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4 MARKUP OF:

5 H.R. 966, THE LAWSUIT ABUSE REDUCTION ACT OF 2011;

6 H.R. 1439, THE BUSINESS ACTIVITY TAX SIMPLIFICATION ACT OF  
7 2011;

8 H.R. 527, THE REGULATORY FLEXIBILITY IMPROVEMENTS ACT OF  
9 2011; AND

10 H.R. 1932, THE KEEP OUR COMMUNITIES SAFE ACT OF 2011

11 Thursday, July 7, 2011

12 House of Representatives

13 Committee on the Judiciary

14 Washington, D.C.

15 The committee met, pursuant to call, at 10:19 a.m., in  
16 Room 2141, Rayburn House Office Building, Hon. Lamar Smith  
17 [chairman of the committee] presiding.

18 Present: Representatives Smith, Sensenbrenner, Coble,  
19 Gallegly, Goodlatte, Lungren, Chabot, Issa, Pence, Forbes,  
20 King, Franks, Gohmert, Jordan, Poe, Chaffetz, Griffin,

21 Marino, Gowdy, Ross, Adams, Quayle, Conyers, Nadler, Scott,  
22 Watt, Lofgren, Jackson Lee, Waters, Cohen, Johnson,  
23 Pierluisi, Quigley, Chu, Deutch, and Sanchez.

24 Staff Present: Sean McLaughlin, Majority Chief of  
25 Staff; Allison Halatei, Majority Deputy Chief of  
26 Staff/Parliamentarian; Sarah Kish, Clerk; Jennifer Lackey,  
27 Clerk; Travis Norton, Majority Counsel; Paul Taylor,  
28 Majority Counsel; Daniel Flores, Majority Counsel; Dimple  
29 Shah, Majority Counsel; Perry Apelbaum, Minority Staff  
30 Director; Norberto Salinas, Minority Counsel; Aaron Hiller,  
31 Minority Counsel; James Park, Minority Counsel; and Hunter  
32 Hammill, Minority Counsel.

33

34 Chairman Smith. The Judiciary Committee will come to  
35 order.

36 Without objection, the chair is authorized to declare  
37 recesses of the committee at any time. The clerk will call  
38 the roll to establish a quorum.

39 Ms. Kish. Mr. Smith?

40 Chairman Smith. Present.

41 Ms. Kish. Mr. Sensenbrenner?

42 Mr. Coble?

43 Mr. Coble. Here.

44 Ms. Kish. Mr. Gallegly?

45 Mr. Goodlatte?

46 Mr. Lungren?

47 Mr. Chabot?

48 Mr. Issa?

49 Mr. Pence?

50 Mr. Forbes?

51 Mr. King?

52 Mr. Franks?

53 Mr. Franks. Here.

54 Ms. Kish. Mr. Gohmert?

55 Mr. Jordan?

56 Mr. Poe?

57 Mr. Poe. Here.

58 Ms. Kish. Mr. Chaffetz?

59 Mr. Griffin?  
60 Mr. Griffin. Here.  
61 Ms. Kish. Mr. Marino?  
62 Mr. Gowdy?  
63 Mr. Ross?  
64 Mrs. Adams?  
65 Mrs. Adams. Here.  
66 Ms. Kish. Mr. Quayle?  
67 Mr. Quayle. Here.  
68 Ms. Kish. Mr. Conyers?  
69 Mr. Berman?  
70 Mr. Nadler?  
71 Mr. Scott?  
72 Mr. Watt?  
73 Ms. Lofgren?  
74 Ms. Lofgren. Here.  
75 Ms. Kish. Ms. Jackson Lee?  
76 Ms. Waters?  
77 Mr. Cohen?  
78 Mr. Cohen. Here.  
79 Ms. Kish. Mr. Johnson?  
80 Mr. Pierluisi?  
81 Mr. Quigley?  
82 Mr. Quigley. Here.  
83 Ms. Kish. Ms. Chu?

84 Mr. Deutch?

85 Ms. Sanchez?

86 Chairman Smith. The gentleman from Pennsylvania?

87 Mr. Marino. Here.

88 [Pause.]

89 Ms. Kish. Mr. Gallegly?

90 Mr. Gallegly. Here.

91 Ms. Kish. Mr. Scott?

92 Mr. Scott. Here.

93 [Pause.]

94 Ms. Kish. Ms. Chu?

95 Ms. Chu. Here.

96 Chairman Smith. Are there any other Members who wish  
97 to record their presence? If not, the clerk will report.

98 Ms. Kish. Mr. Chairman, 14 Members responded present.

99 Chairman Smith. A working quorum is present, but I  
100 would like to wait a minute for the ranking member to  
101 arrive. He is on his way.

102 [Pause.]

103 Chairman Smith. I have been told that the ranking  
104 member is on the way but is happy for us to proceed.

105 So, pursuant to notice, I now call up H.R. 966 for  
106 purposes of markup, and the clerk will report the bill.

107 Ms. Kish. H.R. 966. To amend Rule 11 of the Federal  
108 Rules of Civil Procedure --

109 Chairman Smith. Without objection, the bill will be  
110 considered as read.

111 [The information follows:]

112

113 Chairman Smith. I will recognize myself for an  
114 opening statement, and then a Member of the minority for the  
115 opening statement.

116 In March, I reintroduced H.R. 966, the Lawsuit Abuse  
117 Reduction Act. Senator Chuck Grassley, the ranking member  
118 of the Senate Judiciary Committee, has introduced the same  
119 bill in that body.

120 The Lawsuit Abuse Reduction Act, known as LARA, is  
121 just over a page long, but it would prevent the filing of  
122 hundreds of thousands of pages of frivolous legal pleadings  
123 in Federal court.

124 In recent years, frivolous lawsuits have been filed  
125 against the Weather Channel for failing to accurately  
126 predict storms and against television shows people claimed  
127 were too scary. More and more playgrounds are shutting down  
128 because of liability concerns, and fast food companies are  
129 being sued because inactive children gained weight.

130 Lawsuit abuse has become too common, partly because  
131 the lawyers who bring these cases have everything to gain  
132 and nothing to lose. Plaintiffs' lawyers can file frivolous  
133 suits, no matter how absurd the claims, without any penalty.  
134 Meanwhile, defendants are faced with years of litigation and  
135 attorneys' fees.

136 These cases, and many like them, have wrongly cost  
137 innocent people and business owners their reputations and

138 their bank accounts. According to the respected research  
139 firm Towers Perrin, the annual direct cost of American tort  
140 litigation now exceeds \$250 billion a year.

141 When Business Week wrote an extensive article on what  
142 the most effective legal reforms would be, it stated what is  
143 needed are "penalties that sting." Business Week  
144 recommended "give judges stronger tools to punish renegade  
145 lawyers."

146 Before 1993, it was mandatory for judges to impose  
147 sanctions such as public censures, fines, or orders to pay  
148 for the other side's legal expenses on lawyers who filed  
149 frivolous lawsuits. Then the Civil Rules Advisory  
150 Committee, an obscure branch of the courts, made penalties  
151 optional. This needs to be reversed by Congress.

152 Just a few years ago, the Nation's oldest ladder  
153 manufacturer, a family-owned business near Albany, New York,  
154 filed for bankruptcy protection and was forced to sell off  
155 most of its assets because of litigation costs, even though  
156 the company had never lost a court judgment. As Bernie  
157 Marcus, co-founder and former chairman of the Home Depot has  
158 said, "The cost of even one ill-timed, abusive lawsuit can  
159 bankrupt a growing company and cost hundreds of thousands of  
160 jobs."

161 In his 2011 State of the Union address, President  
162 Obama said, "I am willing to look at other ideas to rein in

163 frivolous lawsuits." The President should support mandatory  
164 sanctions for frivolous lawsuits if he wants to avoid making  
165 frivolous promises.

166 LARA would require monetary sanctions against lawyers  
167 who file frivolous lawsuits. It would reverse the  
168 amendments to Rule 11 that made Rule 11 sanctions  
169 discretionary rather than mandatory. It would also reverse  
170 the rule that allows parties and their attorneys to avoid  
171 sanctions from making frivolous claims by withdrawing them  
172 within 21 days after a motion for sanctions has been filed.

173 Today, Rule 11 is as porous as our southern border.  
174 LARA would get rid of the free pass lawyers now have to file  
175 frivolous lawsuits in Federal court.

176 Further, LARA expressly provides that nothing in the  
177 changes it makes to Rule 11 shall be construed to bar or  
178 impede the assertion or development of new claims, defenses,  
179 or remedies under Federal, State, or local laws, including  
180 civil rights laws. Consequently, the development of civil  
181 rights law would not be affected in any way by LARA.

182 LARA applies even-handedly to cases brought by  
183 individuals as well as businesses, both big and small,  
184 including business claims filed to harass competitors and  
185 illicitly gain market share. The bill also applies to both  
186 plaintiffs and defendants.

187 The American people are looking for short and simple

188 legislative responses to clear problems like lawsuit abuse.  
189 LARA restores accountability to our legal system by  
190 reinstating mandatory sanctions for attorneys who file  
191 meritless suits.

192         Though it will not stop all lawsuit abuse, LARA  
193 encourages attorneys to think twice before filing a  
194 frivolous lawsuit. All Members who oppose frivolous  
195 lawsuits and want to protect the reputations and bank  
196 accounts of innocent Americans should support the Lawsuit  
197 Abuse Reduction Act.

198         That concludes my opening statement.

199         And the gentleman from New York, Mr. Nadler, is  
200 recognized for an opening statement.

201         Mr. Nadler. Thank you, Mr. Chairman.

202         Mr. Chairman, it is deja vu all over again. After a  
203 brief hiatus, we are back to legislation supposedly aimed at  
204 preventing frivolous litigation, but which would, in fact,  
205 revive a rule that gave birth to an entire litigation  
206 industry operating in tandem and in addition to the normal  
207 civil litigation docket.

208         The revised Rule 11 proposed here would take us back  
209 to the failed 1983 rule, which the courts rightly rejected  
210 after a decade of catastrophic experience. Moreover, this  
211 legislation goes even beyond the text of the 1983 rule,  
212 broadening the flawed mandatory sanctions rule even further.

213 Rule 11 of the Federal Rules of Civil Procedure serves  
214 a vital role in maintaining the integrity of our legal  
215 system. As the Rules Committee noted in 1993, "Since the  
216 purpose of Rule 11 sanctions is to deter rather than to  
217 compensate, the rule provides that if a monetary sanction is  
218 imposed, it should ordinarily be paid to the court as a  
219 penalty.

220 "However, under unusual circumstances, deterrence may  
221 be ineffective unless the sanction not only requires the  
222 person violating the rule to make a monetary payment, but  
223 also directs that some or all of this payment be made to  
224 those injured by the violation. Accordingly, the rule  
225 authorizes the court, if requested in a motion and if so  
226 warranted, to award attorneys' fees to another party."

227 While the sponsors expressed a desire to limit  
228 unnecessary litigation, the experience with the old Rule 11,  
229 which this would restore, was the exact opposite. Rule 11  
230 litigation became a routine part of civil litigation,  
231 affecting one-third of all cases. Rather than serving as a  
232 disincentive, the old Rule 11 actually made the system even  
233 more litigious.

234 In the decade following the 1983 amendments, there  
235 were almost 7,000 reported Rule 11 cases, becoming part of  
236 approximately one-third of all Federal civil lawsuits.  
237 Civil cases became two cases, one on the merits and the

238 other dueling Rule 11 allegations by both parties. The  
239 drain on the courts and the parties' resources caused the  
240 Judicial Conference to revisit the rule and adopt the  
241 changes that this bill would now have us undo.

242 In a March 14th letter to Chairman Smith and Ranking  
243 Member Conyers, Judge Lee Rosenthal of the United States  
244 District Court for the Southern District of Texas and chair  
245 of the Committee on Rules of Practice and Procedure, and  
246 Mark Kravitz, chair of the Advisory Committee on Civil  
247 Rules, said, "Undoing the 1993 Rule 11 amendments, even  
248 though no serious problem has been brought to the Rules  
249 Committee's attention with the current practice, would  
250 frustrate the purpose and intent of the Rules Enabling Act.

251 "There is no need to reinstate the 1983 version of  
252 Rule 11 that proved contentious and diverted so much time  
253 and energy of the bar and bench. Doing so would add to, not  
254 improve, the problems of cost and delays that we are working  
255 to address. I urge you, on behalf of the Rules Committees,  
256 to not support the proposed legislation amending Rule 11."

257 When we were considering what became the 2005  
258 amendments to the bankruptcy code, the original legislation  
259 contained the provision that would have required the  
260 imposition of mandatory penalties under Bankruptcy Rule  
261 9011, the corollary to Rule 11. That language was  
262 specifically rejected back in 2005 and does not appear in

263 the public law.

264           The court is given the appropriate discretion to craft  
265 sanctions as appropriate, even though the rest of the  
266 legislation stripped the bankruptcy courts of discretion in  
267 numerous other areas. Congress thought better of that  
268 inflexible, unworkable rule. We were right then, and we  
269 should consider this proposal in that same light.

270           Small businesses, like all businesses, are concerned  
271 about baseless lawsuits. I don't know anyone who wouldn't  
272 be. But just to keep the situation in perspective, I would  
273 also note that in a June 2008 survey of its members by the  
274 National Federation of Independent Businesses, the so-called  
275 voice of small business, their membership ranked cost and  
276 frequency of lawsuits and threatened suits 65th of their top  
277 75 concerns, 36.7 percent responded it was not a problem,  
278 while only 7.3 percent called it critical.

279           Whatever NFIB in Washington may say, I think it is  
280 pretty clear that its membership, actual small  
281 businesspeople, have some healthy perspective on the issue.  
282 In fact, the horror stories we heard at the hearing on this  
283 legislation had nothing to do with Rule 11. Most of them  
284 involved demand letters, which are not covered by Rule 11,  
285 and many of them were clearly State court cases.

286           As Judge Rosenthal has pointed out, no serious problem  
287 has been brought to the Rules Committee's attention. That

288 is a piece of Texas wisdom we should all heed.

289 I ask that a copy of Judge Rosenthal's letter be  
290 placed in the record.

291 Chairman Smith. Without objection, so ordered.

292 [The information follows:]

293

294 Mr. Nadler. Thank you.

295 Mr. Chairman, the courts have ample authority to  
296 sanction conduct that undermines the integrity of our legal  
297 system. But this legislation is the wrong solution in  
298 search of a problem. By taking us back to a time when Rule  
299 11 actually promoted routine, costly, and unnecessary  
300 litigation, this bill is a cure worse than the disease.

301 We know what this rule does, and the courts rightly  
302 rejected it nearly 20 years ago. We should benefit from  
303 that experience and reject this legislation so we don't  
304 revisit the unfortunate experience we had before we repealed  
305 it.

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

307 Chairman Smith. Thank you, Mr. Nadler.

308 The gentleman from Arizona, the chairman of the  
309 Constitution Subcommittee, Mr. Franks, is recognized for an  
310 opening statement.

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

312 Mr. Chairman, in order to stop lawsuit abuse, promote  
313 jobs and the economy, and to restore basic fairness to our  
314 civil justice system, I believe Rule 11 of the Federal Rules  
315 of Civil Procedure must be amended.

316 Rule 11 provides for one of the most basic  
317 requirements for litigation in Federal court, that papers  
318 filed with Federal District Court must be based on both the

319 facts and the law. That is to say that any time a litigant  
320 signs a filing in Federal court, they are certifying that,  
321 to the best of the person's knowledge, information, and  
322 belief, the filing is accurate, based on the law or  
323 reasonable interpretation of the law, and is brought for a  
324 legitimate purpose.

325         This is a simple requirement, Mr. Chairman, but one  
326 that both sides to a lawsuit must abide by if we are to have  
327 a properly functioning Federal court system. However, under  
328 the current Federal procedural rules, failure to comply with  
329 Rule 11 does not necessarily result in the imposition of  
330 sanctions.

331         The fact that litigants can violate Rule 11 without  
332 penalty significantly reduces the deterrent effect of Rule  
333 11, which harms the integrity of the Federal courts and  
334 leads to both plaintiffs and defendants being forced to  
335 respond to frivolous claims and arguments. The Lawsuit  
336 Reduction Act corrects this flaw by requiring that Federal  
337 District Court judges impose sanctions when Rule 11 is  
338 violated.

339         Mandatory sanctions will more strongly discourage  
340 litigants from making frivolous claims in Federal court.  
341 They will also relieve litigants from the financial burden  
342 of having to respond to frivolous claims, as the legislation  
343 requires those who violate Rule 11 to reimburse the opposing

344 party for the reasonable expenses incurred as a direct  
345 result of the violation.

346         Additionally, the legislation eliminates Rule 11's 21-  
347 day safe harbor, which currently gives litigants a free pass  
348 to make frivolous claims as long as they withdraw those  
349 claims if the opposing side objects.

350         Mr. Chairman, as Justice Scalia correctly pointed out  
351 while dissenting from the 1993 changes to the rule, he said  
352 it this way, "Those who file frivolous suits and pleadings  
353 should have no safe harbor. Parties will be able to file  
354 thoughtless, reckless, and harassing pleadings secure in the  
355 knowledge that they have nothing to lose. If objection is  
356 raised, they can retreat without penalty."

357         Although this legislation makes changes to Rule 11, it  
358 is important to recognize that nothing in this legislation  
359 changes the standard by which courts determine whether a  
360 pleading or other filing violates Rule 11. Courts will  
361 apply the same legal standard they have applied since 1993  
362 to determine if a filing runs afoul of Rule 11.

363         Thus, all this legislation really does is to make the  
364 technical and conforming changes to Rule 11 necessary to  
365 make sanctions mandatory rather than discretionary.

366         According to the Federal Rules of Civil Procedure, the  
367 goal of the rules is to ensure that every action and  
368 proceeding in Federal court be determined in a "just,

369 speedy, and inexpensive manner." I believe that this goal  
370 is best served through mandatory sanctions for violating the  
371 simple requirements of Rule 11 that every filing be based on  
372 both the law and the facts.

373 And so, I encourage my colleagues to support the  
374 Lawsuit Abuse Reduction Act and restore mandatory sanctions  
375 Rule 11.

376 And Mr. Chairman, I yield back.

377 Chairman Smith. Thank you, Mr. Franks.

378 The gentleman from Virginia, Mr. Scott, is recognized  
379 for the purpose of offering an amendment.

380 Mr. Scott. Mr. Chairman, first, I would like  
381 unanimous consent to enter into the record the statement on  
382 behalf of the ranking member, Mr. Conyers.

383 Chairman Smith. Okay. Without objection, so ordered.

384 [The statement of Mr. Conyers follows:]

385

386 Mr. Scott. And I have an amendment at the desk.  
387 Chairman Smith. The clerk will report the amendment.  
388 Ms. Kish. Amendment to H.R. 966 offered by Mr. Scott.  
389 Page 2, line 21 --  
390 Chairman Smith. Without objection, the amendment is  
391 considered as read.  
392 [The information follows:]  
393

394 Chairman Smith. And the gentleman is recognized to  
395 explain the amendment.

396 Mr. Scott. Thank you, Mr. Chairman.

397 Mr. Chairman, this amendment exempts constitutional  
398 claims from the provisions of the act. Requiring mandatory  
399 sanctions for such claims will bog down important  
400 constitutional litigation over whether such a challenge is  
401 frivolous and prevents the courts from reaching a decision  
402 on the merits of the constitutional challenge.

403 Mandatory sanction rules will detrimentally impact  
404 plaintiffs with constitutional challenges, exposing them to  
405 legal sanctions even when their lawsuit is meritorious  
406 simply because these valid claims are seen as settled law  
407 and, therefore, under this bill could be seen as frivolous.

408 Therefore, I urge my colleagues to support the  
409 amendment to ensure that these claims arising out of the  
410 Constitution will be able to be heard -- will be able to  
411 have their cases heard. Our system of justice is a moving  
412 body of law, and constitutional cases have the ability to  
413 shift public policy and law. Such claims are vital to our  
414 democracy because they help preserve and define the  
415 constitutional rights of all.

416 Mandatory and arduous sanctions procedures, such as  
417 LARA, will unduly burden plaintiffs bringing constitutional  
418 challenges. Fear of excessive and indiscriminate sanctions

419 may deter constitutional plaintiffs from ever bringing a  
420 suit, and this act may ultimately have a chilling effect on  
421 constitutional plaintiffs.

422         Mandatory sanctions under this bill will impact many  
423 constitutional cases, such as challenges to the Affordable  
424 Care Act under the commerce clause, cases challenging gun  
425 restrictions under the Second Amendment, cases upholding  
426 religious liberty under the First Amendment, and cases  
427 upholding freedom of speech of pro-life students.

428         Mr. Chairman, we have the responsibility to ensure  
429 that those who have arguable constitutional claims will be  
430 able to get to court without being afraid of being  
431 sanctioned for bringing something that is seen as settled  
432 law and, therefore, frivolous.

433         All constitutional claims overturn what appear to  
434 settled law. There are many examples of this in our  
435 history. The perfect example deals with the history of gun  
436 laws.

437         After the Supreme Court decided *United States v.*  
438 *Miller* in 1939, many believed it was settled law that the  
439 Second Amendment should be interpreted as conferring only a  
440 collective and not an individual right to bear arms. This  
441 was later challenged. And in 2008, the Supreme Court said  
442 that the Second Amendment guarantees an individual right to  
443 possess firearms.

444           It is cases like this and others that would be cut off  
445 from the legal system if this bill passed without this  
446 amendment.

447           Again, Mr. Chairman, I urge my colleagues to vote in  
448 favor of the amendment and yield back the balance of my  
449 time.

450           Chairman Smith. Thank you, Mr. Scott.

451           I will recognize myself in support of the amendment,  
452 though not necessarily in support of the comments made by  
453 the gentleman that weren't connected to the amendment.

454           In regard to the amendment, the rule of construction  
455 of the base text states as follows. "Nothing in this act  
456 shall be construed to bar or impede the assertion or  
457 development of new claims, defenses, or remedies under  
458 Federal, State, or local laws, including civil rights laws."

459           Federal constitutional law is Federal law. So I have  
460 no objection to adding "or under the Constitution" to the  
461 rule of construction in the bill. So I support this  
462 amendment.

463           Are there other Members who wish to comment on this  
464 amendment?

465           [No response.]

466           Chairman Smith. If not, the vote is on the amendment.  
467 All in favor, say aye.

468           [A chorus of ayes.]

469 Chairman Smith. Opposed, nay.

470 [No response.]

471 Chairman Smith. The amendment is agreed to.

472 Are there other amendments? The gentleman from  
473 Georgia, Mr. Johnson, is recognized for the purpose of  
474 offering an amendment.

475 Mr. Johnson. Thank you, Mr. Chairman.

476 This amendment --

477 Chairman Smith. Would the clerk report the amendment?

478 Ms. Kish. Amendment to H.R. 966 offered by Mr.

479 Johnson. Page 2, strike line 1 and add "all that follows"  
480 through line 3. Page 2 --

481 Chairman Smith. Without objection, the amendment will  
482 be considered as read.

483 [The information follows:]

484

485 Chairman Smith. And the gentleman from Georgia is  
486 recognized to explain the amendment.

487 Mr. Johnson. Thank you, Mr. Chairman.

488 This amendment would restore the 21-day safe harbor  
489 position to Rule 11. Under the current rule, a party has 21  
490 days to withdraw or correct any filing challenged under Rule  
491 11. The provision allows parties to correct inadvertent  
492 mistakes without penalty.

493 Why is it that we should support this amendment?

494 Well, the purpose of this amendment, as stated, is to curb  
495 abusive litigation. But what it will actually do is curb  
496 the number of lawsuits, and it will increase the amount of  
497 time and money that citizens spend on litigation.

498 It will curb legitimate lawsuits because it makes it  
499 more expensive for attorneys to handle these cases for  
500 plaintiffs. It will be more expensive because the stakes  
501 will be higher, and the chances that the plaintiff will be  
502 struck with a Rule 11 motion at some point during the  
503 proceedings is greatly increased because the defense bar  
504 would use that lever as a specter hanging over the heads of  
505 all plaintiffs. And then we would have defenses to the  
506 allegation of Rule 11 misconduct.

507 We would have defenses to those and then allegations  
508 of those who say that the defensive pleading asserting a  
509 Rule 11 violation is itself a Rule 11 violation. And in

510 fact, I wish we had a Rule 11 process for this committee  
511 because this committee is considering this rule change in  
512 contravention of the Rules Enabling Act that Congress  
513 passed, 28 U.S. C. Sections 2072 and 2074.

514         And that requires that evidentiary or procedural rules  
515 or amendments first be brought to the Judicial Conference,  
516 which is a group of -- well, which is the group that  
517 represents all of the Federal judges, all of the Article III  
518 judges of the Nation. And what that does is puts these  
519 kinds of changes under the microscope of scrutiny by judges  
520 and also provides an opportunity for lawyers and the public  
521 to weigh in. And then it gives the opportunity for the  
522 judges to reconsider in light of the public comments.

523         We are contravening that process today with this  
524 legislation. And I think that it is -- I believe that the  
525 safe harbor provisions are important to Rule 11 in that a  
526 mistake that is made should not be turned into a penalty.  
527 There should be an opportunity for lawyers to rectify any  
528 kind of problem with pleadings after having been notified  
529 that there is a pleading.

530         And this Lawsuit Abuse Reduction Act eliminates that  
531 safe harbor, and this will not lead to lawsuit or reduction  
532 of lawsuit. It will actually cause more litigation.

533         I believe that if the Judicial Conference considered  
534 this rule change, they would find that they don't want to go

535 back to the old 1983 version where there was no safe harbor  
536 provision. I believe that they would say that what we have  
537 been doing since then with the 21-day safe harbor has been  
538 an effective way of weeding out frivolous lawsuits,  
539 frivolous pleadings within lawsuits, and that this bill is  
540 unnecessary.

541 And with that, Mr. Chairman, I will urge my colleagues  
542 to support this common-sense amendment, restoring the 21-day  
543 safe harbor rule, and I yield back the balance of my time.

544 Chairman Smith. Okay. Thank you, Mr. Johnson.

545 I will recognize myself in opposition to the  
546 amendment.

547 It is essential that LARA reverse the 1993 amendments  
548 to Rule 11 that allow those who file frivolous lawsuits to  
549 avoid sanctions for making frivolous claims and then simply  
550 withdrawing them within 21 days after a motion for sanctions  
551 has been filed. This loophole, which LARA closes, gives  
552 lawyers an unlimited number of free passes to file frivolous  
553 pleadings with impunity.

554 Justice Scalia correctly predicted that such  
555 amendments would, in fact, encourage frivolous lawsuits.  
556 Opposing the 1993 amendments in which the 21-day rule was  
557 available, Justice Scalia wrote, "In my view, those who file  
558 frivolous suits and pleadings should have no safe harbor.  
559 The rule should be solicitous of the abused and not of the

560 abuser.

561 "Under the revised rule, parties will be able to file  
562 thoughtless, reckless, and harassing pleadings secure in the  
563 knowledge that they have nothing to lose. If objection is  
564 raised, they can retreat without penalty."

565 LARA would eliminate the free pass lawyers have to  
566 file frivolous lawsuits under today's Rule 11. So I urge my  
567 colleagues to oppose this amendment.

