, Mr. Gowdy.

Who seeks to be recognized?

The gentleman from Georgia.

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

Chairman Smith. The gentleman is recognized for 5 minutes.

Mr. Johnson. Thank you, Mr. Chairman.

I listened carefully to the comments of my colleague from California who depended on not the Constitution but the Federalist Papers. I believe it was Alexander Hamilton, was it? Was it Hamilton? Or whoever it was. I guess it doesn't make any difference. And then he commented about the commerce clause and, quote, breaking down barriers to trade as one of the reasons why tort reform, as is evidenced by H.R. 5, is a Federal issue. And then he went on to devote most of his time to extolling the virtues of a Ronald Reagan task force that said that we should -- Congress should regulate medical malpractice.

But I would tender that the regulation of commerce among the States, which we all recognize is a part of our Constitution, does not

limit constitutional or Federal intrusion into just areas where we are breaking down barriers to trade. The commerce clause has been construed to mean that any matter affecting commerce is subject to congressional authority, Federal Government authority. And so I would agree that, just like in ObamaCare, tort law affects interstate commerce. And so the Congress has the authority, in my humble opinion, to deal in this issue.

But I think this is wrong for Congress to extend itself into the traditional area of State tort law. And I find it perplexing that when it comes to the regulation of the insurance and health care as affecting interstate commerce we get objections to that, but when it comes to dealing with State tort law which affects interstate commerce we find that the Federal Government is able to intrude.

I don't understand the distinction between tort cases and health care and health insurance. What is the difference if one of my colleagues on the other side -- what distinguishes one from the other insofar as the commerce clause grants this body the authority to intrude upon a traditional area of State law? Can anyone answer that?

Anybody, please. Can someone please?

Mr. Gowdy. Will the gentleman yield?

Mr. Johnson. Please, I will yield.

Mr. Gowdy. How do you reconcile the Wickard case or the Wright's case? You have a wheat farmer who is doing nothing but growing wheat in his backyard.

Mr. Johnson. I will reclaim my time.

I am talking about, as a rule, Congress has authority in my opinion to intrude upon the State tort laws with a uniform Federal law. I will give you that. And you agree with that. But --

Mr. Gowdy. Actually, I don't agree with that.

Mr. Johnson. Well, okay. But you do agree that health insurance and health care affect interstate commerce?

Mr. Gowdy. Do I believe that the commerce clause is elastic enough to support the so-called Affordable Care Act? You know, I will be interested in that part of it. I think the mandate part of it, the constitutional clause analysis of the mandate, is what will prove to be the undoing of the so-called Affordable Care Act.

Mr. Johnson. If the mandate is unconstitutional, then it is saying that Congress act to affect interstate commerce is wrong, and thus the U.S. Supreme Court is intruding on the political process. And I would venture to you, sir, to say that, affecting interstate commerce, both tort law and health care and insurance fall under the same category and there is no distinction. And the Federal Government has the authority under the Constitution to intrude upon State laws insofar as both of those situations are concerned.

Now, and my question to you is, if I am wrong, why? What is the distinction between the two?

Mr. Gowdy. Well, I was at the Supreme Court for part the hearing, and I actually -- to be candid with the gentleman from Georgia, I assumed that our passing this med-mal bill would be used by the administration's solicitor general in support of his argument.

Now, I was not able to hear all of the solicitor general's argument because there was some bumbling and some silence, but the part I was able to hear they never made that case. They never made the case that because we passed H.R. 5 that that opened up the commerce clause for the President's health care law.

Mr. Johnson. I will say if the administration did not --

Chairman Smith. The gentleman's time expired.

Mr. Johnson. -- than I would argue to you that they should have. And I appreciate your courage stepping up to the microphone and responding to my concerns, though I am still troubled by the inconsistency that the gentleman points out.

Chairman Smith. We have had a good discussion on this amendment, and the question is on the amendment --

The gentleman from Michigan.

Mr. Conyers. Mr. Chairman, I would like to be recognized to speak in support of the Scott amendment.

Chairman Smith. Okay. The gentleman is recognized.

Mr. Conyers. I thank the chair.

The Scott amendment merely restores joint and several liability ensuring that an injured patient is fully compensated for his or her injuries.

Now joint liability forces multiple defendants, such as a negligent surgical team in a hospital, to apportion fault among themselves and does not burden the injured patient with assigning fault. Our civil justice system has determined that it is the injured

patient, not multiple negligent health care providers, who deserve the greatest measure of protection. And I urge my colleagues to consider this.

By eliminating joint liability for economic loss, H.R. 5 is virtually more extreme than most State law. Economic loss compensates injured patients for out-of-pocket expenses, hospital and doctor bills, lost wages and salary. And even though the proponents of H.R. 5 claim to use California's MICRA law as the model, not even California eliminates joint and several liability for economic damages.

States have rejected the elimination of joint liability for economic loss because it would shift the cost from negligent health care providers on to taxpayers. So remember that it has been determined that joint and several liability is in the interest of the injured patient and not the negligent health care providers.

Mr. Scott. Will the gentleman yield?

Mr. Conyers. Yes, of course I would yield.

Mr. Scott. Thank you.

I would like to thank you for mentioning the fact that the professionals can apportion the responsibility in advance and they can pay for insurance in advance based on that agreement, and they can charge their fees based on whoever is paying for the insurance. All of that can take place beforehand so that there is no problem with the apportionment.