568 Are there other Members who wish to be heard on this  
569 amendment?

570 The gentleman from Tennessee is recognized.

571 Mr. Cohen. Thank you, Mr. Chairman.

572 Let me ask you, just looking at this, would you be  
573 open to an amended version where you had, say, the 21 days -  
574 - or you could have 10 days, whatever days it would be. But  
575 21 seems kind of what we had. But during that 21-day  
576 period, when the person could withdraw their suit, still  
577 have them be subject to attorneys' fees.

578 I think that if somebody has to respond with a lawyer  
579 and incur fees, that the party -- I guess it would often be  
580 that it would be the defendant -- shouldn't have to incur  
581 attorneys' fees. But maybe you give the 21 days an  
582 opportunity for somebody to get, you know, let me change my  
583 approach or whatever and at least not have sanctions,  
584 monetary sanctions, and compensation. So that there is a

585 middle ground.

586 Would that be something that you could consider?

587 Chairman Smith. Mr. Cohen, if you would yield? I  
588 can't tell you this second whether that would be something  
589 that we could discuss. I would be happy to discuss it,  
590 rather it is I don't know whether I could accept it. But it  
591 is a good idea to consider.

592 We can go on and vote on the amendment. Mr. Johnson  
593 can withdraw the amendment. We can consider further  
594 discussion of that issue between here and the House floor.  
595 I will leave it up to the gentleman from Georgia to make  
596 that decision.

597 Mr. Cohen. Well, as for me, I will be happy -- I  
598 understand, and I would like to work with you between here  
599 and the House floor. I think a middle ground is something  
600 maybe -- and I am a believer that Rule 11 should be strong  
601 and proposed such, when I was a State senator, on medical  
602 malpractice.

603 But I do think there always should be a safe harbor  
604 for somebody. And I heard what Justice Scalia said. I  
605 didn't hear what Justice Thomas said. So I would like to  
606 research that.

607 [Laughter.]

608 Chairman Smith. Getting back to the point, be happy  
609 to further discuss that with you.

610 Mr. Cohen. Thank you, sir.

611 Chairman Smith. Mr. Johnson is recognized.

612 Mr. Johnson. Thank you, Mr. Chairman.

613 I would respectfully insist that we go forward with  
614 this amendment.

615 Chairman Smith. Okay.

616 Mr. Johnson. There has been no case made that the  
617 rule should be changed, and there has been no compliance  
618 with our own law, 28 U.S.C. 2072 and 2074, the Rule Enabling  
619 Act. And I think this is precisely the kind of rule change  
620 that needs to go through that process.

621 And since it has not gone through that process, I  
622 think it is important that we maintain the status quo.

623 Chairman Smith. Okay. Thank you, Mr. Cohen. And  
624 thank you, Mr. Johnson.

625 The question is on the amendment. All in favor, say  
626 aye.

627 [A chorus of ayes.]

628 Chairman Smith. All opposed, say no.

629 [A chorus of nays.]

630 Chairman Smith. In the opinion of the chair, the  
631 majority having voted in opposition, the amendment is not  
632 agreed to.

633 Mr. Johnson. A recorded vote?

634 Chairman Smith. A recorded vote has been requested,

635 and the clerk will call the roll.

636 Ms. Kish. Mr. Smith?

637 Chairman Smith. No.

638 Ms. Kish. Mr. Smith votes no.

639 Mr. Sensenbrenner?

640 [No response.]

641 Ms. Kish. Mr. Coble?

642 Mr. Coble. No.

643 Ms. Kish. Mr. Coble votes no.

644 Mr. Gallegly?

645 [No response.]

646 Ms. Kish. Mr. Goodlatte?

647 Mr. Goodlatte. No.

648 Ms. Kish. Mr. Goodlatte votes no.

649 Mr. Lungren?

650 Mr. Lungren. No.

651 Ms. Kish. Mr. Lungren votes no.

652 Mr. Chabot?

653 [No response.]

654 Ms. Kish. Mr. Issa?

655 [No response.]

656 Ms. Kish. Mr. Pence?

657 [No response.]

658 Ms. Kish. Mr. Forbes?

659 [No response.]

660 Ms. Kish. Mr. King?  
661 [No response.]  
662 Ms. Kish. Mr. Franks?  
663 Mr. Franks. No.  
664 Ms. Kish. Mr. Franks votes no.  
665 Mr. Gohmert?  
666 [No response.]  
667 Ms. Kish. Mr. Jordan?  
668 [No response.]  
669 Ms. Kish. Mr. Poe?  
670 [No response.]  
671 Ms. Kish. Mr. Chaffetz?  
672 [No response.]  
673 Ms. Kish. Mr. Griffin?  
674 Mr. Griffin. No.  
675 Ms. Kish. Mr. Griffin votes no.  
676 Mr. Marino?  
677 [No response.]  
678 Ms. Kish. Mr. Gowdy?  
679 [No response.]  
680 Ms. Kish. Mr. Ross?  
681 Mr. Ross. No.  
682 Ms. Kish. Mr. Ross votes no.  
683 Mrs. Adams?  
684 Mrs. Adams. No.

685 Ms. Kish. Mrs. Adams votes no.  
686 Mr. Quayle?  
687 Mr. Quayle. No.  
688 Ms. Kish. Mr. Quayle votes no.  
689 Mr. Conyers?  
690 [No response.]  
691 Ms. Kish. Mr. Berman?  
692 [No response.]  
693 Ms. Kish. Mr. Nadler?  
694 Mr. Nadler. Aye.  
695 Ms. Kish. Mr. Nadler votes aye.  
696 Mr. Scott?  
697 Mr. Scott. Aye.  
698 Ms. Kish. Mr. Scott votes aye.  
699 Mr. Watt?  
700 Mr. Watt. Aye.  
701 Ms. Kish. Mr. Watt votes aye.  
702 Ms. Lofgren?  
703 Ms. Lofgren. Aye.  
704 Ms. Kish. Ms. Lofgren votes aye.  
705 Ms. Jackson Lee?  
706 Ms. Jackson Lee. Aye.  
707 Ms. Kish. Ms. Jackson Lee votes aye.  
708 Ms. Waters?  
709 [No response.]

710 Ms. Kish. Mr. Cohen?  
711 Mr. Cohen. Aye.  
712 Ms. Kish. Mr. Cohen votes aye.  
713 Mr. Johnson?  
714 Mr. Johnson. Aye.  
715 Ms. Kish. Mr. Johnson votes aye.  
716 Mr. Pierluisi?  
717 [No response.]  
718 Ms. Kish. Mr. Quigley?  
719 Mr. Quigley. Aye.  
720 Ms. Kish. Mr. Quigley votes aye.  
721 Ms. Chu?  
722 Ms. Chu. Aye.  
723 Ms. Kish. Ms. Chu votes aye.  
724 Mr. Deutch?  
725 Mr. Deutch. Aye.  
726 Ms. Kish. Mr. Deutch votes aye.  
727 Ms. Sanchez?  
728 Ms. Sanchez. Aye.  
729 Ms. Kish. Ms. Sanchez votes aye.  
730 Chairman Smith. The gentleman from Wisconsin?  
731 Mr. Sensenbrenner. No.  
732 Ms. Kish. Mr. Sensenbrenner votes no.  
733 Chairman Smith. The gentleman from Ohio?  
734 Mr. Jordan. No.

735 Ms. Kish. Mr. Jordan votes no.  
736 Chairman Smith. The gentleman from California?  
737 Mr. Gallegly. No.  
738 Ms. Kish. Mr. Gallegly votes no.  
739 Chairman Smith. The gentleman from Pennsylvania?  
740 Mr. Marino. No.  
741 Ms. Kish. Mr. Marino votes no.  
742 Chairman Smith. The gentlewoman from Florida?  
743 The gentleman from South Carolina?  
744 Mr. Gowdy. No.  
745 Ms. Kish. Mr. Gowdy votes no.  
746 Chairman Smith. The gentleman from Puerto Rico?  
747 Mr. Pierluisi. Yes.  
748 Ms. Kish. Mr. Pierluisi votes yes.  
749 [Pause.]  
750 Chairman Smith. The clerk will report.  
751 Ms. Kish. Mr. --  
752 Chairman Smith. The gentleman from Texas?  
753 Mr. Gohmert. No.  
754 Ms. Kish. Mr. Gohmert votes no.  
755 Mr. Chairman, 12 Members voted aye; 15 Members voted  
756 no.  
757 Chairman Smith. The majority having voted against the  
758 amendment, the amendment is not agreed to.  
759 Are there other amendments?

760 Ms. Jackson Lee. Mr. Chairman?

761 Chairman Smith. The gentlewoman from Texas, Ms.  
762 Jackson Lee, is recognized for the purpose of offering an  
763 amendment.

764 Ms. Jackson Lee. Mr. Chairman, I have an amendment at  
765 the desk.

766 Chairman Smith. And the clerk will report the  
767 amendment.

768 Ms. Kish. Amendment to H.R. 966 offered by Ms.  
769 Jackson Lee. Page 2 --

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

772 Chairman Smith. Without objection, so ordered.

773 [The information follows:]

774

775 Chairman Smith. And the gentlewoman is recognized to  
776 explain the amendment.

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

778 If I may take a moment of personal privilege? I just  
779 wanted to make note of the fact that we have worked together  
780 over the years, speaking of you, Mr. Chairman, and myself.  
781 We have had some agreements when we have worked together.  
782 We have seen bipartisanship on this committee addressing the  
783 question of patent reform just recently, and I know that  
784 there are those opportunities.

785 I would like to encourage the chairman, if he would in  
786 the time we have remaining in this year, to look at the  
787 anti-bullying legislation that I proposed to you for a  
788 hearing and to work with either the full committee or the  
789 subcommittee on a very important issue. I think it is  
790 important for us to make a statement on that issue as the  
791 United States Congress, as it is an issue that is  
792 proliferating across the Nation.

793 So, Mr. Chairman, I hope we will have an opportunity  
794 to dialogue on that question, and I wanted to say that in  
795 the spirit of bipartisanship as I move to discuss my  
796 amendment.

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

798 Ms. Jackson Lee. And will we have an opportunity to  
799 -- I know that you were distracted. I was indicating that I

800 hope that we will have an opportunity to discuss the anti-  
801 bullying legislation that I have offered to you for an  
802 opportunity for a hearing and to move forward, inasmuch as  
803 we have a number of bills on here today.

804 And so, I hope we will have that opportunity.

805 Chairman Smith. I am looking forward to that  
806 opportunity as well. Look forward to discussing it with you  
807 after the markup.

808 Ms. Jackson Lee. Thank you.

809 Going on this amendment, Mr. Chairman, in my  
810 bipartisan spirit, this is simply a bill that I fully  
811 disagree with. It would change the sanctions for a  
812 violation of Federal Rules of Civil Procedure 11 to a cost-  
813 shifting sanction payable to the opposing party, a former  
814 version of the rule in effect from 1983 until 1993 that we  
815 changed.

816 The cost-shifting provision was eliminated by the  
817 courts because it encouraged satellite litigation. My  
818 amendment would restore the sanctions currently available  
819 under Rule 11, which provide the correct balance in  
820 punishing unwarranted conduct without encouraging  
821 unnecessary litigation.

822 My amendment would strike the language in H.R. 966  
823 that makes mandatory sanctions mandatory and replaces it  
824 with the language now that restores discretion in sanction

825 to the court. This amendment would allow judges the  
826 discretion to determine the type of sanctions, and it is a  
827 compromise amendment that restores some judicial discretion  
828 back into Rule 11 process.

829 Under the current rule, judges determine both whether  
830 or not sanctions are in order and what type of sanctions are  
831 appropriate. In fact, I believe the present Rule 11 is  
832 fine. I have not been able to determine where the frivolous  
833 lawsuits are.

834 I have not heard national headlines in our communities  
835 of interviews by constituents saying get rid of a trial  
836 lawyer in a frivolous lawsuit. In fact, I have heard  
837 individuals say find me a lawyer so that I can remedy the  
838 damages of an injury on the job, I can remedy the impact of  
839 an unfair foreclosure. It is necessary today to protect  
840 consumers' rights sometimes by the work of lawyers who, in  
841 many instances, work on contingency or work without fees in  
842 order to provide the most impoverished the opportunity for  
843 access to our courts.

844 I think this bill changes the balance of scales of  
845 justice and blocks from the courthouse door the most  
846 vulnerable. By eliminating the mandatory fee-shifting  
847 provision, the 1993 rule discouraged satellite litigation  
848 and encouraged parties to move forward with the merits of  
849 the case.

850           The old rule that we had, the Rule 11 that was in  
851 effect for a 10-year period until the courts repealed it,  
852 mandatory fee shifting was used to discourage plaintiffs  
853 from bringing meritorious claims.

854           The other aspect of this case that really troubles me,  
855 Mr. Chairman and to my colleagues, is a disproportionate  
856 effect on plaintiffs, especially plaintiffs in civil rights  
857 cases. Sanctions were more often imposed against plaintiffs  
858 than defendants and more often imposed against plaintiffs in  
859 certain kinds of cases, primarily in civil rights and  
860 certain kinds of discrimination cases.

861           A leading study on this issue showed that although  
862 civil rights cases made up 11.4 percent of Federal cases  
863 filed, 22.7 percent of the cases in which sanctions have  
864 been imposed were civil rights cases. I ask my colleagues  
865 to consider the importance of giving discretion to the  
866 judiciary on the question of sanctions.

867           That judge understands whether or not a person has  
868 come maliciously into the court or whether or not in their  
869 very best mind, they came in to help a deprived individual  
870 find a limited access to the courts. Let us not turn back  
871 the clock on justice. The courts were right when they  
872 repealed this onerous Rule 11 and made a more palatable  
873 approach to making sure that there is a balance between  
874 those who want to access the courts in a fair way, but do

875 not have the ability to do so and lawyers are willing to  
876 take their cases.

877 Be reminded of the incident both in the Gulf right now  
878 with the oil spill where people are still hurting and are  
879 likely to want to file suit. Be reminded of the incident  
880 that is occurring in Montana, where people are impacted.  
881 These individuals need to have access to the courts.

882 I would ask my colleagues to support this amendment,  
883 which returns discretion to the judges, the most important  
884 person in that courtroom deciding what lawyers are up to, to  
885 be able to render justice by having discretion in the  
886 sanctions that would be issued. Let's not have a chilling  
887 effect on justice in America.

888 With that, I ask my colleagues to support the  
889 amendment. I yield back, Mr. Chairman.

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

891 The gentleman from Arizona, Mr. Franks, is recognized.

892 Mr. Franks. Mr. Chairman, I would oppose this  
893 amendment because it would actually negate the bill by  
894 removing its provision that guarantees compensation to the  
895 victims of frivolous lawsuits. Only mandatory sanctions for  
896 frivolous lawsuits that include compensation can provide  
897 that much-needed light at the end of the tunnel for the  
898 victims of frivolous lawsuits.

899 Mr. Chairman, today, few victims of frivolous lawsuits

900 find it in their interest to spend the extra time and money  
901 to pursue Rule 11 sanctions because there is simply no  
902 guarantee that if the court finds the case frivolous that  
903 the victims will, indeed, be compensated. And if there is a  
904 risk victims won't be compensated following a Rule 11  
905 proceeding, then they could find themselves in an even  
906 deeper financial hole than the original frivolous lawsuit  
907 put them in in the first place.

908 Under the mandatory sanctions in this legislation,  
909 victims of lawsuit abuse will have the guarantee of  
910 compensation they need to make it worth their while to  
911 defend themselves against frivolous lawsuits. And this  
912 amendment would strike that guarantee, Mr. Chairman, and it  
913 would keep Rule 11 in its current toothless form, which  
914 provides little comfort for the victims of frivolous  
915 lawsuits.

916 And I would urge my colleagues to join me in opposing  
917 the amendment.

918 Mr. Lungren. Would the gentleman yield?

919 Mr. Franks. I would yield to the gentleman.

920 Mr. Lungren. Would the gentleman say that the use of  
921 frivolous lawsuits is sort of one form of adult bullying?

922 Mr. Franks. I would actually agree with you, Mr.  
923 Chairman.

924 Mr. Lungren. And in order to deal with bullies, don't

925 you have to have some strong deterrent?

926 Mr. Franks. Have to have a big stick.

927 Mr. Cohen. Mr. Chairman, those are leading questions.

928 [Laughter.]

929 Mr. Franks. And I would agree with the gentleman that  
930 they are leading questions.

931 Chairman Smith. The gentleman from Tennessee, Mr.  
932 Cohen, is recognized.

933 Mr. Cohen. Thank you.

934 Mr. Franks, let me ask you a question. I kind of have  
935 some inclination to support some middle ground, and that is  
936 what the lady from Texas is offering. But what I am  
937 concerned, and this just gets to judge's discretion, give me  
938 some other situations to where we have judges that we don't  
939 give them discretion.

940 I mean, we have got mandatory minimum sentences, and  
941 that is one mistake we made. But other than that?

942 Mr. Franks. I guess the one that comes to my mind  
943 immediately is, years ago, I was involved in writing the  
944 Dangerous Crimes Against Children legislation in Arizona  
945 because we found that judges were oftentimes using  
946 discretion to give what we thought was greater latitude to  
947 child predators than we deemed appropriate.

948 And there were many times where someone would be let  
949 out of prison after they had actually killed a child. This

950 is not just an example out of my head. This is a true  
951 situation, where a little Hoskins girl was killed by a  
952 person, and they were let out of prison. And then they went  
953 up and killed a little Wilson girl in Flagstaff.

954 And we wrote the Dangerous Crimes Against Children  
955 bill, and we put in mandatory sentencing guidelines where  
956 the judges did not have the same discretion, and it had a  
957 profound impact not only on child molesters, but on the  
958 protection of children in Arizona. And that was one of the  
959 cases that it was appropriate.

960 Mr. Cohen. Right. Sentencing is one thing, and I  
961 know we have done that. But any place other than sentencing  
962 where we kind of make them robots?

963 Mr. Franks. If the gentleman would yield, I will just  
964 suggest that in this case, if you are a judge and you are  
965 having to work with lawyers that come before you every day,  
966 and you think that perhaps they are part of allowing a  
967 frivolous claim to be put into the court. But you know you  
968 are going to have to work with them, and you are thinking,  
969 well, the psychological barrier there to put sanctions on  
970 them exists.

971 But if you have a mandatory situation, the judge can  
972 say, listen, if I deem this frivolous, I have to have these  
973 mandatory sentences because the Congress has said. I  
974 believe that the overall impact here will be a good one, and

975 that is why I support the overall legislation.

976 Mr. Cohen. So, Mr. Franks, let me ask you this. If  
977 you think the judges are going to be intimidated -- they got  
978 a life job, lifetime appointment. You think they are going  
979 to be intimidated by this powerful trial lawyer or friendly  
980 trial lawyer or whatever, then wouldn't they not make the  
981 decision that it was a frivolous lawsuit and let them off  
982 the hook entirely?

983 Mr. Franks. Well --

984 Mr. Cohen. I mean, don't you think the judges, they  
985 have the discretion to determine if it is frivolous or not.  
986 We can't say it is mandatory that they make something  
987 frivolous. And if there are mandatory sanctions, then they  
988 are even less likely to make it, rule that it is a frivolous  
989 lawsuit.

990 Mr. Franks. We have a lot of different mandatory  
991 guidelines, but as you know, this legislation does not  
992 affect the judge's discretion on whether to declare  
993 something frivolous or not.

994 Mr. Cohen. That is right. But what it does do --

995 Mr. Franks. Give you another example. The Private  
996 Securities Litigation Reform Act of 1995 imposes mandatory  
997 sanctions on those who bring abusive litigation with the  
998 presumption that the opposing party is entitled to recover  
999 the reasonable attorneys' fees. This is not a brand-new

1000 concept.

1001 And with that, I would yield back to the gentleman.

1002 Mr. Cohen. Well, I take back and I would like to ask  
1003 Ms. Jackson Lee, doesn't Mr. Franks's logic extend that the  
1004 judge would then not find that the lawsuit was frivolous so  
1005 that there wouldn't be sanctions if they were friendly with  
1006 that? And that might be less frivolous lawsuits found.

1007 Ms. Jackson Lee. I think that is absolutely right.  
1008 Thank you for yielding to me.

1009 It, in essence, takes the judge's ability away to have  
1010 a random of options. So in order to say I am going to  
1011 protect this lawyer, then they would never find any case  
1012 frivolous because they are forced to make a decision of  
1013 sanctions.

1014 In this instance, you could find a case frivolous and  
1015 you could make a decision not to sanction on the level of --  
1016 you know, I hate to use the term "frivolousness," but the  
1017 intent, whether it was a mistake, whether it was a lawsuit  
1018 that was -- in all intents and purposes was sincere, but yet  
1019 had the elements of such.

1020 You give the judge the ability to level the  
1021 punishment, which the U.S. Sentencing Commission, by the  
1022 way, has argued on behalf of Federal judges to go back to  
1023 discretion in sentencing. We don't have that completely at  
1024 this point. But what I would suggest is my friends on the

1025 other side of the aisle -- and I would hate to think that  
1026 individuals who come in for a number of cases dealing with  
1027 Social Security and Medicare would, in essence, be  
1028 considered bullies but would be considered protectors of the  
1029 institutions that we deserve to protect.

1030 And I know my good friend on the other side of the  
1031 aisle is a dear friend, but bullying is so deeply of great  
1032 concern to children and schools that I know that he is  
1033 taking it as seriously as I am.

1034 But what I would suggest is that my simple amendment  
1035 gives discretion to the judges that we have confirmed by  
1036 Senate confirmation and others who have received the  
1037 affirmation of the constituents or the citizenry who has  
1038 either voted or appointed these individuals. And therefore,  
1039 I would suggest that this is an appropriate modification of  
1040 this bill because it was shown that the old bill that was  
1041 before the modification by the courts did not work.

1042 And the final insult is for those who are trying to go  
1043 in on behalf of civil rights issues are the more intimidated  
1044 or the ones that would have the hard handle of non-justice  
1045 against them and have sanctions rendered.

1046 I ask my colleagues in their empathy and their  
1047 sympathy to join in supporting this amendment, which would  
1048 bring balance to the underlying legislation. I yield back.

1049 Chairman Smith. The gentlewoman's time has expired.

1050 Are there other Members who wish to be recognized on  
1051 our side? The gentleman from South Carolina, Mr. Gowdy?  
1052 Mr. Gowdy. Thank you, Mr. Chairman.  
1053 I would just ask the gentlelady from Texas -- and I  
1054 don't know the answer to this question -- but just among the  
1055 sphere of cases where summary judgment has been granted. In  
1056 other words, there is no material fact in dispute at all, no  
1057 factual dispute. It is only on the law, and summary  
1058 judgment is granted. In those, in that universe of cases,  
1059 how many times have sanctions been imposed in U.S. District  
1060 Court?

1061 Ms. Jackson Lee. I am trying to Google the answer for  
1062 you quickly, but without having an answer at my fingertips,  
1063 what I would say to you is that the underlying premise of  
1064 the section that I want to modify is for the judge to have  
1065 no discretion. It does not indicate that the judge could  
1066 not use their discretion and render sanctions.

1067 This rule is not limited to summary judgment motions.  
1068 So I am not sure of the underlying premise of the  
1069 gentleman's question. I don't have the numbers.

1070 But what I would say to you is the underlying premise  
1071 of my amendment is to give the judge discretion to say yes  
1072 or no. And I am not going to use a litmus test on a court  
1073 and say you have said yes too often or no too often.

1074 But there will be times when I would assure you that

1075 that judge, no matter who appointed them -- a Republican  
1076 administration, in the instance of Federal judges, and a  
1077 Democratic administration -- would want to have discretion  
1078 to make a decision under Rule 11. That is the only question  
1079 that I am raising at this point.

1080 I yield back to the gentleman.

1081 Mr. Gowdy. Reclaiming my time, I picked the category  
1082 of summary judgment cases because that is an easy universe  
1083 of cases to study, and I can't think of a single time where  
1084 a U.S. District Court judge has imposed Rule 11 sanctions,  
1085 even when there is no material dispute as to a fact.

1086 So I guess my point is, right now, they have  
1087 unfettered discretion, and I have not heard a single case  
1088 cited on the other side as when they have exercised their  
1089 discretion to impose sanctions for a frivolous lawsuit.

1090 Ms. Jackson Lee. Would the gentleman just yield for a  
1091 question?

1092 Mr. Gowdy. Sure.

1093 Ms. Jackson Lee. I am sorry. You have a study in  
1094 front of you of all summary judgment cases from the  
1095 beginning of the Federal court system as the Constitution  
1096 crafted it since the 1700s?

1097 Mr. Gowdy. No. That is why I asked the question,  
1098 whether or not the gentlelady from Texas could cite a single  
1099 case?

1100 Ms. Jackson Lee. Well, I --

1101 Mr. Gowdy. Because in my 16 years, I can't.

1102 Ms. Jackson Lee. Okay. Well, the only thing, I will  
1103 just end on this note. I was just wondering if you had that  
1104 data in front of you right now because I could not imagine  
1105 the body of information that we would have at this table  
1106 that would characterize cases starting from our early  
1107 history or the use of the summary judgment motion.

1108 So I would just say that is a difficult premise to  
1109 make because I don't know whether you have the data in front  
1110 of you.

1111 Thank you. I yield back.

1112 Chairman Smith. Do you yield back your time?

1113 Mr. Gowdy. I yield back. I see the gentleman from  
1114 Tennessee's hand is up.

1115 Chairman Smith. Do you want to yield to the gentleman  
1116 from Tennessee, since --

1117 Mr. Gowdy. If I have any time left.

1118 Chairman Smith. Okay.

1119 Mr. Gowdy. Yes, I yield to the gentleman from  
1120 Tennessee.

1121 Chairman Smith. The gentleman has 2 minutes left, and  
1122 he yields to the gentleman from Tennessee.

1123 Mr. Gowdy. I will give him one of those two.

1124 Mr. Cohen. Thank you.

1125           Just summary judgment and frivolous lawsuits are  
1126 apples and oranges. I mean, true that given all the facts  
1127 that it still doesn't present. But if you would have  
1128 brought Brown v. Board of Education, they would have said  
1129 even if the facts are true, it didn't fit the law. You had  
1130 to find somebody who understood a higher law. And sometimes  
1131 at the trial level, you don't quite find that on occasions  
1132 as often as you should.

1133           But I mean, the summary judgments are certainly  
1134 different. Don't you see the distinction between a summary  
1135 judgment and a frivolous -- Rule 11?

1136           Mr. Gowdy. Of course. You can file a lawsuit and be  
1137 thrown out on summary judgment and it not be frivolous.

1138           Mr. Cohen. Right.

1139           Mr. Gowdy. I just find it amazing -- and I don't use  
1140 the word lightly -- amazing that you can't cite a single  
1141 case where summary judgment has been granted and sanctions  
1142 were also imposed. I am not saying it is a carte blanche,  
1143 de facto, per se rule. I am saying can you find me a single  
1144 instance where summary judgment was granted and the judge  
1145 exercised his or her discretion to also impose sanctions?

1146           Mr. Cohen. I can't respond to that.

1147           Mr. Gowdy. Hearing none.

1148           Mr. Cohen. The lady from Texas couldn't answer your  
1149 question. I will refuse to answer your question under the

1150 grounds that it might incriminate me.

1151 [Laughter.]

1152 Mr. Gowdy. I would yield back.

1153 Chairman Smith. The gentleman yields back the time.

1154 The gentlewoman from California, Ms. Sanchez?

1155 Ms. Sanchez. Thank you, Mr. Chairman.

1156 I note with some degree of amusement the exchange that

1157 has been going on regarding cases of summary judgment.

1158 Summary judgment can be granted in cases in which there is

1159 no dispute as to the facts, but in which case plaintiffs are

1160 trying to assert a novel or interesting new theory of law

1161 and apply the facts to that law.

1162 So not all summary judgment motions that are granted

1163 are necessarily frivolous lawsuit. In fact, that is how our

1164 common law case system moves forward with novel questions of

1165 law is when interesting situations come up that don't fit

1166 the traditional fact pattern but, in fact, makes way for new

1167 law.

1168 For example, things like palimony, which didn't used

1169 to exist until somebody asserted a novel theory of law that

1170 if somebody fathered a child, they could be, in fact, sued

1171 for palimony or monies awarded to help raise that child.

1172 Many novel questions of civil rights or anti-

1173 discrimination laws didn't fit the traditional fact patterns

1174 until those cases were brought. And having them before a

1175 judge, the judge saw the need to move the law forward in a  
1176 way that changed the law there ever after, Brown v. Board of  
1177 Education being a very good example of that.

1178 Mr. Gowdy. Would the gentlelady yield for a question?

1179 Ms. Sanchez. I will not. You have had time, and I  
1180 want to make certain points.

1181 If the point of the changes to Rule 11 are to try to  
1182 dissuade people from litigating, in fact, what this does --  
1183 without giving discretion to the judges or giving a safe  
1184 harbor provision, what it actually does is encourage  
1185 attorneys to dig in their heels and to litigate to the  
1186 death, so to speak, when these Rule 11 issues come up  
1187 because they will not be trying the cases. They will be  
1188 trying to try the attorneys.

1189 And I think looking at some of the information with  
1190 respect to Federal judges who were surveyed, 91 percent  
1191 opposed the proposed requirement that sanctions be imposed  
1192 for every Rule 11 violation. That means that 91 percent of  
1193 judges sitting currently on the Federal bench don't think  
1194 that the sanctions should be mandatory because they don't  
1195 think that that is helpful.

1196 And in fact, if you look at the proposed changes and  
1197 the 1983 rule, a whole cottage industry of Rule 11  
1198 litigation mushroomed after that rule change because people  
1199 were trying to harass and intimidate parties in a lawsuit by

1200 going after people for Rule 11 sanctions.

1201           So, again, if the point of the proposed bill is to  
1202 curb frivolous litigation, it is not going to do anything of  
1203 the sort. Without the safe harbor provision and without  
1204 some discretion by judges to impose sanctions when and where  
1205 they think it is necessary -- and it might be surprising  
1206 that many judges don't think that things warrant sanctions,  
1207 but that doesn't mean that they are wrong.

1208           You may disagree with them personally, but that  
1209 doesn't mean that somehow in the universe because we can't  
1210 cite a single case of a summary judgment motion that was  
1211 accompanied with Rule 11 sanctions, I bet there probably is  
1212 a case out there. I don't happen to be familiar with it,  
1213 nor are my colleagues on a moment's notice. But that  
1214 doesn't mean that there is a problem here.

1215           And I keep going back to the people who interpret and  
1216 apply the law. If they don't see this as beneficial, I  
1217 don't understand why Congress is meddling and mandating that  
1218 this happen.

1219           Again, I think we should leave the application of the  
1220 law to those who have been entrusted to uphold it, and we  
1221 should respect the fact that 91 percent of them oppose the  
1222 requirement that sanctions are imposed without any  
1223 discretion and the fact that a whole cottage industry of  
1224 Rule 11 litigation will follow it.

1225           Again, if the goal is to reduce litigation, you are  
1226 not doing it with this bill without Ms. Jackson Lee's  
1227 amendment.

1228           So, on that note, I will --

1229           Mr. Johnson. Would the gentlelady yield?

1230           Ms. Sanchez. I will yield back my time to the  
1231 chairman.

1232           Chairman Smith. The gentlewoman has yielded back her  
1233 time.

1234           Are there any other -- the gentleman from Georgia, Mr.  
1235 Johnson, is recognized.

1236           Mr. Johnson. Thank you, Mr. Chairman.

1237           Mr. Chairman, I think the big elephant in this room is  
1238 represented by the question about the careful and deliberate  
1239 process that Congress put in place with the legislation, 28  
1240 U.S.C. 2072 through 2074, the Rules Enabling Act. And this  
1241 elephant in the room requires us to answer the questions  
1242 that are emblazoned on its sides and on its back and on its  
1243 front.

1244           Just why is it, and since we are asking questions  
1245 during this hearing, I will just pose the question to any of  
1246 my colleagues on the other side of the aisle, isn't it a  
1247 fact that 28 U.S.C. is still in effect? Should not we be  
1248 passing this on to the Judicial Conference for their careful  
1249 and thoughtful consideration in accordance with the process

1250 that we ourselves laid down?

1251 Or should we be rescinding 28 U.S.C. as being  
1252 something that is no longer necessary? I mean, what is the  
1253 usefulness of 28 U.S.C. if we are not going to use it? Why  
1254 haven't we used it on this case? If someone could please  
1255 answer that elephant question?

1256 And yes, Mr. Franks, I see you kind of --

1257 Chairman Smith. If the gentleman will yield? Real  
1258 quickly, I will try my hand at answering the gentleman's  
1259 question real quickly.

1260 Mr. Johnson. All right. Thank you.

1261 Chairman Smith. By the way, there is nothing in 28  
1262 U.S.C. that prevents Congress from making any changes that  
1263 it wants to.

1264 Mr. Johnson. I realize that.

1265 Chairman Smith. Congress has never relinquished its  
1266 constitutional authority to create and alter the Rules of  
1267 Federal Court Procedure, and in fact, it has a duty, I  
1268 believe, to address pressing problems, in this case the  
1269 threat of frivolous lawsuits that affect all aspects of  
1270 American society. So 28 U.S.C. does not prevent us from  
1271 doing what we need to do to prevent those frivolous  
1272 lawsuits.

1273 Thank you. I thank you, the gentleman for yielding.

1274 Mr. Johnson. Thank you.

1275 Ms. Jackson Lee. Would the gentleman yield?

1276 Mr. Johnson. And I agree with your statement that  
1277 Congress is not bound by 28 U.S.C. 2072, is not bound to  
1278 follow it and certainly has the authority, the  
1279 constitutional authority to enact this legislation. But is  
1280 it wise for us to do it?

1281 Is it a careful manner of adjusting the rules of  
1282 evidence or the rules of procedure, something that our  
1283 laypeople on this committee and many lawyers on the  
1284 committee have not had the opportunity to understand because  
1285 they haven't dealt with litigation in Federal courts.

1286 Isn't it something that we should be careful about  
1287 instead of putting our thumb on the scale of justice so that  
1288 it benefits the corporate interests, the interest that would  
1289 exploit people's civil rights, and especially at a time when  
1290 -- and I am sure that others have received this -- a letter  
1291 from the Committee of Rules of Practice and Procedure of the  
1292 Judicial Conference of the United States, dated March 14th,  
1293 wherein they state that this legislation is hurtful and  
1294 unnecessary.

1295 And I would submit, I would ask that this March 14th  
1296 letter from the Judicial Conference of the United States  
1297 setting forth their opinion about this be included in the  
1298 record.

1299 Chairman Smith. Without objection, so ordered.

1300 [The information follows:]

1301

1302           Mr. Johnson. And also the American Bar Association  
1303 letter, dated June 1, 2011, stating its reasons for being in  
1304 opposition to this legislation.

1305           Chairman Smith. Without objection, so ordered.

1306           [The information follows:]

1307

1308 Ms. Jackson Lee. Mr. Johnson, would you yield?

1309 Mr. Johnson. And I will yield to Ms. Jackson Lee.

1310 Ms. Jackson Lee. Just very quickly, the old bill had  
1311 the purpose of sanctions as compensation. The new, current  
1312 bill that we are trying to amend is deterrence, which is  
1313 what we wanted.

1314 Let me not leave on the table that I could not answer  
1315 the question on the SJ. It was a shock for me to hear that  
1316 we were asked to analyze SJ motions over the history of  
1317 litigation in America.

1318 What I would say is a judge rendering a summary  
1319 judgment motion does not necessarily suggest that the case  
1320 was frivolous. It means that there are not sufficient facts  
1321 to be able to move forward. That does not equal sanctions  
1322 and frivolity.

1323 So I would ask my colleagues to give judges again the  
1324 discretion to render sanctions for an issue that has not  
1325 been a problem and would render justice.

1326 And I yield back to the gentleman.

1327 Mr. Johnson. Okay. And last, but not least, I don't  
1328 think that I have gotten a satisfactory answer as to why we  
1329 are going through a process outside of our own process that  
1330 we have established in 28 U.S.C. 2072. I have not received  
1331 one satisfactory reason --

1332 Chairman Smith. The gentleman's time has expired. I

1333 thought you said my response was satisfactory.

1334 Mr. Johnson. Well, not to why we should not be  
1335 utilizing that legislation.

1336 Chairman Smith. Okay. The gentleman's time has  
1337 expired.

1338 The question is on the Sheila Jackson Lee Amendment.  
1339 All in favor, say aye.

1340 [A chorus of ayes.]

1341 Chairman Smith. Opposed, nay.

1342 [A chorus of nays.]

1343 Chairman Smith. In the opinion of the chair, the nays  
1344 have it.

1345 Ms. Jackson Lee. Roll call, Mr. Chairman?

1346 Chairman Smith. A roll call vote has been requested,  
1347 and the clerk will call the roll.

1348 Ms. Kish. Mr. Smith?

1349 Chairman Smith. No.

1350 Ms. Kish. Mr. Smith votes no.

1351 Mr. Sensenbrenner?

1352 [No response.]

1353 Ms. Kish. Mr. Coble?

1354 Mr. Coble. No.

1355 Ms. Kish. Mr. Coble votes no.

1356 Mr. Gallegly?

1357 Mr. Gallegly. No.

1358 Ms. Kish. Mr. Gallegly votes no.  
1359 Mr. Goodlatte?  
1360 Mr. Goodlatte. No.  
1361 Ms. Kish. Mr. Goodlatte votes no.  
1362 Mr. Lungren?  
1363 Mr. Lungren. No.  
1364 Ms. Kish. Mr. Lungren votes no.  
1365 Mr. Chabot?  
1366 Mr. Chabot. No.  
1367 Ms. Kish. Mr. Chabot votes no.  
1368 Mr. Issa?  
1369 [No response.]  
1370 Ms. Kish. Mr. Pence?  
1371 Mr. Pence. No.  
1372 Ms. Kish. Mr. Pence votes no.  
1373 Mr. Forbes?  
1374 [No response.]  
1375 Ms. Kish. Mr. King?  
1376 [No response.]  
1377 Ms. Kish. Mr. Franks?  
1378 Mr. Franks. No.  
1379 Ms. Kish. Mr. Franks votes no.  
1380 Mr. Gohmert?  
1381 Mr. Gohmert. No.  
1382 Ms. Kish. Mr. Gohmert votes no.

1383 Mr. Jordan?  
1384 Mr. Jordan. No.  
1385 Ms. Kish. Mr. Jordan votes no.  
1386 Mr. Poe?  
1387 Mr. Poe. No.  
1388 Ms. Kish. Mr. Poe votes no.  
1389 Mr. Chaffetz?  
1390 Mr. Chaffetz. No.  
1391 Ms. Kish. Mr. Chaffetz votes no.  
1392 Mr. Griffin?  
1393 Mr. Griffin. No.  
1394 Ms. Kish. Mr. Griffin votes no.  
1395 Mr. Marino?  
1396 Mr. Marino. No.  
1397 Ms. Kish. Mr. Marino votes no.  
1398 Mr. Gowdy?  
1399 Mr. Gowdy. No.  
1400 Ms. Kish. Mr. Gowdy votes no.  
1401 Mr. Ross?  
1402 Mr. Ross. No.  
1403 Ms. Kish. Mr. Ross votes no.  
1404 Mrs. Adams?  
1405 Mrs. Adams. No.  
1406 Ms. Kish. Mrs. Adams votes no.  
1407 Mr. Quayle?

1408 Mr. Quayle. No.

1409 Ms. Kish. Mr. Quayle votes no.

1410 Mr. Conyers?

1411 Mr. Conyers. Aye.

1412 Ms. Kish. Mr. Conyers votes aye.

1413 Mr. Berman?

1414 [No response.]

1415 Ms. Kish. Mr. Nadler?

1416 Mr. Nadler. Aye.

1417 Ms. Kish. Mr. Nadler votes aye.

1418 Mr. Scott?

1419 Mr. Scott. Aye.

1420 Ms. Kish. Mr. Scott votes aye.

1421 Mr. Watt?

1422 Mr. Watt. Aye.

1423 Ms. Kish. Mr. Watt votes aye.

1424 Ms. Lofgren?

1425 Ms. Lofgren. Aye.

1426 Ms. Kish. Ms. Lofgren votes aye.

1427 Ms. Jackson Lee?

1428 Ms. Jackson Lee. Aye.

1429 Ms. Kish. Ms. Jackson Lee votes aye.

1430 Ms. Waters?

1431 [No response.]

1432 Ms. Kish. Mr. Cohen?

1433 Mr. Cohen. Aye.

1434 Ms. Kish. Mr. Cohen votes aye.

1435 Mr. Johnson?

1436 Mr. Johnson. Aye.

1437 Ms. Kish. Mr. Johnson votes aye.

1438 Mr. Pierluisi?

1439 Mr. Pierluisi. Aye.

1440 Ms. Kish. Mr. Pierluisi votes aye.

1441 Mr. Quigley?

1442 Mr. Quigley. Aye.

1443 Ms. Kish. Mr. Quigley votes aye.

1444 Ms. Chu?

1445 Ms. Chu. Aye.

1446 Ms. Kish. Ms. Chu votes aye.

1447 Mr. Deutch?

1448 [No response.]

1449 Ms. Kish. Ms. Sanchez?

1450 Ms. Sanchez. Aye.

1451 Ms. Kish. Ms. Sanchez votes aye.

1452 Mr. Sensenbrenner?

1453 Mr. Sensenbrenner. No.

1454 Ms. Kish. Mr. Sensenbrenner votes no.

1455 Chairman Smith. Are there any other Members who wish

1456 to be recorded?

1457 [No response.]

1458 Chairman Smith. If not, the clerk will report.

1459 Ms. Kish. Mr. Chairman, 12 Members voted aye; 19  
1460 Members voted nay.

1461 Chairman Smith. The majority having voted against the  
1462 amendment, the amendment is not agreed to.

1463 Are there any other amendments?

1464 [No response.]

1465 Chairman Smith. A reporting quorum being present, the  
1466 question is on reporting the bill favorably to the House.  
1467 Those in favor, say aye.

1468 [A chorus of ayes.]

1469 Chairman Smith. Opposed, no.

1470 [A chorus of nays.]

1471 Chairman Smith. The ayes have it, and the bill is  
1472 ordered reported favorably.

1473 A roll call vote has been requested, and the clerk  
1474 will call the roll.

1475 Ms. Kish. Mr. Smith?

1476 Chairman Smith. Aye.

1477 Ms. Kish. Mr. Smith votes aye.

1478 Mr. Sensenbrenner?

1479 Mr. Sensenbrenner. Aye.

1480 Ms. Kish. Mr. Sensenbrenner votes aye.

1481 Mr. Coble?

1482 Mr. Coble. Aye.

1483 Ms. Kish. Mr. Coble votes aye.  
1484 Mr. Gallegly?  
1485 Mr. Gallegly. Aye.  
1486 Ms. Kish. Mr. Gallegly votes aye.  
1487 Mr. Goodlatte?  
1488 Mr. Goodlatte. Aye.  
1489 Ms. Kish. Mr. Goodlatte votes aye.  
1490 Mr. Lungren?  
1491 Mr. Lungren. Aye.  
1492 Ms. Kish. Mr. Lungren votes aye.  
1493 Mr. Chabot?  
1494 Mr. Chabot. Aye.  
1495 Ms. Kish. Mr. Chabot votes aye.  
1496 Mr. Issa?  
1497 Mr. Issa. Aye.  
1498 Ms. Kish. Mr. Issa votes aye.  
1499 Mr. Pence?  
1500 Mr. Pence. Aye.  
1501 Ms. Kish. Mr. Pence votes aye.  
1502 Mr. Forbes?  
1503 [No response.]  
1504 Ms. Kish. Mr. King?  
1505 Mr. King. Aye.  
1506 Ms. Kish. Mr. King votes aye.  
1507 Mr. Franks?

1508 Mr. Franks. Aye.  
1509 Ms. Kish. Mr. Franks votes aye.  
1510 Mr. Gohmert?  
1511 Mr. Gohmert. Aye.  
1512 Ms. Kish. Mr. Gohmert votes aye.  
1513 Mr. Jordan?  
1514 [No response.]  
1515 Ms. Kish. Mr. Poe?  
1516 Mr. Poe. Aye.  
1517 Ms. Kish. Mr. Poe votes aye.  
1518 Mr. Chaffetz?  
1519 [No response.]  
1520 Ms. Kish. Mr. Griffin?  
1521 [No response.]  
1522 Ms. Kish. Mr. Marino?  
1523 Mr. Marino. Aye.  
1524 Ms. Kish. Mr. Marino votes aye.  
1525 Mr. Gowdy?  
1526 Mr. Gowdy. Aye.  
1527 Ms. Kish. Mr. Gowdy votes aye.  
1528 Mr. Ross?  
1529 Mr. Ross. Aye.  
1530 Ms. Kish. Mr. Ross votes aye.  
1531 Mrs. Adams?  
1532 Mrs. Adams. Aye.

1533 Ms. Kish. Mrs. Adams votes aye.  
1534 Mr. Quayle?  
1535 Mr. Quayle. Aye.  
1536 Ms. Kish. Mr. Quayle votes aye.  
1537 Mr. Conyers?  
1538 Mr. Conyers. No.  
1539 Ms. Kish. Mr. Conyers votes no.  
1540 Mr. Berman?  
1541 [No response.]  
1542 Ms. Kish. Mr. Nadler?  
1543 Mr. Nadler. No.  
1544 Ms. Kish. Mr. Nadler votes no.  
1545 Mr. Scott?  
1546 Mr. Scott. No.  
1547 Ms. Kish. Mr. Scott votes no.  
1548 Mr. Watt?  
1549 Mr. Watt. No.  
1550 Ms. Kish. Mr. Watt votes no.  
1551 Ms. Lofgren?  
1552 Ms. Lofgren. Aye.  
1553 Ms. Kish. Ms. Lofgren votes aye.  
1554 Ms. Jackson Lee?  
1555 Ms. Jackson Lee. No.  
1556 Ms. Kish. Ms. Jackson Lee votes no.  
1557 Ms. Lofgren votes no.

1558 Ms. Waters?  
1559 [No response.]  
1560 Ms. Kish. Mr. Cohen?  
1561 Mr. Cohen. No.  
1562 Ms. Kish. Mr. Cohen votes no.  
1563 Mr. Johnson?  
1564 Mr. Johnson. No.  
1565 Ms. Kish. Mr. Johnson votes no.  
1566 Mr. Pierluisi?  
1567 Mr. Pierluisi. No.  
1568 Ms. Kish. Mr. Pierluisi votes no.  
1569 Mr. Quigley?  
1570 Mr. Quigley. No.  
1571 Ms. Kish. Mr. Quigley votes no.  
1572 Ms. Chu?  
1573 Ms. Chu. No.  
1574 Ms. Kish. Ms. Chu votes no.  
1575 Mr. Deutch?  
1576 [No response.]  
1577 Ms. Kish. Ms. Sanchez?  
1578 Ms. Sanchez. No.  
1579 Ms. Kish. Ms. Sanchez votes no.  
1580 Mr. Jordan?  
1581 Mr. Jordan. Aye.  
1582 Ms. Kish. Mr. Jordan votes aye.

1583 Mr. Griffin?

1584 Mr. Griffin. Aye.

1585 Ms. Kish. Mr. Griffin votes aye.

1586 Ms. Waters?

1587 Ms. Waters. No.

1588 Ms. Kish. Ms. Waters votes no.

1589 [Pause.]

1590 Chairman Smith. The clerk will report.

1591 Ms. Kish. Mr. Chairman, 20 Members voted aye; 13

1592 Members voted nay.

1593 Chairman Smith. Okay. The ayes have it, and the bill

1594 is ordered reported favorably.

1595 Without objection, the bill would be reported, and

1596 staff is authorized to make technical and conforming

1597 changes. Members have 2 days to submit their views.

1598 Pursuant to notice, I now call up H.R. 1439 for

1599 purposes of markup. This is the Business Activity Tax

1600 Simplification Act of 2011, and it is sponsored by Mr.

1601 Goodlatte and Mr. Scott.

1602 The clerk will report the bill.

1603 Ms. Kish. H.R. 1439. To regulate certain State

1604 taxation of interstate commerce and for other purposes.

1605 Chairman Smith. Without objection, the bill will be

1606 considered as read.

1607 [The information follows:]

1608

1609 Chairman Smith. And rather than recognizing myself  
1610 for an opening statement, I am going to ask unanimous  
1611 consent that my opening statement be made a part of the  
1612 record.

1613 [The statement of Chairman Smith follows:]

1614

1615 Chairman Smith. And I will yield to the ranking  
1616 member as well.

1617 Mr. Conyers. I will do the same.

1618 Chairman Smith. The ranking member asks unanimous  
1619 consent that his opening statement be made a part of the  
1620 record as well.

1621 [The statement of Mr. Conyers follows:]

1622

1623           Mr. Nadler. Mr. Chairman, would we add some other  
1624 opening statements by unanimous consent to be made part of  
1625 the record, like mine?

1626           Chairman Smith. Without objection.

1627           [The statement of Mr. Nadler follows:]

1628

1629 Chairman Smith. And the gentleman from Virginia, Mr.  
1630 Goodlatte, is recognized.

1631 Mr. Goodlatte. Thank you, Mr. Chairman.

1632 And I urge my colleagues to support the Business  
1633 Activity Tax Simplification Act, which I introduced with my  
1634 friend and colleague Representative Bobby Scott.

1635 This legislation will provide a bright-line test from  
1636 out-of-State to clarify State and local authority to collect  
1637 business activity taxes from out-of-State entities. Many  
1638 States and local governments levy corporate income,  
1639 franchise, and other taxes on out-of-State companies that  
1640 conduct business activities within their jurisdictions.  
1641 While providing revenue for States, these taxes also serve  
1642 to pay for the privilege of doing business in a State.

1643 However, with the growth of the Internet, companies  
1644 are increasingly able to conduct transactions without the  
1645 constraint of geopolitical boundaries. The growth of the  
1646 technology industry and interstate business-to-business and  
1647 business-to-consumer transactions raise questions over where  
1648 multi-State companies should be required to pay corporate  
1649 income and other business activity taxes.

1650 Over the past several years, a growing number of  
1651 jurisdictions have sought to collect business activity taxes  
1652 from businesses located in other States even though those  
1653 businesses receive no appreciable benefits from the taxing

1654 jurisdiction. This has led to unfairness, uncertainty,  
1655 generated contentious widespread litigation, and hindered  
1656 business expansion, as businesses shy away from expanding  
1657 their presence in other States for fear of exposure to  
1658 unfair tax burdens.

1659 We need a basic bright, fair line rule in this area.  
1660 Previous actions by the Supreme Court and Congress have laid  
1661 the groundwork for such a bright-line rule.

1662 In the landmark case of Quill v. North Dakota, the  
1663 Supreme Court declared that a State cannot impose a tax on  
1664 an out-of-State business unless that business has a  
1665 substantial nexus with the taxing State. However, the court  
1666 did not define what constituted a "substantial nexus" for  
1667 purposes of imposing business activity taxes.

1668 In addition, over 50 years ago, Congress passed Public  
1669 Law 86-272, which set clear, uniform standards for when  
1670 States could and could not impose certain taxes on out-of-  
1671 State businesses when the business's activities in the State  
1672 were nominal and only involved the solicitation of order for  
1673 sales of tangible property. However, the scope of Public  
1674 Law 86-272 only extended to activities related to tangible  
1675 personal property. Our Nation's economy has changed  
1676 dramatically over the past 50 years, and our outdated  
1677 statute needs to be modernized.

1678 The Business Activity Tax Simplification Act updates

1679 the protections of Public Law 86-272 to reflect the changing  
1680 nature of our economy by expanding the scope of those  
1681 protections from just tangible personal property to include  
1682 intangible property and services. In addition, our  
1683 legislation establishes a clear, uniform physical presence  
1684 test, such that an out-of-State company must have a physical  
1685 presence in a State before the State can impose corporate  
1686 net income taxes or other types of business activity taxes  
1687 on that company.

1688 In our current challenging economic times, it is  
1689 especially important to eliminate artificial government-  
1690 imposed barriers to small businesses. Small businesses are  
1691 crucial to our economy and account for a significant  
1692 majority of new product ideas and innovation. Small  
1693 businesses are also central to the American dream of self-  
1694 improvement and individual achievement, which is why it is  
1695 so vital that Congress enact legislation that reduces the  
1696 excessive and often duplicative tax burdens that hinder  
1697 small businesses and ultimately overall economic growth and  
1698 job creation.

1699 Unfortunately, small businesses are often the hardest  
1700 hit when aggressive States and localities impose excessive  
1701 tax burdens on out-of-State companies. These businesses do  
1702 not have the resources to hire the teams of lawyers that  
1703 many large corporations devote to tax compliance, and they

1704 are more likely to halt expansion to avoid uncertain tax  
1705 obligations and litigation expenses.

1706           The clarity that the Business Activity Tax  
1707 Simplification Act will bring will ensure fairness, minimize  
1708 litigation, and create the kind of legally certain and  
1709 stable business climate that frees up funds for businesses  
1710 of all sizes to make investments, expand interstate  
1711 commerce, grow the economy, and create jobs. At the same  
1712 time, this legislation will protect the ability of States to  
1713 ensure that they are fairly compensated when they provide  
1714 services to businesses that do have physical presences in  
1715 the State.

1716           H.R. 1439 does not limit the ability of a State to  
1717 impose whatever taxes it wants on whatever business it  
1718 wants, as long as these businesses have an appreciable  
1719 physical presence within that State. In addition, the  
1720 legislation expressly protects the ability of States to use  
1721 all tools at their disposal to aggressively combat illegal  
1722 activities, sham transactions, or any other abuses.

1723           I urge my colleagues to support this legislation and  
1724 yield back.

1725           Chairman Smith. Thank you, Mr. Goodlatte.

1726           The other gentleman from Virginia, Mr. Scott, is  
1727 recognized.

1728           Mr. Scott. Thank you, Mr. Chairman.

1729           Mr. Chairman and Ranking Member Conyers, I appreciate  
1730 the committee's consideration of H.R. 1439, the Business  
1731 Activity Tax Simplification Act, introduced by my friend and  
1732 colleague from Virginia, Mr. Goodlatte.

1733           This bill seeks to update a 50-year-old Federal  
1734 statute that determines when a State can impose State income  
1735 taxes on sale of tangible personal goods in that State.  
1736 Over the years, States have adopted a series of business  
1737 activity taxes that are proxies for State income taxes,  
1738 including gross receipts taxes, licensing arrangements, and  
1739 other charges that States frequently seek to impose on out-  
1740 of-State companies.