Without that, you have got multiple costs; and some people who in the general practice, like nurses, never get sued, all of a sudden

they are going to have to get some insurance because they are going to be on the barrel end of lawsuits. They might have been 5 percent responsible. Now they have to hire a lawyer to protect them in a malpractice case and pay premiums where they have live responsibility. Right now, they don't pay very much malpractice at all. Now they have to get enough so that every time something goes wrong in the emergency room they have got to hire a lawyer, and their costs will be borne -- their cost for malpractice will go up as a result.

And another priority is that, unless the plaintiff rounds up all of the potential defendants, they can't ever get all of their recovery.

So I thank the gentleman for yielding.

Mr. Conyers. Could I ask for 2 additional minutes for the gentleman from North Carolina?

Chairman Smith. The gentleman stills has a minute 20 seconds remaining.

Mr. Conyers. I yield him the balance of my time.

Mr. Watt. I just wanted to point out the portion of the letter from the California Medical Association which specifically requested amendments that would allow States with joint and several liability laws to maintain those important laws. They specifically -- for the reasons that you all have pointed out, the California Medical Association has no interest in doing away with joint and several liability.

And maybe I should submit this letter for the record. I will be happy to do that.

I ask unanimous consent to submit it for the record.

Chairman Smith. Without objection.

[The information follows:]

\*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

Mr. Lungren. Mr. Chairman? Over here on our side.

Chairman Smith. The gentleman yields back his time?

Mr. Conyers. I yield back my time.

Chairman Smith. The gentleman from California, Mr. Lungren.

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

Two things. One is I am constrained to support the amendment because I have heard from the California Medical Association on this issue; and having practiced about 4 and a half years of law in California State courts dealing with medical malpractice cases, I understand the concern raised by the doctors in this particular case.

And joint and several liability, along with the other changes -- along with the changes we had in MICRA in California, has made a difference; and the doctors in my State are concerned that the fair share rule would cause difficulty with respect to insurance coverage and the allocation of liability as is practiced in my home State.

But having said that, I would just like to address some of the comments that were made earlier about the lack of a distinction between this issue and the so-called health care reform bill.

The argument made in the U.S. Supreme Court was on the issue of the individual mandate, and a couple of points were made under that. One is that the administration is arguing -- and I expect that those on the other side are arguing in defense of the bill -- that the Federal Government can compel you to enter into interstate commerce by the individual mandate. And, therefore, by mandating or compelling you

to enter into interstate commerce, they therefore can regulate --

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

Mr. Lungren. No, I will not yield for a moment.

That is a unique bootstrapping argument that is questioned by the Court in the argument before the Court.

Secondly, already not revealing how he is going to rule on the case, Justice Kennedy said that this issue involves a fundamental change in the relationship of the individual with his or her Federal Government. And he was talking about the obligation imposed by the law on every individual to purchase a product -- in this case health care -- thereby conditioning their existence as a legitimate or legal American. Now that is a fundamental change in the relationship of the individual to the Federal Government.

Now those on your side of the aisle may believe that is appropriate. May believe that in fact the Federal Government under the Constitution has such expansive jurisdiction that literally nothing is outside its ambit. But the fact of the matter is a question of unique fundamental issue has been presented before the Supreme Court.

Now we may find by 5-4 or something that the Supreme Court has decided that there are no limits to the Constitution. But let's not understate the significance of the argument made before the Supreme Court, even though we have been told by some on the other side of the aisle that any such suggestion that a constitutional question of any significance was actually within the bill and within this part of the

bill that is the individual mandate was nonsense. In fact, we had an unparalleled -- it was two-and-a-half or 3 days of argument before the Supreme Court. At least in my lifetime that has not happened. When I had the privilege of arguing before the Supreme Court, even though we had a consolidated case, we had a total of an hour and a half for two States of the Union. This was without precedent in my lifetime.

So there is an essential difference between what we are talking about here, as timely as this is, and what was before the Court. And so I would just like to disabuse ourselves of the notion that this is somehow even with the same ballpark as what they were arguing. They are arguing the question of whether or not the Federal Government has the authority to tell you as an American citizen, to remain a legal American citizen, that you must buy a product as approved by the Federal Government as the Federal Government decides on a yearly basis. That is a tremendous reach of the Federal Government.

We find now we are talking about preventive medicine. We hear from people in the White House that we should be better about how we eat, that in fact we need to exercise, that in fact we need to eat less fatty meat. We have some people saying if you eat one portion of red meat that somehow has negative effects.

If in fact the Federal Government can demand that you buy a product, what products can it not demand that you buy? Participation in a health -- a fitness program? Mandate certain things that you have to eat or purchase? Whether or not you can eat them, I suppose maybe they would say the Federal Government can't do that, but maybe mandate

that you have to purchase them.

Even though I support the gentleman's amendment and even though I understand the arguments made, let's not extend this to suggest that this is the same as what is before the Supreme Court. What is before the Supreme Court is unique.

Chairman Smith. The gentleman's time has expired.

Before we go on, since we clearly are not necessarily going to get as far today as I had hoped or even finish this amendment, a bipartisan and classified briefing on the subject of cyber security began at 4:30 today. We have had requests from both sides that we stand in recess so that members can attend that briefing. So we are going to recess subject to the call of the chair.

Let me explain to members that the call of the chair gives me some flexibility as to when we return to continue this markup. My expectation is that we will return at 1:30 tomorrow. There is a possibility it might be earlier than that, and that is why it is subject to call of the chair. Everybody will get plenty of advance notice if it is before that time. But that does give us some flexibility.

I appreciate the discussion we have had today. We will recess subject to the call of the chair, and probably 1:30 tomorrow.

[Whereupon, at 4:35 p.m., the committee was adjourned, to be reconvened on Wednesday, April 18, 2012.]