1741           Some States have enacted overly aggressive and often  
1742 unfair business activity taxes. Several businesses in my  
1743 State have been acutely aware of these aggressive business  
1744 activity taxes.

1745           Smithfield Foods, for example, located in the district  
1746 represented by Mr. Forbes, has had its trucks traveling up  
1747 and down the New Jersey turnpike threatened with  
1748 confiscation by New Jersey tax revenue agents.

1749           The Virginia-based Capital One Bank has joined other  
1750 financial institutions who are becoming easy prey for other  
1751 States and localities seeking to increase their tax revenues  
1752 by targeting out-of-State businesses because they send  
1753 credit cards into other States, and those credit cards are

1754 used in other States. And those States are trying to tax  
1755 that activity.

1756 Other sectors of Virginia economy -- manufacturing,  
1757 information technology, franchising, media industries --  
1758 have also been targeted with overly aggressive business  
1759 activity taxes by those States.

1760 There is an urgent need to modernize this decades-old  
1761 law. BATSA would clarify the standard governing State  
1762 assessment of corporate income taxes and comparable taxes on  
1763 a business. Specifically, the bill would articulate a  
1764 bright line, physical presence nexus standard that includes  
1765 either owning or leasing any real estate or tangible  
1766 property in the State or assigning one or more employees to  
1767 perform certain activities in the State for more than 15  
1768 days in a taxable year.

1769 Businesses should be responsible for paying taxes to  
1770 States where they do business. But BATSA would ensure  
1771 fairness, minimize costly litigation for both State  
1772 governments and taxpayers, reduce the likelihood of  
1773 businesses being double taxed on the same income, and create  
1774 the kind of legal certainty and stability that encourages  
1775 businesses to make investments, expand interstate commerce,  
1776 and create jobs.

1777 More importantly, the bill would ensure that  
1778 businesses continue to pay business activity taxes to States

1779 that provide them with direct benefits and protections.

1780 Mr. Chairman, I appreciate the committee's focus on  
1781 this timely matter and urge my colleagues to support the  
1782 bill.

1783 Chairman Smith. Thank you, Mr. Scott.

1784 Having heard from Mr. Goodlatte and Mr. Scott, are  
1785 there any amendments?

1786 Ms. Chu. Mr. Chair, I have an amendment at the desk.

1787 Chairman Smith. Okay. The gentlewoman from  
1788 California is recognized for the purpose of offering an  
1789 amendment.

1790 Ms. Chu. Yes, this is Amendment Number 2.

1791 Chairman Smith. Amendment Number 2. The clerk will  
1792 report the amendment.

1793 Ms. Kish. Amendment to H.R. 1439 offered by Ms. Chu.

1794 Chairman Smith. Without objection, the amendment will  
1795 be considered as read.

1796 [The information follows:]

1797

1798 Chairman Smith. And the gentlewoman is recognized to  
1799 explain the amendment.

1800 Ms. Chu. I would like to yield for a moment to  
1801 Ranking Member Mr. Conyers.

1802 Mr. Conyers. Well, I just want to support Judy Chu's  
1803 amendment to change the date, and I ask unanimous consent,  
1804 while I put my statement in the record, but because of the  
1805 bipartisan nature of the support for this amendment, it is  
1806 with great regret that I report that under this amendment,  
1807 if passed, we could reduce State revenues by at least \$8  
1808 billion. And that was by 2005 figures. It is probably  
1809 going to be more now.

1810 And the Governors, it is kind of interesting to me.  
1811 The Governors Association does not support an amendment  
1812 written by two of our distinguished members of the  
1813 committee. They do not support this amendment. They oppose  
1814 it, as a matter of fact. That is why I thank the gentlelady  
1815 for yielding to me.

1816 Ms. Chu. Thank you.

1817 My amendment is simple. It delays implementation of  
1818 this bill from January 1, 2012, less than 6 months away, to  
1819 January 1, 2022. This bill makes major changes to the tax  
1820 regime in States across this country, including my home  
1821 State of California. Implementing this legislation in 6  
1822 months is completely impractical.

1823 Overall, I am strongly opposed to this legislation.  
1824 Prior to this position, I was a member of California's  
1825 elected tax board called the Board of Equalization. Because  
1826 of my years working on State tax issues, I know firsthand  
1827 the devastating effect that this legislation would have on  
1828 State budgets, State programs, and the American people they  
1829 serve.

1830 In 2006, the SBO scored an earlier version of this  
1831 bill and determined that State and local governments would  
1832 lose \$3 billion in annual revenues. The National Governors  
1833 Association placed that loss at \$7 billion.

1834 Of course, this version of the bill expands the  
1835 provisions to include services, and I would assume would  
1836 only increase the loss of revenue for States. In fact, this  
1837 dramatic loss of revenue is an unfunded mandate for States,  
1838 and the CBO said it was the largest unfunded mandate that  
1839 they had ever measured.

1840 Mr. Conyers. Would the gentlelady yield momentarily?

1841 Ms. Chu. Yes.

1842 Mr. Conyers. I wanted to thank Messrs. Scott and  
1843 Nadler. This amendment is approved by the Governors  
1844 Association. The bill is opposed by the Governors  
1845 Association.

1846 I thank the gentlelady for yielding again.

1847 Ms. Chu. Thank you very much for that clarification.

1848 Yes, the Governors are opposed very much so to this bill.

1849           And in fact, I want to give you an example, which is  
1850 California. California imposes a franchise tax on entities  
1851 that have sales totaling \$500,000 or more, in addition to a  
1852 physical presence standard. Under BATSA, the economic  
1853 presence provision of California law would disappear.

1854           This change, under an earlier, narrower version of  
1855 this bill, would cost California \$614 million in 2013 alone.  
1856 But this bill is even broader, including nontangible goods  
1857 and services, meaning that the \$150 million price tag has to  
1858 be so much higher.

1859           So if this bill goes through today, in just 6 months,  
1860 companies that have filed tax returns for years won't have  
1861 to do so, and the State of California and the citizens it  
1862 serves will be victims at a time when we can least afford  
1863 it. And in fact, just last week, California passed a new  
1864 budget bill that had to make massive cuts for an  
1865 unprecedented \$27 billion budget gap. To do so, they had to  
1866 cut 23 percent of funds for the State's universities,  
1867 slashed \$2 billion from Medicaid, closed 70 State parks for  
1868 the first time ever, and threatened school funding.

1869           However, despite these cuts, the budget deal does not  
1870 restore California's long-term health. We still have a \$10  
1871 billion deficit on top of that.

1872           If this bill goes into effect in 6 months, I know what

1873 the fallout will be. More programs for the needy that will  
1874 disappear, investments in our State's future thrown away,  
1875 and basic public services will disappear. This bill is  
1876 essentially an unfunded mandate and would cause almost every  
1877 State to lose revenue.

1878 So I urge support of my amendment, which will delay  
1879 implementation of this drastic legislation for another  
1880 decade, protecting State revenues during a recession.

1881 Chairman Smith. Thank you, Ms. Chu.

1882 Mr. Goodlatte. Mr. Chairman?

1883 Chairman Smith. The gentleman from Virginia, Mr.  
1884 Goodlatte, is recognized.

1885 Mr. Goodlatte. Thank you, Mr. Chairman.

1886 Mr. Chairman, I strongly oppose this amendment because  
1887 it would extend by 10 years the uncertainty that businesses  
1888 currently face when trying to determine whether they have  
1889 enough substantial nexus to a State to be subject to its net  
1890 income or other business activity tax. This bill gives  
1891 American businesses the certainty they need to be able to  
1892 plan for their tax liabilities and invest leftover capital  
1893 in creating new jobs.

1894 Many small businesses lack the in-house expertise or  
1895 the resources to hire tax lawyers to determine whether they  
1896 have enough nexus to trigger income tax liability in a State  
1897 where they are not physically present. The sooner the

1898 provisions of this bill take effect, the sooner small  
1899 businesses can predict their tax obligations with certitude  
1900 and begin putting Americans back to work.

1901         The effective date currently set forth in this bill is  
1902 January 1, 2012. Extending the effective date by 10 years  
1903 would mean 10 more years of surprise tax bills and  
1904 Department of Revenue surveys in the mailboxes of small  
1905 businesses every January. It would mean 10 more years of  
1906 businesses guessing whether they had done enough business  
1907 activity in another State that year to meet the State's  
1908 vague economic nexus standard.

1909         I urge opposition to this amendment, and I would say  
1910 to those concerned about economic growth and revenue in any  
1911 State, including California, the objective should be to  
1912 encourage the growth of businesses in that State so that  
1913 they can reach out and do business across America and bring  
1914 back revenues to that State, which would be subject to  
1915 taxation.

1916         Yes, States would have to make adjustments in how they  
1917 impose taxes. But they would also save very substantial  
1918 revenues which are not calculated in the estimates that the  
1919 gentlewoman refers to that deal with the amount of resources  
1920 wasted by States requiring business, large and small, to  
1921 dance on the head of a pin rather than focus on what they  
1922 really should be doing, and that is taxation of businesses

1923 in their States that they are providing substantial support  
1924 for through the State.

1925 And that, after all, is what individual State's  
1926 taxation is all about, and it should not be about taxation  
1927 without representation, which is one of the founding causes  
1928 of our country and which is what takes place when States  
1929 stretch further and further to come up with more and more  
1930 precarious ideas about why out-of-State businesses should be  
1931 taxed in their jurisdiction.

1932 So I urge my colleagues to oppose this amendment.

1933 Mr. Conyers. Would the gentleman yield?

1934 Mr. Goodlatte. I would be happy to yield.

1935 Mr. Conyers. Thanks, Bob.

1936 The problem is that 1439 doesn't establish clear  
1937 rules. As a matter of fact, here is the language. "A  
1938 business must be physically present in the State for 14 days  
1939 without being physically present." It allows the business  
1940 to be physically present in the State for 14 days without  
1941 being present.

1942 Mr. Goodlatte: Reclaiming my time, it is far, far  
1943 clearer than the current rules, which in most instances are  
1944 nonexistent. And businesses and States need a bright-line  
1945 test so that they know under what circumstances when  
1946 companies and individuals engage in interstate commerce they  
1947 can be subject to the jurisdiction of the State's tax code.

1948           Mr. Conyers.   Could I ask the gentleman about one  
1949 other provision?

1950           Mr. Goodlatte:   Certainly.

1951           Mr. Conyers.   What about the provision that would  
1952 legalize certain tax-sheltering practices and income-  
1953 shifting methods that several States already consider  
1954 questionable?

1955           Mr. Goodlatte:   Well, H.R. 1439 protects the  
1956 sovereignty of States to create tax policy for businesses  
1957 that have physical presences within their jurisdictions,  
1958 just as they do today.   States will have to continue to have  
1959 the ability to create tax policies that reflect the demands  
1960 of their State budgets.

1961           Nothing in H.R. 1439 limits the ability of a State to  
1962 determine the types of taxes to impose, what tax rates  
1963 should apply, or which businesses should be subjected to  
1964 those taxes within the borders of that State.   Thus, H.R.  
1965 1439 protects a State's ability to use its tax laws to  
1966 generate as much tax revenue from in-State businesses as it  
1967 deems appropriate.

1968           States would also continue to be free to decide  
1969 through their tax laws which types of businesses they want  
1970 to encourage and discourage within their borders.   H.R. 1439  
1971 simply lays out the basic framework for when States can and  
1972 cannot tax out-of-State businesses.   States would be allowed

1973 to tax out-of-State businesses only when those businesses  
1974 have a physical presence in the taxing State and protects  
1975 the ability of States to decide their own tax laws regarding  
1976 businesses that have physical presence within their borders.

1977 And the bill contains express provision to protect  
1978 States' abilities to go after sham transactions, which I am  
1979 sure that is what the gentleman is referring to.

1980 Chairman Smith. Does the gentleman yield back the  
1981 balance of your time?

1982 Mr. Goodlatte: And I yield back.

1983 Chairman Smith. The gentleman yields back.

1984 Are there other Members who wish to be heard on the  
1985 Chu Amendment? The gentleman from Virginia, Mr. Scott?

1986 Mr. Scott. Thank you, Mr. Chairman.

1987 The gentl lady from California has talked about  
1988 revenue losses, aggregate revenue losses in the State. When  
1989 you pay taxes in the one State, you generally get credit for  
1990 those taxes in the first State. So if one State is losing,  
1991 some other State is going to gain.

1992 The purpose of this is fair apportionment so that the  
1993 State in which the business actually resides and is doing  
1994 business with a physical presence gets the ability to tax.  
1995 To the extent that there is an aggregate loss, that means  
1996 people are being double taxed. That, frankly, is the  
1997 purpose of this bill.

1998           And if there is \$8 billion a year in double taxation,  
1999 that is more the reason to have the bill.

2000           Mr. Chairman, I yield back.

2001           Mr. Goodlatte. Would the gentleman yield?

2002           Mr. Scott. I yield to my colleague.

2003           Mr. Goodlatte. I thank the gentleman for yielding,  
2004 and I appreciate his comments.

2005           Mr. Chairman, I would ask that this letter from 200  
2006 business organizations and businesses, large and small, be  
2007 entered into the record.

2008           Chairman Smith. Without objection, so ordered.

2009           [The information follows:]

2010

2011 Mr. Goodlatte. Yield back.

2012 Chairman Smith. Are there other Members who wish to

2013 --

2014 Mr. Lungren. Mr. Chairman?

2015 Chairman Smith. The gentleman from North Carolina,

2016 Mr. Watt.

2017 Mr. Watt. If the gentleman -- he may have been next

2018 since --

2019 Chairman Smith. Oh, the gentleman's time has expired.

2020 So I will recognize the gentleman from North --

2021 Mr. Watt. And he was seeking recognition. I didn't

2022 know whether you wanted to go to that side or not.

2023 Chairman Smith. Okay. The gentleman from California,

2024 Mr. Lungren, is recognized.

2025 Mr. Lungren. I thank the gentleman for the

2026 recognition.

2027 I was home in my district in California just -- well,

2028 twice over the last month for extended periods of time. And

2029 one of those times, I had four or five small businesspeople

2030 visit me with their prime concern over the taxation that

2031 takes place, as they make their sales on the Internet,

2032 taxation that takes place in other States.

2033 They specifically complained of the things that the

2034 gentleman from Virginia has talked about, the idea that they

2035 don't know when they are liable, when they are not liable.

2036 That they get these bills from other States unknowingly, so  
2037 to speak.

2038 That they have difficulty trying to figure it out.  
2039 That unless Congress acts, they are afraid that their  
2040 businesses, which are located in California, will, frankly,  
2041 go out of business. They talk about the Internet being the  
2042 ability for them to sell worldwide.

2043 In each case, they have talked about how they expanded  
2044 their businesses so that they are paying far more in taxes  
2045 in California than they had in the past. So I understand  
2046 what the gentlelady from California is saying with respect  
2047 to this amendment. But there is another side to it, which I  
2048 have seen in my own district.

2049 Interestingly enough, for this morning, the private  
2050 concern that puts out numbers on job growth for the last  
2051 month indicated something on the order of 159,000 jobs  
2052 created in the last month, of which the great bulk were from  
2053 small business. A smaller percentage from medium-size  
2054 businesses, an even smaller percentage from the large  
2055 businesses.

2056 And they don't have the figures on what is going to  
2057 happen in Government, but we know Government is not growing,  
2058 or at least is not growing as fast as it has in the past.  
2059 And the long and short of it is that small business is going  
2060 to get us out of this terrible recession that we are in.

2061 And small businesses are particularly hurt by this lack of  
2062 certainty that exists with respect to taxation by States in  
2063 which they do not have a physical presence.

2064 So this may not be the perfect bill, but I would like  
2065 to see an alternative. And it just seems to me that a 10-  
2066 year delay is another way of killing the bill. It is not an  
2067 alternative to the problem that has been presented to me.

2068 The other thing is, with all due respect to my home  
2069 State of California and the gentlelady's participation in  
2070 it, it is not because we are lacking in taxing, that we  
2071 don't have enough taxes on the books. Our tax rates are  
2072 driving people out of the State of California.

2073 We are losing corporate America, and by that, I mean  
2074 the employees, as well as the employers of corporate  
2075 America. Just in the last couple of months, I have talked  
2076 to several people who have businesses who are leaving  
2077 California because of our exorbitant tax rates.

2078 We put a surcharge on the high-income earners, the  
2079 gentlelady recalls, over the last number of years, and we  
2080 have got less revenues in the State of California by doing  
2081 that. We have effectively driven taxpayers out of the State  
2082 of California.

2083 Mr. Conyers. Will the gentleman yield?

2084 Mr. Lungren. The idea that somehow we are going to  
2085 solve our problems in the State of California by making sure

2086 we tax more people or tax them at higher rates just flies in  
2087 the face of what has happened.

2088 Mr. Conyers. Would the gentleman yield?

2089 Mr. Lungren. I would be happy to yield.

2090 Mr. Conyers. You ought to run for the Governor of  
2091 California.

2092 Mr. Lungren. I did that 13 years ago, and if they had  
2093 better sense then, we wouldn't be in the mess we are in  
2094 today.

2095 [Laughter.]

2096 Mr. Lungren. Because I talked about low tax rates. I  
2097 talked about less regulation. I talked about  
2098 infrastructure. And I was told those weren't the proper  
2099 things to talk about.

2100 So we have no infrastructure. We have high tax rates.  
2101 We have the worst regulatory scheme in the world. I have  
2102 got people who come to me and say get the rest of the  
2103 country to pass AB 32, which is our form of cap and trade.

2104 I said you have got to hear what I am hearing from my  
2105 colleagues. They are laughing at us. They are saying thank  
2106 God you passed AB 32 because that forces businesses out of  
2107 the State.

2108 Governor Perry says he loves to go hunting. He is a  
2109 great hunter. He says he loves to go on hunting trips to  
2110 California because he always bags an employer or two.

2111 [Laughter.]

2112 Mr. Lungren. That is funny, except it is sad. We are  
2113 losing jobs in my State, and it is not because we are  
2114 undertaxed. It is because we are overtaxed. We are  
2115 overregulated. And yes, we have finally cooked the golden  
2116 goose.

2117 If you want to know where we are, we are half way  
2118 between Washington, D.C., and Greece. It is called  
2119 California, unfortunately, today. And my hope is that  
2120 California will change its ways and not lead the rest of  
2121 this country on this --

2122 Mr. Conyers. I take my suggestion back.

2123 Mr. Lungren. Well, I thank the gentleman for asking  
2124 the question, although my wife would probably leave me if I  
2125 ran for. And after 42 years, that is too much of an  
2126 investment, and I am just not going to do that again.

2127 But I just want to say this. Sometimes we better get  
2128 it out of our system that we believe that the solution to  
2129 our problems of deficits is that we haven't taxed enough.  
2130 It is the small business community that has come to me and  
2131 begged that we do something about this problem.

2132 If this isn't the solution, I would like to see the  
2133 alternative. The alternative is not to have them in this  
2134 limbo for the next 10 years so that they, again, have to say  
2135 I don't know how I can compete, I don't know how I can

2136 continue to increase jobs in California when I don't know  
2137 when I am going to get the onslaught of tax bills from  
2138 States in which I have no physical presence.

2139         So if this isn't the solution, I would like to know  
2140 what the alternative is. Unfortunately, the gentlelady's  
2141 amendment is not an alternative.

2142         Chairman Smith. The gentleman's time has expired.  
2143 Thank you, Mr. Lungren.

2144         Let me make a quick announcement that I expect to  
2145 recess the markup of this committee as soon as this bill is  
2146 completed, and we will come back after the first set of  
2147 votes, whenever they end about 1:30 p.m. or 1:45 p.m.

2148         There is also a subset of the Democratic Caucus that  
2149 is meeting at noon. I would like to respect the request of  
2150 a half a dozen members of this committee to be able to  
2151 attend that caucus.

2152         However, we have two more amendments left, and I will  
2153 leave it up to those individuals whether they want to offer  
2154 those amendments. But I do want to finish this bill before  
2155 we stand in recess.

2156         Ms. Chu, do you have an amendment?

2157         Ms. Chu. We have a vote.

2158         Chairman Smith. Oh, I am sorry. The vote is on the  
2159 Chu Amendment. Pardon me. I am in a bit of a rush here.

2160         All those in favor of the amendment, say aye.

2161 [A chorus of ayes.]  
2162 Chairman Smith. Those opposed, say nay.  
2163 [A chorus of nays.]  
2164 Chairman Smith. In the opinion of the chair, the nays  
2165 --  
2166 Ms. Chu. Mr. Chair, I ask for a recorded vote.  
2167 Chairman Smith. A recorded vote has been requested,  
2168 and the clerk will call the roll.  
2169 Ms. Kish. Mr. Smith?  
2170 Chairman Smith. No.  
2171 Ms. Kish. Mr. Smith votes no.  
2172 Mr. Sensenbrenner?  
2173 [No response.]  
2174 Ms. Kish. Mr. Coble?  
2175 Mr. Coble. No.  
2176 Ms. Kish. Mr. Coble votes no.  
2177 Mr. Gallegly?  
2178 [No response.]  
2179 Ms. Kish. Mr. Goodlatte?  
2180 Mr. Goodlatte. No.  
2181 Ms. Kish. Mr. Goodlatte votes no.  
2182 Mr. Lungren?  
2183 Mr. Lungren. No.  
2184 Ms. Kish. Mr. Lungren votes no.  
2185 Mr. Chabot?

2186 Mr. Chabot. No.  
2187 Ms. Kish. Mr. Chabot votes no.  
2188 Mr. Issa?  
2189 [No response.]  
2190 Ms. Kish. Mr. Pence?  
2191 Mr. Pence. No.  
2192 Ms. Kish. Mr. Pence votes no.  
2193 Mr. Forbes?  
2194 [No response.]  
2195 Ms. Kish. Mr. King?  
2196 [No response.]  
2197 Ms. Kish. Mr. Franks?  
2198 [No response.]  
2199 Ms. Kish. Mr. Gohmert?  
2200 [No response.]  
2201 Ms. Kish. Mr. Jordan?  
2202 Mr. Jordan. No.  
2203 Ms. Kish. Mr. Jordan votes no.  
2204 Mr. Poe?  
2205 [No response.]  
2206 Ms. Kish. Mr. Chaffetz?  
2207 Mr. Chaffetz. No.  
2208 Ms. Kish. Mr. Chaffetz votes no.  
2209 Mr. Griffin?  
2210 Mr. Griffin. No.

2211 Ms. Kish. Mr. Griffin votes no.  
2212 Mr. Marino?  
2213 Mr. Marino. No.  
2214 Ms. Kish. Mr. Marino votes no.  
2215 Mr. Gowdy?  
2216 [No response.]  
2217 Ms. Kish. Mr. Ross?  
2218 Mr. Ross. No.  
2219 Ms. Kish. Mr. Ross votes no.  
2220 Mrs. Adams?  
2221 Mrs. Adams. No.  
2222 Ms. Kish. Mrs. Adams votes no.  
2223 Mr. Quayle?  
2224 Mr. Quayle. No.  
2225 Ms. Kish. Mr. Quayle votes no.  
2226 Mr. Conyers?  
2227 Mr. Conyers. Aye.  
2228 Ms. Kish. Mr. Conyers votes aye.  
2229 Mr. Berman?  
2230 [No response.]  
2231 Ms. Kish. Mr. Nadler?  
2232 Mr. Nadler. Aye.  
2233 Ms. Kish. Mr. Nadler votes aye.  
2234 Mr. Scott?  
2235 Mr. Scott. No.

2236 Ms. Kish. Mr. Scott votes no.  
2237 Mr. Watt?  
2238 Mr. Watt. No.  
2239 Ms. Kish. Mr. Watt votes no.  
2240 Ms. Lofgren?  
2241 Ms. Lofgren. No.  
2242 Ms. Kish. Ms. Lofgren votes no.  
2243 Ms. Jackson Lee?  
2244 [No response.]  
2245 Ms. Kish. Ms. Waters?  
2246 Ms. Waters. No.  
2247 Ms. Kish. Ms. Waters votes no.  
2248 Mr. Cohen?  
2249 Mr. Cohen. No.  
2250 Ms. Kish. Mr. Cohen votes no.  
2251 Mr. Johnson?  
2252 Mr. Johnson. No.  
2253 Ms. Kish. Mr. Johnson votes no.  
2254 Mr. Pierluisi?  
2255 Mr. Pierluisi. Aye.  
2256 Ms. Kish. Mr. Pierluisi votes yes.  
2257 Mr. Quigley?  
2258 Mr. Quigley. Aye.  
2259 Ms. Kish. Mr. Quigley votes aye.  
2260 Ms. Chu?

2261 Ms. Chu. Aye.

2262 Ms. Kish. Ms. Chu votes aye.

2263 Mr. Deutch?

2264 [No response.]

2265 Ms. Kish. Ms. Sanchez?

2266 [No response.]

2267 Ms. Kish. Mr. Sensenbrenner?

2268 Ms. Sanchez. Aye.

2269 Ms. Kish. Ms. Sanchez votes aye.

2270 Chairman Smith. The gentleman from Wisconsin?

2271 Mr. Sensenbrenner. No.

2272 Ms. Kish. Mr. Sensenbrenner votes no.

2273 Chairman Smith. The gentleman from California?

2274 Mr. Gallegly. No.

2275 Ms. Kish. Mr. Gallegly votes no.

2276 Chairman Smith. Another gentleman from California?

2277 Mr. Issa. No.

2278 Ms. Kish. Mr. Issa votes no.

2279 Mr. Franks?

2280 Mr. Franks. No.

2281 Ms. Kish. Mr. Franks votes no.

2282 Mr. King?

2283 Mr. King. No.

2284 Ms. Kish. Mr. King votes no.

2285 Chairman Smith. The gentlewoman from California?

2286 Ms. Waters. Aye.

2287 Chairman Smith. The gentlewoman from California, Ms.

2288 Waters, votes aye.

2289 Ms. Kish. Votes aye.

2290 Chairman Smith. The gentlewoman from Texas?

2291 Ms. Jackson Lee. No.

2292 Ms. Kish. Ms. Jackson Lee votes no.

2293 Chairman Smith. The clerk will report.

2294 Ms. Kish. Mr. Chairman, 7 Members voted aye; 24

2295 Members voted nay.

2296 Chairman Smith. The majority having voted against the

2297 amendment, the amendment is not agreed to.

2298 The gentleman from New York, Mr. Nadler, is recognized

2299 for the purpose of offering an amendment.

2300 Mr. Nadler. Thank you, Mr. Chairman.

2301 I have an amendment at the desk.

2302 Chairman Smith. The clerk will report the amendment.

2303 Ms. Kish. Amendment to H.R. 1439 offered by Mr.

2304 Nadler --

2305 Chairman Smith. Without objection, the amendment will

2306 be considered as read.

2307 [The information follows:]

2308

2309 Chairman Smith. And the gentleman is recognized to  
2310 explain the amendment.

2311 Mr. Nadler. Thank you, Mr. Speaker -- Mr. Chairman.  
2312 [Laughter.]

2313 Chairman Smith. And I will take it.

2314 Mr. Nadler. Mr. Chairman, in the interest of time, I  
2315 ask that my entire statement be entered into the record.

2316 Chairman Smith. Without objection, the gentleman's --  
2317 [The statement of Mr. Nadler follows:]

2318

2319 Mr. Nadler. I will just read a part of it. The heart  
2320 of this bill is the imposition of the new physical presence  
2321 requirement. A new physical presence requirement for the  
2322 State taxation of out-of-State entities found in Section 3.  
2323 I believe this is a mistake which really amounts to a huge  
2324 corporate tax cut, and my amendment would strike Section 3  
2325 from the bill.

2326 Current law, as articulated by the Supreme Court in  
2327 Complete Auto Transit, among other requirements, says the  
2328 State must have a substantial nexus with the entity in  
2329 question in order to be able to subject it to a business  
2330 tax. The requirements imposed by the Supreme Court come  
2331 from principles underlying the dormant commerce doctrine.

2332 It is important to note that the tax entity does not  
2333 have to have a physical presence within the State. The case  
2334 which reaffirmed the physical presence requirement, Quill,  
2335 dealt only with sales of use taxes. So this bill expands  
2336 current law to impose a new physical presence requirement on  
2337 States who seek to impose certain taxes on out-of-State  
2338 entities. This would amount to a huge corporate tax break.

2339 At a time of fiscal crisis for States in which they  
2340 face a combined \$103 billion shortfall, it is unconscionable  
2341 that we would further limit their taxing authority by  
2342 passing this bill. We should not be putting a straitjacket  
2343 on the ability of States to provide needed services like

2344 education, law enforcement, and healthcare.

2345           Moreover, this bill would hardly create a level  
2346 playing field. Big businesses, better able to manipulate  
2347 how they locate their physical presence, would be able to  
2348 avoid taxes much more easily than small mom-and-pop shops.  
2349 And while everything is moving to the Internet, some  
2350 industries are more compatible with online sales than  
2351 others.

2352           Businesses which can more easily sell online would  
2353 have more opportunities to use tax avoidance methods than  
2354 brick-and-mortar stores under this bill. I would also point  
2355 out that since things are moving to the Internet, what the  
2356 future holds is that companies that are going to do a lot of  
2357 business in a given State may not have a physical presence  
2358 there.

2359           Increasingly, they may have a physical presence in one  
2360 place with a computer and a couple of employees and do all  
2361 their business over the Internet and through the mail. And  
2362 if we say the States can't tax them, we would be excluding  
2363 from taxes what may become the dominant form of business in  
2364 this country.

2365           Furthermore, the bill creates perverse incentives.  
2366 Companies will want to locate all of their physical  
2367 operations in the lowest State possible, or perhaps in the  
2368 Cayman Islands. Thus, they could minimize their tax burden

2369 regardless of the location from where their income is  
2370 actually derived.

2371 I know many businesses feel States are taxing them  
2372 unfairly. Rather than adopting a whole new system, which  
2373 will cost States hundreds of millions, if not billions, of  
2374 dollars and create a roadmap for corporate tax avoidance, we  
2375 should work to address any specific problems within the  
2376 current system in which States can tax entities with an  
2377 economic nexus within their State.

2378 Let me say one other thing. When I got out of  
2379 college, I worked at Corporation Trust Company for a year.  
2380 And Corporation Trust Company was if you were a lawyer and  
2381 you wanted to change your corporate charter and qualify to  
2382 do business in 43 States by Tuesday morning, you called up  
2383 Corporate Trust Company.

2384 They had contacts with all the secretaries of state.  
2385 They had loose leaf binders with all the rules and regs on  
2386 taxes, and they would do it for you. Today, I am sure all  
2387 those people who did that don't work there anymore. They  
2388 have probably been replaced by one computer and robo-signed  
2389 letters to the secretaries of state of the various States.

2390 It has become very easy today to comply with all of  
2391 the tax laws of the various States. All you need is a  
2392 computer and a letter writer -- and a check writer, I should  
2393 say. So these problems are not insurmountable.

2394           But by putting a new physical presence requirement in  
2395 an era when everything is going toward computers and the  
2396 Internet, what we are really doing is completely destroying  
2397 a large part of the tax base of the various States. And it  
2398 is something we shouldn't do without a great deal of  
2399 examination, especially when the States are crying for  
2400 revenue now and laying off hundreds of thousands of people.

2401           And finally, as I said, there may be specific problems  
2402 that we ought to address. But a general physical presence  
2403 requirement, a new physical presence requirement that will  
2404 destroy a large part of the tax bases of the States is not  
2405 what the Federal Government ought to be doing.

2406           I move the amendment.

2407           Mr. Conyers. I support the gentleman's amendment to  
2408 strike the physical presence standard requirement from this  
2409 bill.

2410           Mr. Nadler. I thank the gentleman. I yield back, and  
2411 I ask that this entire statement be entered into the record.

2412           Chairman Smith. Without objection. The gentleman  
2413 yields back his time.

2414           The gentleman from Virginia, Mr. Goodlatte, is  
2415 recognized.

2416           Mr. Goodlatte. Thank you, Mr. Chairman.

2417           Mr. Chairman, I oppose this amendment because it  
2418 leaves the wide variety of current State net income tax

2419 nexus standards in their current state of disarray. This is  
2420 really an old economy versus new economy argument. But  
2421 remember, this legislation is supported by both bricks and  
2422 mortar, businesses large and small, and online businesses.

2423         And I want to highlight that the base bill does not  
2424 deal with Internet sales taxes, but with corporate income  
2425 tax and other business activity taxes. And I have to say  
2426 that we have some small businesses represented here in the  
2427 audience who will tell you that when you start talking about  
2428 different business activity taxes -- and there is a myriad  
2429 of them of various varieties, based upon various standards  
2430 that have to be met in different States -- that they will  
2431 tell you that they can't possibly find some computer program  
2432 that they can push a button, and it will file their tax  
2433 returns in these various States.

2434         They need an army of lawyers and accountants, and they  
2435 are asking for this legislation so that they will have a  
2436 bright-line test and they will know how much activity they  
2437 can conduct in a State before they qualify for this type of  
2438 activity.

2439         And I can assure you that businesses will look to  
2440 expand, no matter what State they are in, if they can have  
2441 that kind of certainty. It is uncertainty that is hindering  
2442 our economy in so many areas, and much of it is created here  
2443 in the Congress.

2444 But sometimes it is due to the fact that the States  
2445 are overregulating and overtaxing out-of-State small  
2446 businesses, and this is an opportunity to give them a  
2447 bright-line test, let them know what the parameters are, and  
2448 let them go and grow their jobs. And then, if they are  
2449 located in your State, tax them. If they are not located in  
2450 your State, grow some businesses in your State and tax  
2451 those.

2452 I yield back.

2453 Chairman Smith. The gentleman yields back. Thank  
2454 you, Mr. Goodlatte.

2455 The question is on the Nadler Amendment. Those in  
2456 favor, say aye.

2457 [A chorus of ayes.]

2458 Chairman Smith. Opposed, no.

2459 [A chorus of nays.]

2460 Chairman Smith. In the opinion of the chair, the nays  
2461 have it, and the amendment is not agreed to.

2462 Are there any other amendments?

2463 Ms. Chu. Mr. Chair, I have an amendment.

2464 Chairman Smith. The gentlewoman from California is  
2465 recognized for the purpose of offering an amendment.

2466 Ms. Chu. This is Amendment Number 3.

2467 Chairman Smith. The clerk will report the amendment.

2468 Ms. Kish. Amendment to H.R. 1439 offered by Ms. Chu.

2469 Page 6, strike lines --

2470 Chairman Smith. Without objection, the amendment is

2471 considered as read.

2472 [The information follows:]

2473

2474 Chairman Smith. And the gentlewoman is recognized to  
2475 explain the amendment.

2476 Ms. Chu. My amendment would strike the section that  
2477 creates an exception to physical presence under the bill.  
2478 The underlying bill essentially creates a big loophole for  
2479 businesses who want to evade paying their taxes.

2480 By stating that companies can only be taxed if they  
2481 are in the State for more than 2 weeks, no matter how much  
2482 business or how much money they make during that time, it  
2483 allows companies to essentially get out of paying the taxes  
2484 they owe. In order to interact with their customers and  
2485 produce goods and services, many kinds of businesses need to  
2486 send employees and equipment into States in which they do  
2487 not actually maintain offices, factories, or other permanent  
2488 facilities.

2489 For example, an equipment manufacturer may visit its  
2490 customers to install and troubleshoot its products. A  
2491 construction company may send heavy equipment to a building  
2492 site. An advertising agency personnel may meet at a  
2493 client's office to plan a campaign.

2494 Under current law, these kinds of activities would  
2495 almost certainly obligate a company to pay the State's  
2496 corporate income tax if the State chose to impose it. But  
2497 under BATSA, companies could place any amount of property  
2498 and any number of employees in a State to conduct any

2499 activity it wishes without creating nexus, as long as the  
2500 property or equipment remains in the State for 14 or fewer  
2501 days per tax year.

2502 Now there are some legitimate reasons that States may  
2503 decide to allow businesspersons to come into their State and  
2504 do business without imposing taxes, but most States who have  
2505 this de minimis presence put some restrictions on this,  
2506 whereas this underlying bill has none.

2507 California law, for instance, says that it provides a  
2508 7-day extension for doing business for entities that are in  
2509 the State for trade shows or conventions, provided the  
2510 entity receives less than \$10,000 in gross income from those  
2511 activities. This is a specific exception with policy  
2512 reasons behind it, but the BATSA provision is open-ended and  
2513 ripe for abuse.

2514 I urge my colleagues to support my amendment and  
2515 strike this tax loophole.

2516 Chairman Smith. Thank you, Ms. Chu.

2517 The gentleman from Virginia, Mr. Goodlatte?

2518 Mr. Goodlatte. Thank you, Mr. Chairman.

2519 Mr. Chairman, I also oppose this amendment. The  
2520 underlying bill contains a de minimis provision so that  
2521 businesses that conduct activity in a State only temporarily  
2522 are not liable for net income or business activity taxes in  
2523 the State.

2524           One of the principal purposes of the legislation is so  
2525 that States that have a law that says seven tractor trailers  
2526 driving on the interstate highway through a State is  
2527 sufficient physical presence in the State to require them to  
2528 file a corporate income tax return or business activity tax  
2529 return. Some States have provisions that say if you show up  
2530 at one trade show in the State and stay for just a few days,  
2531 and even if you don't have any sales at the trade show, you  
2532 can be subject to business activity and corporate income tax  
2533 requirements.

2534           So the provision makes sense. Taxes are usually used  
2535 to fund essential government services like schools, roads,  
2536 police and fire departments. A business that is active in a  
2537 jurisdiction for only a brief amount of time consumes only  
2538 very little, if any, government services. So they should  
2539 not be liable for any tax to that jurisdiction.

2540           The bright-line test here of 15 days helps to assure  
2541 that all States know where they stand. Above 15 days, they  
2542 can impose the taxes they want to impose. Below 15 days,  
2543 they do not.

2544           I oppose the amendment because it would strike the de  
2545 minimis provision, making businesses subject to a State's  
2546 net income tax the first moment they cross its borders. The  
2547 result would be "gotcha" taxation, and we are seeing that in  
2548 a number of States as States strain to find more and more

2549 sources of tax revenue. But they are wasting many resources  
2550 of the State to try to get businesses, large and small, with  
2551 de minimis contacts to comply with their laws when they  
2552 ought to be focused on growing the economy by helping the  
2553 businesses already in their State expand and do business in  
2554 other States.

2555 Many of the tax bills this committee considers,  
2556 including Mr. Coble and Mr. Johnson's Mobile Workforce State  
2557 Income Tax Simplification Act, contain a de minimis  
2558 provision to ensure that businesses and individuals are not  
2559 subject to taxation merely because they technically  
2560 triggered a liability threshold for a brief amount of time.

2561 Many States impose an income tax, gross receipts, or  
2562 other business activity tax on businesses that have a mere  
2563 economic nexus to the State. Just as that standard is  
2564 vague, so, too, are existing de minimis exceptions. This  
2565 bill confirms not only the bright-line physical presence  
2566 test for business activity taxes, but also provides a  
2567 bright-line de minimis rule that is consistent with all  
2568 States so that businesses can be certain about when their  
2569 liability is triggered.

2570 And I urge opposition to this amendment.

2571 Chairman Smith. Thank you, Mr. Goodlatte.

2572 Mr. Scott. Will the gentleman yield?

2573 Chairman Smith. Will the gentleman yield to the

2574 gentleman from Virginia?

2575 Mr. Scott. Mr. Chairman, I would also say that if  
2576 there is not a national standard, you just invite double  
2577 taxation because some States are going to have an exception.  
2578 Others aren't. Nobody will know who to pay or where, and  
2579 you can end up with double taxation. So we need a national  
2580 standard so everybody will know what the rules are  
2581 everywhere.

2582 I yield back.

2583 Chairman Smith. Thank you, Mr. Goodlatte. Thank you,  
2584 Mr. Scott.

2585 Are there other Members who wish to be heard on this  
2586 amendment?

2587 [No response.]

2588 Chairman Smith. If not, the vote is on the amendment.  
2589 All in favor, say aye.

2590 [A chorus of ayes.]

2591 Chairman Smith. All opposed, say nay.

2592 [A chorus of nays.]

2593 Chairman Smith. In the opinion of the chair, the nays  
2594 have it, and the amendment is not agreed to.

2595 Are there any other amendments?

2596 [No response.]

2597 Chairman Smith. If not, a reporting quorum being  
2598 present, the question is on reporting the bill favorably to

2599 the House. Those in favor, say aye.

2600 [A chorus of ayes.]

2601 Chairman Smith. Opposed, nay.

2602 [A chorus of nays.]

2603 Chairman Smith. The ayes have it, and the bill is  
2604 ordered reported favorably.

2605 Without objection, the bill will be reported, and  
2606 staff is authorized to make technical and conforming  
2607 changes. Members will have 2 days to submit views.

2608 As I mentioned a while ago, it is my intent to resume  
2609 this markup after the first series of votes, which I expect  
2610 to end about 1:30 p.m. And then we will take up H.R. 527,  
2611 the Regulatory Flexibility Act.

2612 Finally, before we recess, I would like to clarify  
2613 that the committee voted to report H.R. 966 as amended. And  
2614 without objection, that bill is ordered reported as amended.

2615 The committee will stand in recess until after the  
2616 first set of votes.

2617 [Recess.]

2618 Chairman Smith. [Presiding] The Judiciary Committee  
2619 will resume its markup. And the clerk will call the roll?

2620 Ms. Kish. Mr. Smith?

2621 Chairman Smith. Present.

2622 Ms. Kish. Mr. Sensenbrenner?

2623 Mr. Coble?

2624 Mr. Gallegly?  
2625 Mr. Goodlatte?  
2626 Mr. Lungren?  
2627 Mr. Chabot?  
2628 Mr. Issa?  
2629 Mr. Pence?  
2630 Mr. Forbes?  
2631 Mr. King?  
2632 Mr. Franks?  
2633 Mr. Gohmert?  
2634 Mr. Jordan?  
2635 Mr. Poe?  
2636 Mr. Chaffetz?  
2637 Mr. Griffin?  
2638 Mr. Marino?  
2639 Mr. Gowdy?  
2640 Mr. Ross?  
2641 Ms. Adams?  
2642 Mr. Quayle?  
2643 Mr. Conyers?  
2644 Mr. Berman?  
2645 Mr. Nadler?  
2646 Mr. Scott?  
2647 Mr. Watt?  
2648 Ms. Lofgren?

2649 Ms. Jackson Lee?  
2650 Ms. Waters?  
2651 Mr. Cohen?  
2652 Mr. Johnson?  
2653 Mr. Pierluisi?  
2654 Mr. Quigley?  
2655 Ms. Chu?  
2656 Mr. Deutch?  
2657 Ms. Sanchez?  
2658 Mr. Cohen?  
2659 Mr. Marino?  
2660 Ms. Adams?  
2661 Mr. Griffin?  
2662 Mr. Scott?  
2663 Mr. Quayle?  
2664 Mr. Johnson?  
2665 Mr. Chabot?  
2666 Mr. Gohmert?  
2667 Chairman Smith. The clerk will report.  
2668 Ms. Kish. Mr. Chairman, 16 members responded present.  
2669 Chairman Smith. Okay. We have a working quorum  
2670 present, but I would like to wait just a few more minutes  
2671 for the ranking member, or to at least determine whether he  
2672 is on his way or not. And then we will proceed.  
2673 I understand we will proceed with opening statements,

2674 and then we will await the arrival of the ranking member.

2675 Pursuant to notice, I now call up H.R. 527 for  
2676 purposes of markup. And the clerk will report the bill?

2677 Ms. Kish. H.R. 527. To amend Chapter 6 of Title V --

2678 Chairman Smith. Without objection, the bill will be  
2679 considered as read.

2680 [The information follows:]

2681

2682 Chairman Smith. And I will recognize myself for an  
2683 opening statement.

2684 Our national economic recovery remains sluggish with  
2685 the unemployment rate above 9 percent. Jobs are the key to  
2686 economic recovery, and small businesses, not government  
2687 regulatory agencies, are the job creators in America.

2688 Unfortunately in recent years, Federal regulations  
2689 have become a barrier to economic stimulation and job  
2690 creation. The Small Business Administration estimates that  
2691 Federal regulation can impose a crushing \$1.75 trillion  
2692 burden on the economy or \$15,000 per household.

2693 Overregulation kills jobs, and the cost of regulatory  
2694 compliance is disproportionately higher for small  
2695 businesses, which are the main job creators in America.  
2696 Firms with fewer than 20 employees must pay 36 percent more  
2697 to comply with Federal regulations than firms with 500 or  
2698 more employees. This hurts small businesses' ability to  
2699 create the jobs Americans need.

2700 There is a broad bipartisan consensus that  
2701 overregulation is a serious and growing problem for the  
2702 American economy. President Obama in a *Wall Street Journal*  
2703 op ed recognized that overregulation "stifles innovation"  
2704 and "has a chilling effect on growth and jobs."

2705 In a presidential directive issued January 18th, 2011  
2706 to all executive departments and agencies, President Obama

2707 stated, "My Administration is firmly committed to  
2708 eliminating excessive and unjustified burdens on small  
2709 businesses, and to ensuring that regulations are designed  
2710 with careful consideration of their effects, including their  
2711 cumulative effects, on small businesses."

2712         This bill urgently needed -- excuse me. This bill  
2713 provides urgently needed help. It ensures that agencies  
2714 will fully account for the effects of new regulations on  
2715 small businesses by thoroughly analyzing regulations in  
2716 advance. The agency then will have the information  
2717 necessary to act in a way that does not impose unnecessary,  
2718 wasteful, or burdensome regulations on small businesses.

2719         The Regulatory Flexibility Act of 1980 and the Small  
2720 Business Regulatory Enforcement Fairness Act of 1996 require  
2721 agencies to prepare a regulatory flexibility analysis so  
2722 agencies will know how a proposed regulation will affect  
2723 small businesses before it is adopted. But GAO has found in  
2724 numerous studies that agency compliance with these statutes  
2725 is inconsistent. For example, currently the law allows an  
2726 agency to avoid preparing a regulatory flexibility analysis  
2727 if the agency head certifies that the new rule will not have  
2728 a significant economic impact on a substantial number of  
2729 small businesses. But none of these terms is defined in the  
2730 law, so agencies routinely take advantage of this by issuing  
2731 boiler plate certifications.

2732           The bill fixes this problem by requiring the SBA to  
2733 define these terms uniformly for all agencies, and by  
2734 requiring agencies to justify a certification in detail, and  
2735 to give the legal and factual grounds for the certification.

2736           The legislation also requires agencies to document all  
2737 economic impacts, direct and indirect, that a new regulation  
2738 could have on small businesses. It restricts agencies'  
2739 ability to waive Regulatory Flexibility Act requirements.

2740           Current law requires only three agencies -- the  
2741 Occupational Safety and Health Administration, the  
2742 Environmental Protection Agency, and the Consumer Financial  
2743 Protection Bureau -- to consider the input of small business  
2744 advocacy review panels before issuing new major regulations.  
2745 The bill requires all agencies to use advocacy review  
2746 panels. This gives small businesses more opportunity to be  
2747 heard before major new regulatory burdens are imposed on  
2748 them.

2749           Equally important, the bill strengthens requirements  
2750 that agencies review and improve existing regulations to  
2751 lower the burden on small businesses. It enhances the Small  
2752 Business Administration's ability to comment on and help  
2753 shape major rules. It assures that the Regulatory  
2754 Flexibility Act is uniformly implemented so individual  
2755 agencies cannot interpret their way out from under its  
2756 requirement. And, finally, the bill improves judicial

2757 review.

2758           Some critics of regulatory reform allege that this  
2759 bill undermines agencies' ability to regulate by making  
2760 regulators jump through more hoops. But the bill primarily  
2761 reinforces, rather than adds, to what agencies are supposed  
2762 to be doing already under the Regulatory Flexibility Act and  
2763 the Small Business Regulatory Enforcement Fairness Act.  
2764 Furthermore, the Regulatory Flexibility Act is about  
2765 protecting small businesses from overregulation, not about  
2766 protecting regulators from having to follow too many steps  
2767 before they can regulate.

2768           Do opponents of the bill really want to argue that we  
2769 have too few regulations?

2770           Fundamentally, this bill recognizes that our national  
2771 economic recovery depends on job creators, not regulators.  
2772 We need to create jobs by reducing the regulatory burden on  
2773 small businesses. This bill is the next logical step in  
2774 Congress' long-standing struggle to protect small businesses  
2775 from overregulation. Its consideration could not be more  
2776 timely, nor its passage more important.

2777           I will now recognize the gentleman from Tennessee, Mr.  
2778 Cohen, for his opening statement?

2779           Mr. Cohen. Thank you, Mr. Chairman.

2780           Small businesses are a significant part of our  
2781 Nation's economy, no question about it. And according to a

2782 March 2010 Small Business Administration report, firms  
2783 employing fewer than 500 employees employed half of all  
2784 private sector employees in 2006. Small business can be  
2785 drivers of innovation and economic growth.

2786         The chairman said in his opening statement that nobody  
2787 here could think that we needed more regulation. Well, we  
2788 do need more regulations in certain areas. I would suspect  
2789 that the people that live near the Yellowstone River in  
2790 Montana wish we had more regulations concerning pipelines  
2791 and better regulations, because we are poisoning some of the  
2792 most beautiful and sacred lands that America has. Certainly  
2793 we needed more regulations in the Gulf when the regulations  
2794 we had were not sufficient.

2795         So, there are areas where we need more regulations.  
2796 What is interesting to note is that both of these, the facts  
2797 about small business and its employment, these facts have  
2798 been true under existing regulatory systems that have been  
2799 in place since 1980. There is no change, and that is why  
2800 the Regulatory Flexibility Act was enacted. And since 1996  
2801 when the RFA was amended by the Small Business Regulatory  
2802 Fairness Act, that was true as well.

2803         Despite the arguments of some of the proponents of  
2804 H.R. 527 about how the RFA has been ineffective as stemming  
2805 overbearing regulations that "stifle small businesses," the  
2806 fact is small businesses have generally done well in the 31

2807 years that the RFA has been in place.

2808 I am concerned that H.R. 527 may be a solution in  
2809 search of a problem. During a hearing on this bill before  
2810 the subcommittee that Mr. Coble so well chairs and such a  
2811 wide appointment that the chairman made on Courts,  
2812 Commercial, and Administrative Law, the three majority  
2813 witnesses all cited the same study by Nicole and Mark Crain  
2814 that claims that Federal rulemaking imposes a cumulative  
2815 cost of \$1.75 trillion on the Nation's economy. This was  
2816 the only study that they found, and they all glammed on it.

2817 I noted that the Center for Progressive Reform, among  
2818 others -- more than one -- had debunked the Crain study  
2819 thoroughly. The Center for Progressive Reform notes that  
2820 the Crain study does not account for any benefits of  
2821 regulation, of which there are quite a few, and that it  
2822 relied on suspect methodology in reaching its conclusions.

2823 Unfortunately for the proponents of H.R. 527, the  
2824 Crain study appears to be the only statistical evidence that  
2825 can be cited or is cited in support of the notion of  
2826 regulations impose undue costs on small business. While I  
2827 do not dispute that regulations can impose costs, and the  
2828 cost benefit analysis is a valuable tool for ensuring that  
2829 agencies promulgate good regulations, I remain skeptical as  
2830 to the degree of the purported problem of regulatory costs  
2831 as is presented by the proponents of this particular bill.

2832 I also take notion with the idea that Federal  
2833 regulation is sort to blame for what remains an unacceptably  
2834 high unemployment rate. If anything, current employment  
2835 troubles can be traced to a lack of adequate regulations of  
2836 the financial services industry that almost took this  
2837 country over the precipice and ruined us, as they have done  
2838 partly to the world as world. And housing industries were  
2839 hurt as well through large employer, and it was because of  
2840 lack of regulation in the financial services area with  
2841 derivatives and other doodads that they came up with to make  
2842 money and get people to invest in risky ventures and get  
2843 into subprime loans. This allowed for this reckless private  
2844 sector behavior that led to the financial crisis of 2008 and  
2845 the great recession, the most severe economic recession  
2846 since the Great Depression.

2847 While almost anything can stand to be improved, H.R.  
2848 527 proposes some needlessly drastic measures that threaten  
2849 to undermine public health and safety and waste public  
2850 resources. My amendments, which I will offer today, focus  
2851 on several concerns, but one of which is the expanded use of  
2852 review panels first required under the SBREFA, better known  
2853 as SBREFA or maybe known as SBREFA by me today. I will  
2854 expand upon this when introducing those amendments.

2855 Beyond the expanded use of the review panels, I have  
2856 other concerns with H.R. 527, which I believe will be

2857 addressed by amendments to be offered my colleagues. These  
2858 include the requirement that agencies consider the indirect  
2859 effect of a proposed or final rule, which forces agencies to  
2860 engage in highly speculative analysis. Mark Twain had  
2861 something about liars, statisticians, et cetera.

2862 I am troubled by the repeal of agencies' authority to  
2863 waive or delay their regulatory flexibility analysis in the  
2864 event of an emergency. If we are truly concerned about  
2865 flexibility in the rulemaking process, then at minimum  
2866 agencies ought to retain the ability to respond in an  
2867 emergency. And I am concerned that 527's open-ended look  
2868 back provision may be a backdoor way for business interests  
2869 to undermine existing health and safety regulations.

2870 As the minority witness at our CCAL committee, CCAL,  
2871 subcommittee hearing noted in his testimony, agencies would  
2872 be forced to rejustify long-standing rules ensuring the  
2873 safety of the air we breathe, the water we drink, the food  
2874 we eat, the products we buy, and the places we work, rules  
2875 that most Americans support and have almost become like  
2876 apple pie.

2877 I am open to ideas on tweaking the regulatory process  
2878 in modest ways to make regulatory compliance easier for  
2879 small business, and perhaps find better ways for small  
2880 business to provide input as to specific rules, although I'm  
2881 concerned 527 goes too far.

2882 I do want to support small business. I support small  
2883 business and want to work with the chairman on finding a  
2884 reasonable middle ground to bring this committee together,  
2885 forging America in a forward path that leads to great  
2886 economic vitality from Texas, to Tennessee, to California,  
2887 to Maine, to Florida.

2888 With that, I yield the remainder of my time.

2889 Chairman Smith. Thank you, Mr. Cohen.

2890 The gentleman from North Carolina, the chairman of the  
2891 subcommittee, Mr. Coble, is recognized for an opening  
2892 statement?

2893 Mr. Coble. Thank you, Mr. Chairman. I want to first  
2894 thank the gentleman from Tennessee for his generous comments  
2895 earlier. I say to Mr. Cohen, I just voted for three or four  
2896 of your amendments on the floor, so I thank you for your  
2897 kind words earlier.

2898 Mr. Cohen. They would have been there regardless, but  
2899 do you not know I notice that.

2900 Mr. Coble. I figured you might. I figured that did  
2901 not fall on blind eyes.

2902 Mr. Chairman, I will be brief. I am pleased to be a  
2903 co-sponsor of this important piece of legislation.

2904 On February 10th, our subcommittee held a legislative  
2905 hearing on H.R. 527 and received informative testimony from  
2906 four witnesses.

2907           Our economic review is at a snail's pace, as you  
2908 mentioned. Last week it was reported that the number of  
2909 unemployment claims is not dropping. Job creation is what  
2910 is going to turn our economy around, and small businesses,  
2911 as we all know, are the engine driving that job creation  
2912 program.

2913           But overregulation stymies job creation, and small  
2914 businesses bear the brunt of overregulation. Unlike their  
2915 larger competitors, small businesses must by necessity spend  
2916 a larger share of their resources on regulatory compliance.  
2917 Congress has tried to make agencies pay close attention to  
2918 how their regulations affect small businesses, but  
2919 oftentimes with limited success.

2920           Legislation passed in 1980 and again in 1996 took  
2921 steps in the right direction, but more needs to be done.  
2922 This bill is the next logical step to protect small  
2923 businesses from overregulation, and I am pleased to  
2924 recommend that it be reported to the full House out of the  
2925 full committee.

2926           Some people have told me recently, Mr. Chairman, that  
2927 we do not want you compromising safety. Well, folks, no one  
2928 -- well, strike that. I cannot speak for everyone. But no  
2929 one known to me compromises safety. I think the issue  
2930 simply is this: oftentimes excessive regulations can be  
2931 just as problematic as diminished regulation. And that is

2932 the issue I think we must keep our eye forever on during  
2933 this hearing today.

2934 And with that, Mr. Chairman, I yield back the balance  
2935 of my time.

2936 Chairman Smith. Thank you, Mr. Coble. I have been  
2937 asked to put the ranking member's opening statement into the  
2938 record, and will do so without objection.

2939 [The information follows:]

2940

2941 Chairman Smith. And that takes us back to Mr. Cohen,  
2942 the gentleman from Tennessee, who is recognized for the  
2943 purpose of offering an amendment?

2944 Mr. Cohen. I have an amendment I believe at the desk,  
2945 amendment number four.

2946 Chairman Smith. The clerk will report the amendment.

2947 Mr. Cohen. And I would like to, after reportage,  
2948 waive that we require the reading thereof.

2949 Chairman Smith. Yeah. The clerk will report the  
2950 amendment?

2951 Ms. Kish. Amendment to H.R. 527 offered by Mr. Cohen.  
2952 Page 19, line 16, strike "existing" --

2953 Chairman Smith. Without objection, the amendment is  
2954 considered as read.

2955 [The information follows:]

2956

2957 Chairman Smith. And the gentleman is recognized to  
2958 explain his amendment?

2959 Mr. Cohen. Thank you, Mr. Chairman. This amendment  
2960 will require that representatives of the public or a public  
2961 interest organization, not ACORN, a public interest  
2962 organization that you all have and love, participate on a  
2963 small business review panel that are required under H.R. 527  
2964 for most proposed rules.

2965 Under current law, these review panels, which consist  
2966 of representatives of the agency that is proposing the rule  
2967 at issue, OIRA and the Small Business Administration's  
2968 Office of Advocacy, review proposed rules issued by the  
2969 Environmental Protection Agency and OSHA that may have  
2970 significant economic impact on a substantial number of small  
2971 entities.

2972 The panels hear comments from and must consult with  
2973 small business representatives. The agency issuing the rule  
2974 must then make changes to the rule in response to the  
2975 panel's findings.

2976 H.R. 527 would expand the use of the panels in two  
2977 ways: by applying the review panel requirement to proposed  
2978 rules issued by all agencies, not just the EPA or OSHA, and  
2979 by expanding the universe of proposed rules beyond those  
2980 that have a significant economic impact on a substantial  
2981 number of small entities, the standard that is supposed to

2982 trigger the RFA requirements generally.

2983           While I remain concerned about the expanded use of  
2984 review panels as contemplated under H.R. 527, if use of  
2985 those panels is to be expanded, then they should include  
2986 representatives of the public and public interest  
2987 organizations that can represent the consumer perspective.  
2988 That is always important. Right now, there is no consumer  
2989 perspective represented on these panels, opening the door to  
2990 a skewed perspective on the impact of a proposed rule. An  
2991 accurate and complete assessment of proposed rules impact  
2992 should include an assessment of the rules net benefits and  
2993 not just the cost of complying. Having a consumer  
2994 representative would allow for a complete discussion rather  
2995 than one skewed towards business interests.

2996           Balance is always good. While expanded use of these  
2997 review panels is, in my view, ill advised, if we're going to  
2998 expand their use, we should include all relevant  
2999 perspectives on a proposed rule. I would urge my colleagues  
3000 to support this amendment and have at least one good  
3001 government type of provision added thereto.

3002           Chairman Smith. Thank you, Mr. Cohen.

3003           The gentleman from North Carolina, Mr. Coble?

3004           Mr. Coble. Thank you, Chairman. I oppose this  
3005 amendment because it misconstrues the purpose of the  
3006 advocacy review panels. They're designed to make sure the

3007 voice of small businesses is heard and heeded. After all,  
3008 it is job creators, not regulators, who will create the job  
3009 that will turn our economy around in finality.

3010 Advocacy review panels are specifically designed to  
3011 solicit input from the small businesses who will be affected  
3012 by the proposed new rule. They worked well for OSHA and the  
3013 EPA since 1996. And Dodd-Frank required them for the  
3014 Consumer Financial Protection Bureau. That is why the bill  
3015 extends them to all agencies.

3016 Every rule for which an advocacy rule panel is  
3017 convened also will go through the public notice and comment  
3018 process, which the pro-regulation community well knows how  
3019 to utilize.

3020 And for these reasons, Mr. Chairman, I oppose the  
3021 amendment.

3022 Chairman Smith. Thank you, Mr. Coble. Are there  
3023 other members who wish to speak on this amendment?

3024 If not, the question is on the amendment.

3025 All in favor, say aye.

3026 [A chorus of ayes.]

3027 Chairman Smith. All opposed, say nay.

3028 [A chorus of nays.]

3029 Chairman Smith. In the opinion of the chair, the  
3030 neighborhoods have it, and the amendment is not agreed to.

3031 A roll call, I believe, has been requested. And the

3032 clerk will call the roll?  
3033 Ms. Kish. Mr. Smith?  
3034 Chairman Smith. No.  
3035 Ms. Kish. Mr. Smith votes no.  
3036 Mr. Sensenbrenner?  
3037 [No response.]  
3038 Ms. Kish. Mr. Coble?  
3039 Mr. Coble. No.  
3040 Ms. Kish. Mr. Coble votes no.  
3041 Mr. Gallegly?  
3042 Mr. Gallegly. No.  
3043 Ms. Kish. Mr. Gallegly votes no.  
3044 Mr. Goodlatte?  
3045 [No response.]  
3046 Ms. Kish. Mr. Lungren?  
3047 [No response.]  
3048 Ms. Kish. Mr. Chabot?  
3049 [No response.]  
3050 Ms. Kish. Mr. Issa?  
3051 [No response.]  
3052 Ms. Kish. Mr. Pence?  
3053 [No response.]  
3054 Ms. Kish. Mr. Forbes?  
3055 [No response.]  
3056 Ms. Kish. Mr. King?

3057 Mr. King. No.  
3058 Ms. Kish. Mr. King votes no.  
3059 Mr. Franks?  
3060 Mr. Franks. No.  
3061 Ms. Kish. Mr. Franks votes no.  
3062 Mr. Gohmert?  
3063 [No response.]  
3064 Ms. Kish. Mr. Jordan?  
3065 [No response.]  
3066 Ms. Kish. Mr. Poe?  
3067 [No response.]  
3068 Ms. Kish. Mr. Chaffetz?  
3069 Mr. Chaffetz. No.  
3070 Ms. Kish. Mr. Chaffetz votes no.  
3071 Mr. Griffin?  
3072 Mr. Griffin. No.  
3073 Ms. Kish. Mr. Griffin votes no.  
3074 Mr. Marino?  
3075 Mr. Marino. No.  
3076 Ms. Kish. Mr. Marino votes no.  
3077 Mr. Gowdy?  
3078 Mr. Gowdy. No.  
3079 Ms. Kish. Mr. Gowdy votes no.  
3080 Mr. Ross?  
3081 [No response.]

3082 Ms. Kish. Ms. Adams?  
3083 Mrs. Adams. No.  
3084 Ms. Kish. Ms. Adams votes no.  
3085 Mr. Quayle?  
3086 Mr. Quayle. No.  
3087 Ms. Kish. Mr. Quayle votes no.  
3088 Mr. Conyers?  
3089 Mr. Conyers. Aye.  
3090 Ms. Kish. Mr. Conyers votes aye.  
3091 Mr. Berman?  
3092 [No response.]  
3093 Ms. Kish. Mr. Nadler?  
3094 [No response.]  
3095 Ms. Kish. Mr. Scott?  
3096 Mr. Scott. Aye.  
3097 Ms. Kish. Mr. Scott votes aye.  
3098 Mr. Watt?  
3099 [No response.]  
3100 Ms. Kish. Ms. Lofgren?  
3101 Ms. Lofgren. Aye.  
3102 Ms. Kish. Ms. Lofgren votes aye.  
3103 Ms. Jackson Lee?  
3104 Ms. Jackson Lee. Aye.  
3105 Ms. Kish. Ms. Jackson Lee votes aye.  
3106 Ms. Waters?

3107 [No response.]  
3108 Ms. Kish. Mr. Cohen?  
3109 Mr. Cohen. Aye.  
3110 Ms. Kish. Mr. Cohen votes aye.  
3111 Mr. Johnson?  
3112 Mr. Johnson. Aye.  
3113 Ms. Kish. Mr. Johnson votes aye.  
3114 Mr. Pierluisi?  
3115 Mr. Pierluisi. Aye.  
3116 Ms. Kish. Mr. Pierluisi votes aye.  
3117 Mr. Quigley?  
3118 [No response.]  
3119 Ms. Kish. Ms. Chu?  
3120 Ms. Chu. Aye.  
3121 Ms. Kish. Ms. Chu votes aye.  
3122 Mr. Deutch?  
3123 [No response.]  
3124 Ms. Kish. Ms. Sanchez?  
3125 [No response.]  
3126 Ms. Kish. Mr. Chabot?  
3127 Mr. Chabot. No.  
3128 Ms. Kish. Mr. Chabot votes no.  
3129 Mr. Goodlatte?  
3130 Mr. Goodlatte. No.  
3131 Ms. Kish. Mr. Goodlatte votes no.

3132 Chairman Smith. Are there other members who wish to  
3133 be recorded? The gentlewoman from California, Ms. Waters?  
3134 Here she is.

3135 Ms. Kish. Ms. Waters votes aye.

3136 Chairman Smith. Holding the door open for you. Are  
3137 there other members who wish to be recorded?

3138 If not, the clerk will report?

3139 Ms. Kish. Mr. Chairman, nine members voted aye, 13  
3140 members voted no.

3141 Chairman Smith. A majority having voted against the  
3142 amendment, the amendment is not agreed to.

3143 Does the gentleman from Tennessee have another  
3144 amendment?

3145 Mr. Cohen. Yes, sir, we do have another amendment.

3146 Chairman Smith. Okay. The gentleman is recognized to  
3147 offer that amendment.

3148 Mr. Cohen. It is amendment number five that may be  
3149 seen in your program as 0008 --

3150 Chairman Smith. And the clerk will report the  
3151 amendment?

3152 Mr. Cohen. -- 005 and 8. I got my double Os  
3153 confused.

3154 Ms. Kish. "Amendment to H.R. 527 offered by Mr.  
3155 Cohen. Page 17, line 24, strike "\$100 million or more" and  
3156 insert "\$250 million or more."

3157 Chairman Smith. All right. Without objection, the  
3158 amendment will be considered as read.  
3159 [The information follows:]  
3160

3161 Chairman Smith. And the gentleman is recognized to  
3162 explain the amendment?

3163 Mr. Cohen. This is simply an amendment that just  
3164 simply takes what was \$100 million when this bill was passed  
3165 in 1980 and makes it current with today's economic financial  
3166 indicators, economic indicators, which is that \$100 million  
3167 then is \$250 million today. And it would require that, in  
3168 effect, there be \$250 million, and clarifies that such rule  
3169 would then have to have a significant economic impact on a  
3170 substantial number of entities. That is what the price  
3171 index has gone up, and it seems like we want to be with it  
3172 and current and with the times. So, it is a very easy  
3173 amendment to vote for.

3174 Under my readings of Section 5 of H.R. 527, the review  
3175 panel requirement could be triggered if the proposed rule  
3176 would be a major rule as defined under Executive Order  
3177 12866, even if it does not have a significant economic  
3178 impact on a substantial number of small entities. Well,  
3179 that is something obviously we would not want to do.

3180 To the extent that the review panel requirement is  
3181 triggered by our proposal and may have a \$250 million  
3182 effect, that dollar threshold would be met at the right  
3183 amount rather than 100. That rule was in place in 1981, and  
3184 it was set by executive order.

3185 The universe of rules captured by that \$100 million

3186 threshold is far bigger in 2011 than it was in 1981. It has  
3187 been 30 years. The threshold should reflect inflation over  
3188 the last 30 years, and so it remains a limited universe as  
3189 originally intended. And we went to the records to get the  
3190 exact amount. To be honest, at first we came up with a  
3191 billion, and we said, no, that is not right. We need to do  
3192 something that we can get both sides for. And both sides  
3193 are for truth and accuracy in what today's market is, and  
3194 that is \$250 million. So, we cut it by three-fourths to get  
3195 it here in a bipartisan fashion.

3196 We used the Bureau of Labor Statistics estimates of  
3197 inflation over that time period. The 2011 equivalent of  
3198 \$100 million is 250. The amendment further clarifies such  
3199 rules must have a significant economic impact on a  
3200 substantial number of entities. This clarification keeps  
3201 the expanded review panel requirements faithful for the  
3202 purposes of RFA, which should be limited to the impact of  
3203 rules on small entities. This amendment makes a reasonable  
3204 change, making everything o-kara.

3205 I ask my colleagues to support it.

3206 Chairman Smith. Thank you, Mr. Cohen. A well-  
3207 intended amendment, but I still have to oppose it.

3208 Currently the law requires advocacy review panels for  
3209 new regulations proposed by OSHA and EPA and the Consumer  
3210 Financial Protection Bureau that could have a significant

3211 economic impact on a substantial number of small businesses.

3212 Building on this, the bill requires the Small Business  
3213 Administration to convene advocacy review panels when any  
3214 agency proposes a new major regulation or a regulation that  
3215 could have a significant economic impact on a substantial  
3216 number of small businesses. The definition of a major  
3217 regulation in the bill is consistent with how every  
3218 presidential administration has defined that term in  
3219 executive orders over the last 30 years, including this  
3220 Administration.

3221 One hundred million dollars is the right threshold to  
3222 use. To increase the number to \$1 billion would greatly  
3223 weaken the reform made by this provision and hold back job  
3224 creation. And for that reason, I am going to oppose the  
3225 amendment.

3226 Mr. Cohen. Mr. Chairman, would you yield?

3227 Chairman Smith. I would be happy to yield to the  
3228 gentleman from Tennessee.

3229 Mr. Cohen. I would have joined you in your opposition  
3230 to a billion, but we saw \$750 million to your side.

3231 Chairman Smith. The gentleman is correct. I stand  
3232 corrected. It is \$250 million.

3233 Mr. Cohen. So, you are for it now.

3234 Chairman Smith. No.

3235 [Laughter.]

3236 Chairman Smith. When you come down to the  
3237 Administration's standard of \$100 million, I will --  
3238 Mr. Cohen. Thank you, sir.  
3239 Chairman Smith. -- be happy have a bipartisan  
3240 support.  
3241 Are there other members who wish to be heard on this  
3242 amendment?  
3243 If not, the question is on the amendment. All in  
3244 favor, say aye.  
3245 [A chorus of ayes.]  
3246 Chairman Smith. All opposed, nay.  
3247 [A chorus of nays.]  
3248 Chairman Smith. In the opinion of the chair, the nos  
3249 have it, and the amendment is not agreed to.  
3250 We will go to the next amendment. I understand this  
3251 is one that is going to be offered by the gentlelady from  
3252 Texas, Ms. Jackson Lee?  
3253 Ms. Jackson Lee. Thank you, Mr. Chair.  
3254 I am offering an amendment, the original amendment  
3255 that I introduced.  
3256 Chairman Smith. The clerk will report the amendment?  
3257 Ms. Kish. Amendment to H.R. 527, offered by Ms.  
3258 Jackson Lee of Texas.  
3259 Chairman Smith. Without objection, the amendment is  
3260 considered as read.

3261 [The information follows:]

3262

3263 Chairman Smith. And the gentlewoman from Texas is  
3264 recognized to explain the amendment?

3265 Ms. Jackson Lee. Thank you very much, Mr. Chairman.

3266 I think we all have the good intent to make sure that  
3267 small businesses thrive, that we create jobs, jobs, jobs.  
3268 And so, my amendment is a complement to this legislation,  
3269 and I would hope in a bipartisan gesture as well that this  
3270 amendment could be accepted.

3271 It simply requires that the comptroller general within  
3272 two years after the enactment of the legislation issue a  
3273 report to Congress on the cost effectiveness of the changes  
3274 implemented by this Act. The report will list all  
3275 additional costs and resources that each agency will have to  
3276 expend to carry out this Act and the amendments made by the  
3277 Act. It would also show the effect of this Act and its  
3278 amendments on the efficiency of the rulemaking process,  
3279 including the amount of time required to make and implement  
3280 a new rule.

3281 The study would report on any impact that this Act or  
3282 its amendments would have on the ability to implement new  
3283 agencies, in the event of an emergency, to be able to move  
3284 forward in the event of an emergency.

3285 Lastly, this study would examine the overall  
3286 compliance of agencies with the Regulatory Flexibility Act  
3287 by requiring that multiple agencies conduct detailed

3288 economic analysis of a rule proposed by a single agency.  
3289 Each agency will have to expend time and resources to  
3290 uncover the indirect economic effects of the proposed rule.

3291 We do need to be able to have an assessment of that  
3292 impact. And ultimately, regulations govern businesses in  
3293 the United States. This is to determine how those processes  
3294 work on the job generators of this economy -- small, medium,  
3295 minority, and women-owned businesses, and, of course, our  
3296 larger corporations.

3297 This is unduly burdensome on a process that is already  
3298 sufficient in length as rules currently require a 30-day  
3299 period of after publication prior to effectiveness.

3300 There is also one overarching problem with H.R. 527.  
3301 Although it claims to make improvements, one thing it does  
3302 not do is provide the needed clarification that the GAO has  
3303 repeatedly pointed out and that the agencies have asked for.  
3304 In the past, there have been GAO reports showing incidence  
3305 of agency non-compliance with the current regulatory  
3306 flexibility rulemaking. The report cited this non-  
3307 compliance is due largely to confusion surrounding the  
3308 meaning of significant economic impact on a substantial  
3309 number of small entities.

3310 Agencies have expressed the need to better  
3311 clarification of this clause to aid them in determining when  
3312 rulemaking analysis and review is necessary. Let us help to

3313 make this bill a stronger, or, at least, to respond to the  
3314 ills and the ailments of a complicated process by getting  
3315 guidance from the GAO.

3316 I ask my colleagues to support the amendment.

3317 Chairman Smith. Thank you, Ms. Jackson Lee. And I  
3318 will recognize myself and our position.

3319 And let me say to my colleague from Texas, I do not  
3320 necessarily GAO studies. And, in fact, I supported her  
3321 amendments that have called for GAO studies in the past.  
3322 But the language in this amendment is so biased against the  
3323 bill that I am going to oppose this amendment because of  
3324 that language. If the gentlewoman wants to work with us  
3325 between now and the House floor to revise that language and  
3326 make it neutral, I would be happy to support an amendment to  
3327 call for that GAO study. But under the current language in  
3328 this amendment, I cannot support the gentlewoman's  
3329 amendment.

3330 Ms. Jackson Lee. Would the gentleman yield?

3331 Chairman Smith. I would be happy to yield.

3332 Ms. Jackson Lee. We have had a series of encounters  
3333 with your staff, Mr. Smith, and we are very willing and have  
3334 had several variations of the language. And not one of them  
3335 could satisfy the staff. So, I am not sure whether that is  
3336 a viable offer. I appreciate your generosity here at the  
3337 table, but believe me, we tried, and absolutely would not

3338 settle on anything that would be timely before this  
3339 committee convened.

3340 So, if you are able to either convince your staff or  
3341 to give confidence to that as a serious offer, then it might  
3342 be one that I am willing to accept. But at this point, we  
3343 did not see any seriousness in the staff's efforts to be of  
3344 help when we were engaging with them.

3345 Chairman Smith. Okay. That is my understanding as  
3346 well. So, we will vote on the amendment.

3347 Is there anyone else who wishes to speak on the  
3348 amendment? And if not, all in favor, say aye.

3349 [A chorus of ayes.]

3350 Chairman Smith. All those opposed, say nay.

3351 [A chorus of nays.]

3352 Chairman Smith. In the opinion, the nos have it.

3353 Ms. Jackson Lee. Roll call.

3354 Chairman Smith. And a roll has been requested. And  
3355 the clerk will call the roll.

3356 Ms. Kish. Mr. Smith?

3357 Chairman Smith. No.

3358 Ms. Kish. Mr. Smith votes no.

3359 Mr. Sensenbrenner?

3360 [No response.]

3361 Ms. Kish. Mr. Coble?

3362 Mr. Coble. No.

3363 Ms. Kish. Mr. Coble votes no.  
3364 Mr. Gallegly?  
3365 [No response.]  
3366 Ms. Kish. Mr. Goodlatte?  
3367 [No response.]  
3368 Ms. Kish. Mr. Lungren?  
3369 Mr. Lungren. No.  
3370 Ms. Kish. Mr. Lungren votes no.  
3371 Mr. Chabot?  
3372 Mr. Chabot. No.  
3373 Ms. Kish. Mr. Chabot votes no.  
3374 Mr. Issa?  
3375 [No response.]  
3376 Ms. Kish. Mr. Pence?  
3377 [No response.]  
3378 Ms. Kish. Mr. Forbes?  
3379 Mr. Forbes. No.  
3380 Ms. Kish. Mr. Forbes votes no.  
3381 Mr. King?  
3382 Mr. King. No.  
3383 Ms. Kish. Mr. King votes no.  
3384 Mr. Franks?  
3385 Mr. Franks. No.  
3386 Ms. Kish. Mr. Franks votes no.  
3387 Mr. Gohmert?

3388 [No response.]  
3389 Ms. Kish. Mr. Jordan?  
3390 [No response.]  
3391 Ms. Kish. Mr. Poe?  
3392 [No response.]  
3393 Ms. Kish. Mr. Chaffetz?  
3394 Mr. Chaffetz. No.  
3395 Ms. Kish. Mr. Chaffetz votes no.  
3396 Mr. Griffin?  
3397 Mr. Griffin. No.  
3398 Ms. Kish. Mr. Griffin votes no.  
3399 Mr. Marino?  
3400 Mr. Marino. No.  
3401 Ms. Kish. Mr. Marino votes no.  
3402 Mr. Gowdy?  
3403 Mr. Gowdy. No.  
3404 Ms. Kish. Mr. Gowdy votes no.  
3405 Mr. Ross?  
3406 Mr. Ross. No.  
3407 Ms. Kish. Mr. Ross votes no.  
3408 Ms. Adams?  
3409 Mrs. Adams. No.  
3410 Ms. Kish. Ms. Adams votes no.  
3411 Mr. Quayle?  
3412 Mr. Quayle. No.

3413 Ms. Kish. Mr. Quayle votes no.  
3414 Mr. Conyers?  
3415 Mr. Conyers. Aye.  
3416 Ms. Kish. Mr. Conyers votes aye.  
3417 Mr. Berman?  
3418 [No response.]  
3419 Ms. Kish. Mr. Nadler?  
3420 Mr. Nadler. Aye.  
3421 Ms. Kish. Mr. Nadler votes aye.  
3422 Mr. Scott?  
3423 Mr. Scott. Aye.  
3424 Ms. Kish. Mr. Scott votes aye.  
3425 Mr. Watt?  
3426 Mr. Watt. Aye.  
3427 Ms. Kish. Mr. Watt votes aye.  
3428 Ms. Lofgren?  
3429 Ms. Lofgren. Aye.  
3430 Ms. Kish. Ms. Lofgren votes aye.  
3431 Ms. Jackson Lee?  
3432 Ms. Jackson Lee. Aye.  
3433 Ms. Kish. Ms. Jackson Lee votes aye.  
3434 Ms. Waters?  
3435 [No response.]  
3436 Ms. Kish. Mr. Cohen?  
3437 Mr. Cohen. Aye.

3438 Ms. Kish. Mr. Cohen votes aye.  
3439 Mr. Johnson?  
3440 Mr. Johnson. Aye.  
3441 Ms. Kish. Mr. Johnson votes aye.  
3442 Mr. Pierluisi?  
3443 Mr. Pierluisi. Aye.  
3444 Ms. Kish. Mr. Pierluisi votes aye.  
3445 Mr. Quigley?  
3446 [No response.]  
3447 Ms. Kish. Ms. Chu?  
3448 Ms. Chu. Aye.  
3449 Ms. Kish. Ms. Chu votes aye.  
3450 Mr. Deutch?  
3451 [No response.]  
3452 Ms. Kish. Ms. Sanchez?  
3453 [No response.]  
3454 Chairman Smith. The gentleman from Virginia?  
3455 Mr. Goodlatte. No.  
3456 Ms. Kish. Mr. Goodlatte votes no.  
3457 Chairman Smith. Are there other members who wish to  
3458 be recorded?  
3459 The clerk will report.  
3460 If the clerk will suspend?  
3461 Ms. Waters. Ms. Waters, aye.  
3462 Ms. Kish. Ms. Waters votes aye.

3463 Chairman Smith. The clerk will report?

3464 Ms. Kish. Mr. Chairman, 11 members voted aye, 15  
3465 members voted nay.

3466 Chairman Smith. A majority having voted against the  
3467 amendment, the amendment is not agreed to.

3468 We will now go to the gentleman from Georgia, Mr.  
3469 Johnson, if he has an amendment?

3470 Mr. Johnson. Thank you. I have an amendment at the  
3471 desk.

3472 Chairman Smith. The clerk will report the amendment?

3473 Ms. Kish. An amendment to H.R. 527 offered by Mr.  
3474 Johnson of Georgia. Add at the end of the bill the  
3475 following, "Section, 10, Application With Regard to Certain  
3476 Statutes. None of the amendments made by this Act shall  
3477 apply to any rule" --

3478 Mr. Johnson. Mr. Chairman, I ask that the amendment  
3479 be considered as read.

3480 Chairman Smith. Without objection, the amendment will  
3481 be considered as read.

3482 [The information follows:]

3483

3484 Chairman Smith. This is Mr. Johnson amendment number  
3485 nine. And the gentleman is recognized to explain the  
3486 amendment?

3487 Mr. Johnson. Thank you, Mr. Chairman. My amendment  
3488 is a pretty simple one. It would ensure that Americans have  
3489 access to safe and untainted food.

3490 Every year, about 48 million people, one in six  
3491 Americans, gets sick from food-borne diseases. The Food and  
3492 Drug Administration Food Safety Modernization Act enables  
3493 the FDA to better protect public health by strengthening the  
3494 food safety system. It enables the FDA to focus more on  
3495 preventing food safety problems rather than relying  
3496 primarily on reacting to problems after they occur.

3497 The majority's bill is dangerous, a wolf in sheep's  
3498 clothing. In the name of helping small businesses, this  
3499 bill would make it virtually impossible for Federal agencies  
3500 to protect public health and safety. The sponsors of this  
3501 bill have been perfectly clear about their goal, which is to  
3502 put regulations to a halt. They want to create so many  
3503 barriers and obstacles that it would essentially make it  
3504 impossible for Federal agencies to do their jobs and make  
3505 rules that provide for health and safety of all Americans.

3506 It is essential that the FDA have the ability to  
3507 conduct inspections and prevention programs without having  
3508 to go through speculative analysis of indirect impacts of a

3509 proposed rule, or being forced to rejustify existing rules.

3510           After the United States has gone through food-borne  
3511 illness outbreaks related to eggs, spinach, and peanut  
3512 butter, it is vital that the FDA be able and allowed to do  
3513 its job and regulate without additional barriers intended to  
3514 slow down the regulatory process. The benefits of  
3515 regulations far outweigh their costs.

3516           When I open up this bag of peanuts, Mr. Chairman,  
3517 Georgia peanuts, which are the best peanuts, by the way, in  
3518 addition to our Georgia peaches, which are the best, and  
3519 should I fail to mention UPS and Coca-Cola. But when I open  
3520 this bag of peanuts, I want to have peace of mind. I want  
3521 to have the peace of mind that this bag of Georgia peanuts  
3522 is safe for me to eat.

3523           How can you put a price on peace of mind or confidence  
3524 in America's food supply? I urge all of my colleagues to  
3525 vote this amendment out favorably.

3526           Thank you, Mr. Chairman, and I yield the balance of my  
3527 time.

3528           Chairman Smith. Thank you, Mr. Johnson.

3529           The gentleman from North Carolina, Mr. Coble, is  
3530 recognized?

3531           Mr. Coble. I will say to my friend from Georgia, I  
3532 will give you UPS and Coca-Cola, but I want to argue with  
3533 you about peaches.

3534 [Laughter.]

3535 Chairman Smith. We will do that at a later time.

3536 Mr. Coble. Mr. Chairman, I oppose this amendment  
3537 because it carves out an exception to the bill for  
3538 regulations under the Food and Drug Administration.

3539 If agencies were doing what they were supposed to be  
3540 doing under the Regulatory Flexibility Act, we probably  
3541 would not be here today. Small businesses create jobs, and  
3542 jobs are the key to economic recovery. To help small  
3543 businesses, like minority-owned restaurants, majority-owned  
3544 restaurants, that create jobs, we need to reduce, not  
3545 increase, the regulatory burden on these small businesses.

3546 This amendment would also create some confusion, I  
3547 believe, within the FDA by exempting only its  
3548 responsibilities under the Food and Safety Modernization Act  
3549 for the bill. There should not be two versions of the RFA  
3550 in play at the FDA, it seems to me.

3551 And for these reasons, Mr. Chairman, I oppose the  
3552 amendment.

3553 Chairman Smith. Okay. Thank you, Mr. Coble.

3554 Are there other members who wish to be heard on this  
3555 amendment?

3556 If not, the vote is on the amendment. All in favor,  
3557 say aye.

3558 [A chorus of ayes.]

3559 Chairman Smith. All opposed, say nay.

3560 [A chorus of nays.]

3561 Chairman Smith. It is the opinion of the chair that  
3562 the nays have it, and the amendment is not agreed to.

3563 A recorded vote has been requested, and the clerk will  
3564 call the roll.

3565 Ms. Kish. Mr. Smith?

3566 Chairman Smith. No.

3567 Ms. Kish. Mr. Smith votes no.

3568 Mr. Sensenbrenner?

3569 [No response.]

3570 Ms. Kish. Mr. Coble?

3571 Mr. Coble. No.

3572 Ms. Kish. Mr. Coble votes no.

3573 Mr. Gallegly?

3574 Mr. Gallegly. No.

3575 Ms. Kish. Mr. Gallegly votes no.

3576 Mr. Goodlatte?

3577 [No response.]

3578 Ms. Kish. Mr. Lungren?

3579 Mr. Lungren. No.

3580 Ms. Kish. Mr. Lungren votes no.

3581 Mr. Chabot?

3582 Mr. Chabot. No.

3583 Ms. Kish. Mr. Chabot votes no.

3584 Mr. Issa?  
3585 [No response.]  
3586 Ms. Kish. Mr. Pence?  
3587 [No response.]  
3588 Ms. Kish. Mr. Forbes?  
3589 Mr. Forbes. No.  
3590 Ms. Kish. Mr. Forbes votes no.  
3591 Mr. King?  
3592 Mr. King. No.  
3593 Ms. Kish. Mr. King votes no.  
3594 Mr. Franks?  
3595 Mr. Franks. No.  
3596 Ms. Kish. Mr. Franks votes no.  
3597 Mr. Gohmert?  
3598 [No response.]  
3599 Ms. Kish. Mr. Jordan?  
3600 [No response.]  
3601 Ms. Kish. Mr. Poe?  
3602 [No response.]  
3603 Ms. Kish. Mr. Chaffetz?  
3604 Mr. Chaffetz. No.  
3605 Ms. Kish. Mr. Chaffetz votes no.  
3606 Mr. Griffin?  
3607 [No response.]  
3608 Ms. Kish. Mr. Marino?

3609 Mr. Marino. No.  
3610 Ms. Kish. Mr. Marino votes no.  
3611 Mr. Gowdy?  
3612 Mr. Gowdy. No.  
3613 Ms. Kish. Mr. Gowdy votes no.  
3614 Mr. Ross?  
3615 Mr. Ross. No.  
3616 Ms. Kish. Mr. Ross votes no.  
3617 Ms. Adams?  
3618 Mrs. Adams. No.  
3619 Ms. Kish. Ms. Adams votes no.  
3620 Mr. Quayle?  
3621 Mr. Quayle. No.  
3622 Ms. Kish. Mr. Quayle votes no.  
3623 Mr. Conyers?  
3624 [No response.]  
3625 Ms. Kish. Mr. Berman?  
3626 [No response.]  
3627 Ms. Kish. Mr. Nadler?  
3628 [No response.]  
3629 Ms. Kish. Mr. Scott?  
3630 Mr. Scott. Aye.  
3631 Ms. Kish. Mr. Scott votes aye.  
3632 Mr. Watt?  
3633 Mr. Watt. Aye.

3634 Ms. Kish. Mr. Watt votes aye.  
3635 Ms. Lofgren?  
3636 Ms. Lofgren. Aye.  
3637 Ms. Kish. Ms. Lofgren votes aye.  
3638 Ms. Jackson Lee?  
3639 Ms. Jackson Lee. Aye.  
3640 [No response.]  
3641 Ms. Waters?  
3642 Ms. Waters. Aye.  
3643 Ms. Kish. Ms. Waters votes aye.  
3644 Mr. Cohen?  
3645 Mr. Cohen. Aye.  
3646 Ms. Kish. Mr. Cohen votes aye.  
3647 Mr. Johnson?  
3648 Mr. Johnson. Aye.  
3649 Ms. Kish. Mr. Johnson votes aye.  
3650 Mr. Pierluisi?  
3651 Mr. Pierluisi. Aye.  
3652 Ms. Kish. Mr. Pierluisi votes aye.  
3653 Mr. Quigley?  
3654 [No response.]  
3655 Ms. Kish. Ms. Chu?  
3656 Ms. Chu. Aye.  
3657 Ms. Kish. Ms. Chu votes aye.  
3658 Mr. Deutch?

3659 [No response.]

3660 Ms. Kish. Ms. Sanchez?

3661 [No response.]

3662 Ms. Kish. Mr. Conyers?

3663 Mr. Conyers. Aye.

3664 Ms. Kish. Mr. Conyers votes aye.

3665 Chairman Smith. Are there other members who wish to

3666 be recorded? The gentleman from Arkansas? The gentleman

3667 from Virginia?

3668 Mr. Goodlatte. No.

3669 Ms. Kish. Mr. Goodlatte votes no.

3670 Chairman Smith. The clerk will report.

3671 The clerk will suspend?

3672 The gentleman from New York?

3673 Mr. Nadler. Aye.

3674 Ms. Kish. Mr. Nadler --

3675 Chairman Smith. The gentleman from New York votes

3676 aye.

3677 The clerk will report?

3678 Ms. Kish. Mr. Chairman, 10 members voted aye, 16

3679 members voted nay.

3680 Chairman Smith. The majority having voted against the

3681 amendment, the amendment is not agreed to.

3682 Does the gentleman from Georgia have another

3683 amendment? And the gentleman is recognized for the purposes

3684 of offering an amendment.

3685 And the clerk will report the amendment?

3686 Ms. Kish. Amendment to H.R. 527, offered by Mr.

3687 Johnson of Georgia. Add at the end of the bill the

3688 following, "Section 10, Application With Regards" --

3689 Mr. Johnson. I ask that it be considered as read.

3690 Chairman Smith. Without objection, the amendment will

3691 be considered as read. And the gentleman is recognized to

3692 explain the amendment?

3693 Mr. Johnson. Thank you, Mr. Chairman.

3694 This amendment would ensure that millions have access

3695 to health care.

3696 On March the 23rd, 2010, President Obama signed the

3697 Patient Protection and Affordable Care Act into law. Ever

3698 since this landmark legislation was signed into law, the

3699 majority has been on a mission to dismantle it. This is

3700 disconcerting as the bill is already providing benefits to

3701 thousands of my constituents, and will provide affordable

3702 care to millions of Americans who do not have it today.

3703 For the more 190,000 residents in my district who have

3704 no health insurance, it will allow access to affordable

3705 care. It is going to improve coverage for more than 65,000

3706 seniors, protect more than 2,000 families from going

3707 bankrupt, and allow more than 15,000 small businesses

3708 affordability of coverage for their employees.

3709           Because the majority knows that the President would  
3710 likely veto their pending proposals to repeal the Affordable  
3711 Care Act, it has moved to deregulation as a means to  
3712 eviscerating the law. We all know that regulations and  
3713 guidance are used to implement many of the provisions in the  
3714 Affordable Care Act. Because the majority cannot directly  
3715 repeal the bill, they are seeking to end it through  
3716 deregulation.

3717           This bill, the Regulatory Flexibility Improvement Act,  
3718 is a misnomer. This bill does not improve the regulatory  
3719 process. Instead, it is simply part of the majority's anti-  
3720 regulatory agenda to slow down the regulatory process and  
3721 make it virtually impossible to implement rules for our  
3722 health and public safety.

3723           This bill is far from fine tuning the regulatory  
3724 process. It would do nothing but make the regulatory  
3725 process more bureaucratic and impose unnecessary hurdles for  
3726 agencies seeking to enact rules to protect our health and  
3727 safety. More specifically, this bill will delay, if not  
3728 halt, necessary regulations to implement the Affordable Care  
3729 Act.

3730           I am here to fight for the 32 million Americans and  
3731 more than 500,000 people in my district that would benefit  
3732 from the Health Care Reform bill. I urge all of my  
3733 colleagues to join me and vote this amendment out favorably.

3734 Thank you, Mr. Chairman. And I yield back the balance  
3735 of my time.

3736 Chairman Smith. Thank you, Mr. Johnson. And I will  
3737 recognize myself in opposition to it.

3738 I oppose this amendment because it exempts agencies  
3739 issuing regulations to implement the Patient Protection and  
3740 Affordable Care Act from following the bill's reforms of the  
3741 Regulatory Flexibility Act. There is no reason I see to  
3742 carve out such an exemption.

3743 At over 2,000 pages long, the health care bill  
3744 promises to produce plenty of regulations. With the  
3745 economic recovery stalling, we should not give any agency a  
3746 blank check to impose new regulatory burdens on small  
3747 businesses.

3748 Furthermore, this amendment, like amendment nine,  
3749 introduces confusion by requiring agencies to prepare some  
3750 of their rules under the RFA and others under the reforms of  
3751 this bill. That would not help small businesses, job  
3752 creation, nor the agencies themselves.

3753 So, for these reasons I oppose the amendment.

3754 Are there other members who wish to speak on this  
3755 amendment?

3756 If not, the question is on the amendment. All in  
3757 favor, say aye.

3758 [A chorus of ayes.]

3759 Chairman Smith. Opposed, no.

3760 [A chorus of nays.]

3761 Chairman Smith. In the opinion of the chair, the nos  
3762 have it, and the amendment is not agreed to.

3763 I would like to go now to the gentleman from Puerto  
3764 Rico, Mr. Pierluisi, to offer an amendment that I recommend  
3765 my colleagues accept. And after that, we will go the  
3766 ranking member's amendment.

3767 I did not hear you say that. The gentleman from  
3768 Georgia has asked for a recorded vote on the last amendment,  
3769 and the clerk will call the roll.

3770 Ms. Kish. Mr. Smith?

3771 Chairman Smith. No.

3772 Ms. Kish. Mr. Smith votes no.

3773 Mr. Sensenbrenner?

3774 [No response.]

3775 Ms. Kish. Mr. Coble?

3776 Mr. Coble. No.

3777 Ms. Kish. Mr. Coble votes no.

3778 Mr. Gallegly?

3779 Mr. Gallegly. No.

3780 Ms. Kish. Mr. Gallegly votes no.

3781 Mr. Goodlatte?

3782 Mr. Goodlatte. No.

3783 Ms. Kish. Mr. Goodlatte votes no.

3784 Mr. Lundgren?  
3785 Mr. Lungren. No.  
3786 Ms. Kish. Mr. Lungren votes no.  
3787 Mr. Chabot?  
3788 Mr. Chabot. No.  
3789 Ms. Kish. Mr. Chabot votes no.  
3790 Mr. Issa?  
3791 [No response.]  
3792 Ms. Kish. Mr. Pence?  
3793 [No response.]  
3794 Ms. Kish. Mr. Forbes?  
3795 Mr. Forbes. No.  
3796 Ms. Kish. Mr. Forbes votes no.  
3797 Mr. King?  
3798 Mr. King. No.  
3799 Ms. Kish. Mr. King votes no.  
3800 Mr. Franks?  
3801 Mr. Franks. No.  
3802 [No response.]  
3803 Ms. Kish. Mr. Gohmert?  
3804 [No response.]  
3805 Ms. Kish. Mr. Jordan?  
3806 [No response.]  
3807 Ms. Kish. Mr. Poe?  
3808 [No response.]

3809 Ms. Kish. Mr. Chaffetz?  
3810 Mr. Chaffetz. No.  
3811 Ms. Kish. Mr. Chaffetz votes no.  
3812 Mr. Griffin?  
3813 Mr. Griffin. No.  
3814 Ms. Kish. Mr. Griffin votes no.  
3815 Mr. Marino?  
3816 Mr. Marino. No.  
3817 Ms. Kish. Mr. Marino votes no.  
3818 Mr. Gowdy?  
3819 Mr. Gowdy. No.  
3820 Ms. Kish. Mr. Gowdy votes no.  
3821 Mr. Ross?  
3822 Mr. Ross. No.  
3823 Ms. Kish. Mr. Ross votes no.  
3824 Ms. Adams?  
3825 Mrs. Adams. No.  
3826 Ms. Kish. Ms. Adams votes no.  
3827 Mr. Quayle?  
3828 Mr. Quayle. No.  
3829 Ms. Kish. Mr. Quayle votes no.  
3830 Mr. Conyers?  
3831 Mr. Conyers. Aye.  
3832 Ms. Kish. Mr. Conyers votes aye.  
3833 Mr. Berman?

3834 [No response.]

3835 Ms. Kish. Mr. Nadler?

3836 Mr. Nadler. Aye.

3837 Ms. Kish. Mr. Nadler votes aye.

3838 Mr. Scott?

3839 Mr. Scott. Aye.

3840 Ms. Kish. Mr. Scott votes aye.

3841 Mr. Watt?

3842 Mr. Watt. Aye.

3843 Ms. Kish. Mr. Watt votes aye.

3844 Ms. Lofgren?

3845 Ms. Lofgren. Aye.

3846 Ms. Kish. Ms. Lofgren votes aye.

3847 Ms. Jackson Lee?

3848 Ms. Jackson Lee. Aye.

3849 [No response.]

3850 Ms. Kish. Ms. Waters?

3851 Ms. Waters. Aye.

3852 Ms. Kish. Ms. Waters votes aye.

3853 Mr. Cohen?

3854 Mr. Cohen. Absolutely positively.

3855 Ms. Kish. Mr. Cohen votes aye.

3856 Mr. Johnson?

3857 Mr. Johnson. Aye.

3858 Ms. Kish. Mr. Johnson votes aye.

3859 Mr. Pierluisi?

3860 Mr. Pierluisi. Aye.

3861 Ms. Kish. Mr. Pierluisi votes aye.

3862 Mr. Quigley?

3863 [No response.]

3864 Ms. Kish. Ms. Chu?

3865 Ms. Chu. Aye.

3866 Ms. Kish. Ms. Chu votes aye.

3867 Mr. Deutch?

3868 [No response.]

3869 Ms. Kish. Ms. Sanchez?

3870 [No response.]

3871 Chairman Smith. The gentleman from South Carolina,  
3872 did you vote?

3873 Ms. Kish. Voting yes.

3874 Mr. Gowdy. Yes, sir. I said Your Honor. That is my  
3875 old job. Yes, sir, Mr. Chairman.

3876 Chairman Smith. Okay, thank you, Mr. Gowdy.

3877 Mr. Gowdy. No.

3878 Chairman Smith. You voted no.

3879 Ms. Kish. Voted no, I apologize.

3880 Mr. Gowdy. Thank you. At my age, you cannot scare me  
3881 like that.

3882 [Laughter.]

3883 Chairman Smith. Absolutely , positively no. Are

3884 there other members who wish to record their votes?

3885 If not, the clerk will report.

3886 Ms. Kish. Mr. Chairman, 10 members voted aye, 15  
3887 members voted nay.

3888 Chairman Smith. A majority having voted against the  
3889 amendment, the amendment is not agreed to.

3890 We will go now to the gentleman from Puerto Rico, Mr.  
3891 Pierluisi, for the purpose of offering an amendment?

3892 Mr. Pierluisi. Thank you, Mr. Chairman. I have an  
3893 amendment at the desk.

3894 Chairman Smith. The clerk will report the amendment?

3895 Ms. Kish. Amendment to H.R. 527, offered by Mr.  
3896 Pierluisi of Puerto Rico.

3897 Chairman Smith. Without objection, the amendment will  
3898 be considered as read. And the gentleman is recognized to  
3899 explain the amendment?

3900 Mr. Pierluisi. I will be brief.

3901 My amendment seeks to ensure that the U.S. territories  
3902 are treated identically as the States in one section of the  
3903 bill where the territories' treatment is unclear.

3904 Section 6 of the bill directs each Federal agency in  
3905 assessing its rules to consider the extent to which the rule  
3906 overlaps, duplicates, or conflicts with other Federal rules,  
3907 and with State and local rules. No explicit mention of the  
3908 territories is made.

3909           In my experience, the absence of language explicitly  
3910   referencing the territories can and has led to the  
3911   territories' exclusion. My amendment would ensure that if  
3912   this bill were enacted, that each agency in assessing its  
3913   rules will consider the extent to which the rule overlaps,  
3914   duplicates, or conflicts with rules in the territories in  
3915   addition to State and local rules.

3916           I urge my colleagues to support this amendment.

3917           Chairman Smith. Thank you, Mr. Pierluisi. I will  
3918   recognize myself in support of the amendment as well.

3919           This is a good amendment. There is no reason Federal  
3920   regulations should be duplicative of territorial  
3921   regulations. Small businesses in America's territories  
3922   should have the same right as those in States not to be  
3923   burdened by overregulation.

3924           So, I thank the gentleman from Puerto Rico for this  
3925   amendment, for always looking out for Puerto Rico and the  
3926   territories, and urge my colleagues to support it.

3927           Are there any other members who wish to be heard on  
3928   the amendment? The gentleman from Tennessee, Mr. Cohen, is  
3929   recognized?

3930           Mr. Cohen. Thank you, Mr. Chairman. Let me ask. I  
3931   may be confused, but if I am against the bill and I am for  
3932   Puerto Rico, would I want Puerto Rico to be included in the  
3933   bill or not included in the bill?

3934 [Laughter.]

3935 Mr. Conyers. Very funny.

3936 Mr. Pierluisi. Can I address --

3937 Chairman Smith. Does the gentleman yield to the  
3938 gentleman from Puerto Rico?

3939 Mr. Cohen. I would yield to the gentleman from Puerto  
3940 Rico, yes.

3941 Mr. Pierluisi. Well, let me say I have the same  
3942 dilemma. But, you know, since there is a possibility that  
3943 the bill might be enacted, I had better be covered as well.  
3944 And I am speaking on behalf of the territories.

3945 Mr. Cohen. Even if you are not for the bill.

3946 Mr. Pierluisi. Exactly. If it happens, if it is  
3947 enacted, it better be enacted treating the territories the  
3948 same way the States are being treated. It is just a  
3949 consistent --

3950 Mr. Cohen. I will follow the lead of the  
3951 representative of Puerto Rico. What is good for America's  
3952 upper 50 is good for Puerto Rico, I guess.

3953 Chairman Smith. I think he is covering all his bases,  
3954 and I think that is a smart move.

3955 Are there any other members who wish to be heard?

3956 If not, the vote is on the amendment. All in favor,  
3957 say aye.

3958 [A chorus of ayes.]

3959 Chairman Smith. All opposed, nay.

3960 [No response.]

3961 Chairman Smith. The amendment is agreed to.

3962 Are there other amendments? The gentleman from

3963 Michigan, the ranking member, is recognized for the purpose

3964 of offering an amendment?

3965 Mr. Conyers. Mr. Chairman, I have amendment 14. I

3966 ask that it be reported.

3967 Chairman Smith. The clerk will report the amendment.

3968 Ms. Kish. Amendment to H.R. 527, offered by Mr.

3969 Conyers. Beginning on page 13, line 7, strike Section 4 and

3970 redesignate --

3971 Chairman Smith. Without objection, the amendment is

3972 considered as read.

3973 [The information follows:]

3974

3975 Chairman Smith. And the gentleman is recognized to  
3976 explain his amendment?

3977 Mr. Conyers. Thank you.

3978 This amendment formerly, apparently Mr. Nadler's  
3979 amendment. I do not know who had it. He had a similar one.  
3980 What we do in this provision is eliminate Section 4 of the  
3981 measure, H.R. 527 because we think that it would undermine  
3982 the ability of agencies to quickly respond to emergent  
3983 health and safety risks. And so, what we do is repeal the  
3984 authority under current law that allows an agency to waive  
3985 or delay the initial analyses required under the Regulatory  
3986 Flexibility Act in response to an emergency that makes  
3987 compliance or timely compliance impracticable.

3988 Instead, what the bill does it empower the chief  
3989 counsel for advocacy to issue regulations about how agencies  
3990 in general should comply with the Act. If there is an  
3991 epidemic ecoli or listeria infection caused by some item in  
3992 our Nation's food distribution network, or if there is an  
3993 imminent environmental disaster that could be addressed  
3994 systematically through regulation, this bill says do not  
3995 worry, do not rush. Let us have the chief counsel for  
3996 advocacy decide.

3997 And so, this override of an agency's authority to  
3998 respond to emergencies without having first to go through  
3999 arduous and time consuming tasks of review and analysis is a

4000 slow and perhaps dangerous, under some circumstances,  
4001 procedure.

4002 We all know our Federal agencies are charged with  
4003 promulgating regulations that impact just about every aspect  
4004 of our lives, including what we breathe and drink, the food  
4005 we eat, cars we drive, play toys we give our children.  
4006 Small businesses, like all businesses, provide services and  
4007 goods that also affect our lives. And so, it is in that  
4008 line of thinking that I offer the amendment and hope that it  
4009 will gain the support of the committee.

4010 Thank you, Mr. Chairman.

4011 Chairman Smith. Thank you, Mr. Conyers.

4012 The gentleman from North Carolina, Mr. Coble, is  
4013 recognized?

4014 Mr. Coble. Thank you, Mr. Chairman.

4015 Mr. Chairman, I oppose the amendment because it  
4016 undermines the key reform of the bill. Experience has shown  
4017 that a problem with the current law is that many of its  
4018 terms are not defined, and, therefore, agencies interpret  
4019 the law however it suits them best, and compliance is  
4020 sometimes inconsistent and inadequate.

4021 This bill closes that loophole by giving the Small  
4022 Business Administration rulemaking authority. And,  
4023 furthermore, it gives the SBA the authority to advise  
4024 agencies on how adjudication or a proposed regulation would

4025 affect small businesses.

4026 Further, this bill will not hamper the ability of  
4027 agencies to issue emergency rules under the Administrative  
4028 Procedures Act. The amendment would not prevent agencies to  
4029 respond to emergencies in those circumstances because  
4030 agencies can proceed without notice and comment procedures.  
4031 They do not have to use RFA procedures.

4032 And for these reasons, I oppose the amendment and  
4033 yield back.

4034 Chairman Smith. Thank you, Mr. Coble. Are there  
4035 other members who wish to be heard on the amendment?

4036 If not, the question is on the amendment. Those in  
4037 favor, say aye.

4038 [A chorus of ayes.]

4039 Chairman Smith. Those opposed, no.

4040 [A chorus of nays.]

4041 Chairman Smith. It is the opinion of the chair that  
4042 the nos have it, and the amendment is not agreed to.

4043 We will now proceed with I believe the gentleman from  
4044 New York's amendment. And the gentleman from New York, Mr.  
4045 Nadler, is recognized to offer that amendment?

4046 Mr. Nadler. Thank you. I have amendment number 34 at  
4047 the desk.

4048 Chairman Smith. The clerk will report the amendment?

4049 Ms. Kish. Amendment to H.R. 527, offered by Mr.

4050 Nadler of New York. Page 10, beginning on line one, strike  
4051 "describing the objectives of" --

4052 Chairman Smith. Without objection, the amendment will  
4053 be considered as read, and the gentleman is recognized to  
4054 explain the amendment?

4055 Mr. Nadler. Thank you, Mr. Chairman.

4056 As we have discussed today, many of us on this side of  
4057 the aisle, including myself, are opposed to the underlying  
4058 bill as it throws up a number of needless road blocks to  
4059 Federal agency rulemaking. The health and safety of the  
4060 American people will likely suffer as a result of H.R. 527  
4061 as drafted if it is enacted.

4062 Specifically, the bill focuses on increasing the  
4063 extent to which the projected costs of a proposed rule on  
4064 small entities are considered. Section 2(b) expands current  
4065 law so that an agency would have to consider and include in  
4066 its analysis of a proposed rule's impact on small entities,  
4067 not only the direct cost of a proposed rule, but the  
4068 indirect costs of a proposed rule on all small entities that  
4069 are reasonably foreseeable. Whether or not said entities  
4070 are regulated by the rule.

4071 I do not agree with requiring agencies to determine  
4072 indirect costs on all small entities. What amounts to  
4073 reasonably foreseeable indirect costs is highly speculative  
4074 and subjective. It is, thus, unclear what useful

4075 information could come of such an analysis, if any.

4076           One thing the provision does do is make it easier to  
4077 have the rules thrown out. If a business does not agree  
4078 that the agency really considers all of the indirect costs,  
4079 it gives the business other grounds on which to challenge  
4080 the agency's rulemaking in court.

4081           Moreover, requiring an agency to spend time doing such  
4082 an esoteric analysis puts an extra burden on it. The bill  
4083 provides no extra resources for an agency to do this task.  
4084 Adding this extra burden makes enacting meaningful  
4085 regulations which protect the public health and safety that  
4086 much more difficult.

4087           For these reasons, I do not support requiring agencies  
4088 to report on and consider the indirect costs of proposed  
4089 rules. But if we are going to require this indirect cost  
4090 analysis, there should at least be some balance. My  
4091 amendment would achieve that balance by also requiring an  
4092 agency to include direct benefits and reasonably foreseeable  
4093 indirect benefits of a proposed rule in its initial and  
4094 final regulatory flexibility analysis.

4095           In explaining the rationale behind the rulemaking, an  
4096 agency typically delineates the benefits of a proposed rule.  
4097 And according to testimony at the Administrative Law  
4098 Subcommittee hearing in February from the NFIB, regulatory  
4099 agencies often proclaim indirect benefits from regulatory

4100 proposals. So, my amendment likely would not impose a new  
4101 burden in most agencies.

4102 My amendment simply would ensure that to the extent  
4103 they are not made explicit, direct benefits and reasonably  
4104 foreseeable indirect benefits of a proposed rule will be  
4105 considered. And it would ensure that these benefits are  
4106 included alongside direct and indirect costs to small  
4107 entities' and in agencies' initial and final regulatory  
4108 flexibility analysis.

4109 Small entities, the public, and others who are  
4110 concerned about a proposed rule should have the ability to  
4111 read about its direct and indirect benefits in that  
4112 analysis, as well as its direct and indirect costs. It  
4113 simply balances by requiring direct and indirect benefits as  
4114 well as direct and indirect costs.

4115 I urge all members to support the amendment, and I  
4116 yield back the balance of my time.

4117 Chairman Smith. Thank you, Mr. Nadler.

4118 The gentleman from North Carolina, Mr. Coble?

4119 Mr. Coble. Thank you, Mr. Chairman.

4120 Mr. Chairman, I oppose the amendment because it misses  
4121 the purpose of the Regulatory Flexibility Act.

4122 The law is not designed to measure benefits of  
4123 regulation. It is designed, rather, to protect small  
4124 businesses from excessive or overregulation.

4125 Agencies already evaluate the asserted benefits of a  
4126 given new regulation while at the same time developing it.  
4127 That is not what the Regulatory Flexibility Act is for.  
4128 Accordingly, there is no reason agencies should be required  
4129 to analyze purported benefits in a regulatory flexibility  
4130 analysis. And for this reason, I oppose the amendment.

4131 Chairman Smith. Thank you, Mr. Coble.

4132 Are there other members who wish to be heard on the  
4133 amendment?

4134 If not, all in favor, say aye.

4135 [A chorus of ayes.]

4136 Chairman Smith. All opposed, say nay.

4137 [A chorus of nays.]

4138 Chairman Smith. In the opinion of the chair, the nays  
4139 have it, and the amendment is not agreed to.

4140 Mr. Nadler. Mr. Chairman, a recorded vote, please.

4141 Chairman Smith. The clerk will call the roll?

4142 Ms. Kish. Mr. Smith?

4143 Chairman Smith. No.

4144 Ms. Kish. Mr. Smith votes no.

4145 Mr. Sensenbrenner?

4146 [No response.]

4147 Ms. Kish. Mr. Coble?

4148 Mr. Coble. No.

4149 Ms. Kish. Mr. Coble votes no.

4150 Mr. Gallegly?  
4151 Mr. Gallegly. No.  
4152 Ms. Kish. Mr. Gallegly votes no.  
4153 Mr. Goodlatte?  
4154 [No response.]  
4155 Ms. Kish. Mr. Lundgren?  
4156 Mr. Lungren. No.  
4157 Ms. Kish. Mr. Lungren votes no.  
4158 Mr. Chabot?  
4159 Mr. Chabot. No.  
4160 Ms. Kish. Mr. Chabot votes no.  
4161 Mr. Issa?  
4162 [No response.]  
4163 Ms. Kish. Mr. Pence?  
4164 [No response.]  
4165 Ms. Kish. Mr. Forbes?  
4166 Mr. Forbes. No.  
4167 Ms. Kish. Mr. Forbes votes no.  
4168 Mr. King?  
4169 [No response.]  
4170 Ms. Kish. Mr. Franks?  
4171 Mr. Franks. No.  
4172 Ms. Kish. Mr. Franks votes no.  
4173 Mr. Gohmert?  
4174 [No response.]

4175 Ms. Kish. Mr. Jordan?  
4176 Mr. Jordan. No.  
4177 Ms. Kish. Mr. Jordan votes no.  
4178 Mr. Poe?  
4179 [No response.]  
4180 Ms. Kish. Mr. Chaffetz?  
4181 Mr. Chaffetz. No.  
4182 Ms. Kish. Mr. Chaffetz votes no.  
4183 Mr. Griffin?  
4184 Mr. Griffin. No.  
4185 Ms. Kish. Mr. Griffin votes no.  
4186 Mr. Marino?  
4187 Mr. Marino. No.  
4188 Ms. Kish. Mr. Marino votes no.  
4189 Mr. Gowdy?  
4190 Mr. Gowdy. No.  
4191 Ms. Kish. Mr. Gowdy votes no.  
4192 Mr. Ross?  
4193 Mr. Ross. No.  
4194 Ms. Kish. Mr. Ross votes no.  
4195 Ms. Adams?  
4196 Mrs. Adams. No.  
4197 Ms. Kish. Ms. Adams votes no.  
4198 Mr. Quayle?  
4199 Mr. Quayle. No.

4200 Ms. Kish. Mr. Quayle votes no.  
4201 Mr. Conyers?  
4202 Mr. Conyers. Aye.  
4203 Ms. Kish. Mr. Conyers votes aye.  
4204 Mr. Berman?  
4205 [No response.]  
4206 Ms. Kish. Mr. Nadler?  
4207 Mr. Nadler. Aye.  
4208 Ms. Kish. Mr. Nadler votes aye.  
4209 Mr. Scott?  
4210 Mr. Scott. Aye.  
4211 Ms. Kish. Mr. Scott votes aye.  
4212 Mr. Watt?  
4213 [No response.]  
4214 Ms. Kish. Ms. Lofgren?  
4215 Ms. Lofgren. Aye.  
4216 Ms. Kish. Ms. Lofgren votes aye.  
4217 Ms. Jackson Lee?  
4218 [No response.]  
4219 Ms. Kish. Ms. Waters?  
4220 Ms. Waters. Aye.  
4221 Ms. Kish. Ms. Waters votes aye.  
4222 Mr. Cohen?  
4223 Mr. Cohen. Aye.  
4224 Ms. Kish. Mr. Cohen votes aye.

4225 Mr. Johnson?

4226 Mr. Johnson. Aye.

4227 Ms. Kish. Mr. Johnson votes aye.

4228 Mr. Johnson. Aye.

4229 Ms. Kish. Mr. Johnson votes aye.

4230 Mr. Pierluisi?

4231 [No response.]

4232 Ms. Kish. Mr. Quigley?

4233 [No response.]

4234 Ms. Kish. Ms. Chu?

4235 Ms. Chu. Aye.

4236 Ms. Kish. Ms. Chu votes aye.

4237 Mr. Deutch?

4238 [No response.]

4239 Ms. Kish. Ms. Sanchez?

4240 [No response.]

4241 Chairman Smith. The gentleman from Virginia, Mr.

4242 Goodlatte?

4243 Mr. Goodlatte. No.

4244 Chairman Smith. He votes no, okay.

4245 Ms. Kish. Mr. Goodlatte votes no.

4246 Chairman Smith. The gentleman from Ohio, Mr. King.

4247 Mr. King. I am from Iowa.

4248 Chairman Smith. Oh, I am sorry. From Iowa. Oh.

4249 Ms. Kish. Mr. King votes no.

4250 Chairman Smith. The clerk will call the roll.

4251 Ms. Kish. Mr. Chairman, eight members voted aye, 17  
4252 members voted nay.

4253 Chairman Smith. The majority having voted against the  
4254 amendment, the amendment is not agreed to.

4255 The gentleman is recognized for another amendment?

4256 Mr. Nadler. Thank you.

4257 Chairman Smith. The clerk will report the amendment.

4258 Mr. Nadler. Mr. Chairman, I have an amendment at the  
4259 desk, number 35.

4260 Chairman Smith. The clerk will report the amendment?

4261 Ms. Kish. Amendment to H.R. 527, offered by Mr.  
4262 Nadler of New York. Beginning on page 20, line 19, strike  
4263 through page 21 --

4264 Chairman Smith. Without objection, the amendment will  
4265 be considered as read.

4266 [The information follows:]

4267

4268 Chairman Smith. And the gentleman from New York is  
4269 recognized to explain the amendment?

4270 Mr. Nadler. Thank you, Mr. Chairman.

4271 Mr. Chairman, current law Section 610 of Title V  
4272 requires an agency to do a periodic review of rules which  
4273 have a significant economic impact on a substantial number  
4274 of small entities. The purpose of that review is to see  
4275 which rules, if any, should be repealed or changed, and if  
4276 changed, in what way.

4277 Section 6 of H.R. 527 makes a number of changes to the  
4278 requirement of periodic rule review. One of those changes  
4279 frankly makes no sense. Even if it is simply a drafting  
4280 error, it could have the effect of undoing many current  
4281 regulations.

4282 The new paragraph (d) of Section 610 in Title V as  
4283 amended by the bill would say in part that, "In reviewing a  
4284 rule pursuant to subsections (a) and (c), the agencies shall  
4285 amend or rescind the rule" to minimize the adverse economic  
4286 impact while maximize economic benefits to small entities of  
4287 the rule.

4288 Use of the word "shall" means an agency would have no  
4289 choice but to change or repeal any rule which it finds has a  
4290 significant economic impact on a substantial number of small  
4291 entities.

4292 It is clear why this requirement makes no sense. Why

4293 create a system under which an agency is supposed to review  
4294 regulations to determine what, if anything, to do with them  
4295 on the one hand, only to require a change of said rule on  
4296 the other? In fact, let me read from page 19 of the bill,  
4297 which contains the new paragraph (a) of Section 610. It  
4298 says in part the following: "The purpose of the review  
4299 shall be to determine whether such rule should be continued  
4300 without change or should be amended or rescinded to minimize  
4301 any adverse significant economic impacts."

4302         This stated purpose of the period review is an actual  
4303 analysis. Should an agency keep the change or appeal the  
4304 rule? It is illogical to then require the agency to amend  
4305 or rescind the rule, and prohibit it from keeping it as is  
4306 if it finds that advisable.

4307         Even if this illogical language was simply mistaken,  
4308 it amounts to a broadside attack on regulations of all  
4309 kinds. Regardless of the underlying merits of an existing  
4310 rule, this language would require a change or appeal of any  
4311 rule which has a certain impact on small entities. Using  
4312 such a broad brush is now way to legislate, and it puts in  
4313 danger rules which protects public health and safety.

4314         We should leave a decision whether or not a rule  
4315 should be changed or repealed to the agency itself. It is  
4316 the agency which has the facts, the expertise, and the  
4317 knowledge to make the most informed decision.

4318 My amendment would fix the bill by changing the  
4319 "shall" to "may." It would amend paragraph (d) to say that  
4320 an agency may amend or rescind a rule pursuant to the review  
4321 provided for in the rest of Section 610. It also takes the  
4322 language of the underlying bill in terms of addressing any  
4323 adverse economic impact of a rule or changes to a rule,  
4324 which could result in economic benefits for small entities,  
4325 and would require the agency to consider them in its review.

4326 The changes in this amendment is just a common sense  
4327 correction to what appears to be a drafting error in the  
4328 underlying bill. It would preserve existing regulations and  
4329 let an agency decide as part of its periodic review whether  
4330 those rules should be amended or repealed. Such a change  
4331 should not be dictated by Congress. In fact, we would not  
4332 be dictating. We would simply be saying, you must change  
4333 the rules in an unspecific way. You must review it, and you  
4334 must find some way to change it. That does not make any  
4335 sense. We should say you must review it, and if in your  
4336 view, it would aid the purpose of the bill, you may change  
4337 it or rescind it.

4338 So, this amendment would change the word "shall" to  
4339 the word "may," which I think effectuates the underlying  
4340 purpose of the bill. And while I hate to perfect a bill  
4341 that I do not like, nonetheless craftsmanship says we really  
4342 ought to do it.

4343 I ask all members to support the amendment, and I  
4344 yield back the balance of my time.

4345 Chairman Smith. Thank you, Mr. Nadler. And I will  
4346 recognize myself in opposition.

4347 If experience with the Regulatory Flexibility Act has  
4348 taught us anything, it is that if you give agencies an inch,  
4349 they will take a mile. This bill closes the loopholes and  
4350 ambiguities in the current law to force agencies to give  
4351 small businesses the attention they are supposed to be  
4352 giving them now. This amendment offers agencies a loophole  
4353 when conducting regulatory review.

4354 The bill says agencies shall minimize the burdens of  
4355 existing regulations on small businesses. It does not say  
4356 "may" as the amendment proposes because "may" is the gold  
4357 standard for an agency loophole.

4358 Unfortunately, it has not worked to ask agencies  
4359 nicely to reduce the regulatory burden on small businesses.  
4360 It is now time to insist that they reduce the burden. For  
4361 those reasons, I oppose the --

4362 Mr. Nadler. Would the gentleman yield?

4363 Chairman Smith. And I would be happy to yield to the  
4364 gentleman.

4365 Mr. Nadler. Yeah. Mr. Chairman, it is not the  
4366 language that says it shall review that we are talking  
4367 about. It is the language that says, in reviewing the

4368 agency shall amend or rescind. It should certainly say  
4369 "shall review," but what if it finds that there is no reason  
4370 to amend or rescind?

4371 Chairman Smith. I will reclaim my time. The  
4372 agencies, as the gentleman well knows, are going to take any  
4373 permissive language, like "may," that is not mandatory, and  
4374 that is a loophole through which I think a lot of agencies  
4375 will escape. And we have seen that in current law where the  
4376 agencies have been able to dodge even the current  
4377 requirements that the Administration supports. And so, any  
4378 permissive language, I think, is just too big of a loophole  
4379 wherever it may exist in the --

4380 Mr. Nadler. Would the gentleman yield again?

4381 Chairman Smith. And, yes, I would be happy to yield  
4382 again.

4383 Mr. Nadler. I would simply point out that, you know,  
4384 if you leave the language as it is, and if the agency feels  
4385 that no change is necessary, they will make a change which  
4386 makes no change. They will change the wording in an  
4387 inconsequential way. And they will simply waste some money  
4388 changing the wording. All my amendment would say is if they  
4389 feel no change is warranted, they should say so, as opposed  
4390 to they must change it no matter what, and they will find  
4391 some meaningless way to change it.

4392 Chairman Smith. Well, I thank the gentleman for his

4393 comments. We have an honest difference of opinion. I think  
4394 the agencies need to be mandated, and that is why I disagree  
4395 with his permissive language of "may."

4396 Are there other members who wish to be heard? And if  
4397 not, we will vote on the amendment.

4398 All in favor, say aye.

4399 [A chorus of ayes.]

4400 Chairman Smith. Opposed, nay?

4401 [A chorus of nays.]

4402 Chairman Smith. In the opinion of the chair, the nays  
4403 have it, and the amendment is not agreed to.

4404 Let me announce to the members who are here, I do not  
4405 know of any other amendments to this bill. What I propose  
4406 to do is to continue with the opening statements for H.R.  
4407 1932, The Keep Our Communities Safe Act. So I do not expect  
4408 any further votes today in this committee. We are going to  
4409 vote on final passage, but I just want to let members know  
4410 before they leave or for their planning purposes.

4411 Mr. Coble. Mr. Chairman.

4412 Chairman Smith. Who seeks recognition?

4413 Mr. Coble. Permission to speak out of turn for one  
4414 minute.

4415 Chairman Smith. Oh, the gentleman from North  
4416 Carolina?

4417 Mr. Coble. Mr. Chairman, I would like to introduce

4418 for the record letters from NFIB, which was addressed to you  
4419 and Mr. Conyers, and a letter from the National Restaurant  
4420 Association, which was addressed to Mr. Cohen and me, in  
4421 support of the bill.

4422 Chairman Smith. Okay. Without objection, we will  
4423 make that a part of the record.

4424 [The information follows:]

4425

4426 Chairman Smith. A reporting quorum being present, the  
4427 question is on reporting the bill as amended favorably to  
4428 the House.

4429 Those in favor, say aye.

4430 [A chorus of ayes.]

4431 Chairman Smith. Opposed, no.

4432 [A chorus of nays.]

4433 Chairman Smith. The ayes have it, and the bill, as  
4434 amended, is ordered reported favorably.

4435 A record vote has been requested, and the clerk will  
4436 call the roll.

4437 Ms. Kish. Mr. Smith?

4438 Chairman Smith. No.

4439 Ms. Kish. Mr. Smith votes aye.

4440 Mr. Sensenbrenner?

4441 [No response.]

4442 Ms. Kish. Mr. Coble?

4443 Mr. Coble. Aye.

4444 Ms. Kish. Mr. Coble votes aye.

4445 Mr. Gallegly?

4446 Mr. Gallegly. Aye.

4447 Ms. Kish. Mr. Gallegly votes aye.

4448 Mr. Goodlatte?

4449 [No response.]

4450 Ms. Kish. Mr. Lundgren?

4451 Mr. Lungren. Aye.  
4452 Ms. Kish. Mr. Lungren votes aye.  
4453 Mr. Chabot?  
4454 Mr. Chabot. Aye.  
4455 Ms. Kish. Mr. Chabot votes aye.  
4456 Mr. Issa?  
4457 [No response.]  
4458 Ms. Kish. Mr. Pence?  
4459 [No response.]  
4460 Ms. Kish. Mr. Forbes?  
4461 Mr. Forbes. Aye.  
4462 Ms. Kish. Mr. Forbes votes aye.  
4463 Mr. King?  
4464 Mr. King. Aye.  
4465 Ms. Kish. Mr. King votes aye.  
4466 Mr. Franks?  
4467 Mr. Franks. Aye.  
4468 Ms. Kish. Mr. Franks votes aye.  
4469 Mr. Gohmert?  
4470 [No response.]  
4471 Ms. Kish. Mr. Jordan?  
4472 Mr. Jordan. Aye.  
4473 Ms. Kish. Mr. Jordan votes yes.  
4474 Mr. Poe?  
4475 [No response.]

4476 Ms. Kish. Mr. Chaffetz?  
4477 Mr. Chaffetz. Aye.  
4478 Ms. Kish. Mr. Chaffetz votes aye.  
4479 Mr. Griffin?  
4480 [No response.]  
4481 Ms. Kish. Mr. Marino?  
4482 Mr. Marino. Yes.  
4483 Ms. Kish. Mr. Marino votes yes.  
4484 Mr. Gowdy?  
4485 Mr. Gowdy. Yes.  
4486 Ms. Kish. Mr. Gowdy votes yes.  
4487 Mr. Ross?  
4488 Mr. Ross. Yes.  
4489 Ms. Kish. Mr. Ross votes yes.  
4490 Ms. Adams?  
4491 Mrs. Adams. Yes.  
4492 Ms. Kish. Ms. Adams votes yes.  
4493 Mr. Quayle?  
4494 Mr. Quayle. Aye.  
4495 Ms. Kish. Mr. Quayle votes aye.  
4496 Mr. Conyers?  
4497 Mr. Conyers. No.  
4498 Ms. Kish. Mr. Conyers votes no.  
4499 Mr. Berman?  
4500 [No response.]

4501 Ms. Kish. Mr. Nadler?  
4502 Mr. Nadler. No.  
4503 Ms. Kish. Mr. Nadler votes no.  
4504 Mr. Scott?  
4505 Mr. Scott. No.  
4506 Ms. Kish. Mr. Scott votes no.  
4507 Mr. Watt?  
4508 [No response.]  
4509 Ms. Kish. Ms. Lofgren?  
4510 Ms. Lofgren. No.  
4511 Ms. Kish. Ms. Lofgren votes no.  
4512 Ms. Jackson Lee?  
4513 [No response.]  
4514 Ms. Kish. Ms. Waters?  
4515 Ms. Waters. No.  
4516 Ms. Kish. Ms. Waters votes no.  
4517 Mr. Cohen?  
4518 Mr. Cohen. No.  
4519 Ms. Kish. Mr. Cohen votes no.  
4520 Mr. Johnson?  
4521 [No response.]  
4522 Ms. Kish. Mr. Pierluisi?  
4523 [No response.]  
4524 Ms. Kish. Mr. Quigley?  
4525 [No response.]

4526 Ms. Kish. Ms. Chu?  
4527 Ms. Chu. No.  
4528 Ms. Kish. Ms. Chu votes no.  
4529 Mr. Deutch?  
4530 [No response.]  
4531 Ms. Kish. Ms. Sanchez?  
4532 [No response.]  
4533 Chairman Smith. The gentleman from California, Mr.  
4534 Issa?  
4535 Ms. Kish. Mr. Issa votes aye.  
4536 Chairman Smith. The gentleman from Virginia?  
4537 Mr. Goodlatte. Aye.  
4538 Ms. Kish. Mr. Goodlatte votes aye.  
4539 Chairman Smith. The gentleman from Arkansas?  
4540 Mr. Griffin. Aye.  
4541 Ms. Kish. Mr. Griffin votes aye.  
4542 Chairman Smith. The gentleman from Georgia?  
4543 Mr. Johnson. Aye.  
4544 Chairman Smith. The gentleman may want to --  
4545 Mr. Johnson.  
4546 Ms. Kish. Mr. Johnson votes no.  
4547 Chairman Smith. The gentleman from Georgia votes no.  
4548 The clerk will report?  
4549 Ms. Kish. Mr. Chairman, 18 members voted aye, eight  
4550 members voted nay.

4551 Chairman Smith. The ayes have it, and the bill as  
4552 amended is ordered reported favorably. Without objection,  
4553 the bill will be reported as a single amendment in the  
4554 nature of a substitute incorporating the amendment adopted.  
4555 The staff is authorized to make technical and conforming  
4556 changes. And members will have two days to submit views.  
4557 [The information follows:]  
4558

4559 Chairman Smith. As I mentioned a while ago, that  
4560 concludes the actual markup of the Judiciary Committee. We  
4561 are going to proceed to opening statements on H.R. 1932.  
4562 And I do not expect any more votes today.

4563 I would like to thank all the members for their  
4564 participation today.

4565 Ms. Lofgren. Could I ask a question?

4566 Chairman Smith. The gentlewoman from California, yes?

4567 Ms. Lofgren. On schedule, I understand that you have  
4568 suggested opening statements. When would the bill be  
4569 scheduled for markup?

4570 Chairman Smith. I would expect us to continue next  
4571 week.

4572 Ms. Lofgren. Thank you.

4573 Chairman Smith. Pursuant to notice, I now call up  
4574 H.R. 1932 for purposes of opening statements and a markup  
4575 later on.

4576 The clerk will report the bill?

4577 Ms. Kish. H.R. 1932, to amend the --

4578 Chairman Smith. Without objection the bill will be  
4579 considered as read.

4580 [The information follows:]

4581

4582 Chairman Smith. And I will begin by recognizing  
4583 myself and the ranking member, and then the chairman and  
4584 ranking members of the subcommittee.

4585 In the 2001 decision of *Zadvydas v. Davis*, the Supreme  
4586 Court ruled that immigrants ordered removed could not be  
4587 detained more than six months if there was no reasonable  
4588 likelihood of their being deported.

4589 According to recent data from U.S. Immigration and  
4590 Customs Enforcement, *Zadvydas* and a companion decision have  
4591 resulted in the release of nearly 4,000 dangerous criminal  
4592 immigrants each year since 2008. These Supreme Court  
4593 decisions have inadvertently created a safe haven for  
4594 criminals. Why can we not deport immigrants after they have  
4595 been ordered removed?

4596 In 2006, the Department of Homeland Security's  
4597 inspector general reported that thousands of immigrants  
4598 could not be removed because some countries frustrate the  
4599 removal process. The inspector general found that nearly  
4600 134,000 immigrants with pending or final orders of removal  
4601 had been released from 2001 to 2004. The inspector general  
4602 found that these immigrants were unlikely to ever be  
4603 repatriated if ordered removed because of the unwillingness  
4604 of their countries of origin to provide them the necessary  
4605 travel documents.

4606 Thousands of criminal immigrants ordered removed have

4607 been released. This includes an immigrant who was  
4608 implicated in a mob-related multiple homicide. It also  
4609 includes an immigrant who shot a New York State trooper  
4610 after being released. In at least two other tragic  
4611 instances, criminal immigrants released because of *Zadvydas*  
4612 have gone on to commit multiple murders.

4613 Wang Chen was ordered removed for assaulting Kyen Woo.  
4614 China refused to grant Wang the necessary documents, and he  
4615 was released as a result of *Zadvydas*. He was again released  
4616 after another assault and another removal order. He went on  
4617 to violently murder Ms. Woo.

4618 Abel Arango served time in prison for armed robbery.  
4619 Since Cuba would not take him back, he was released from DHS  
4620 detention. He then went on to shoot Ft. Myers, Florida  
4621 police officer, Andrew Widman, in the face. Officer Woodman  
4622 never had the opportunity to draw his weapon. The husband  
4623 and father of three died at the scene.

4624 Just because a criminal immigrant cannot be returned  
4625 to their home country does not mean they should be freed  
4626 into our communities. Dangerous criminal immigrants need to  
4627 be detained.

4628 H.R. 1932, the Keep Our Communities Safe Act, provides  
4629 a statutory basis for DHS to detain, as long as necessary,  
4630 specified dangerous immigrants who cannot be removed. The  
4631 bill authorizes DHS to detain them beyond six months in

4632 circumstances such as where release would threaten the  
4633 safety of the community and the alien is an aggravated felon  
4634 or has committed a crime of violence.

4635 Aliens may be detained for periods of six months at a  
4636 time, and the period of detention may be renewed. The bill  
4637 provides for judicial review of detention decisions in the  
4638 United States District Court for the District of Columbia.  
4639 H.R. 1932 also corrects a number of ill-considered detention  
4640 decisions handed down by the Ninth Circuit. The Circuit has  
4641 ruled that criminal immigrants in the middle of protracted  
4642 removal proceedings have to be released from detention.  
4643 This gives criminal immigrants an additional incentive to  
4644 engage in delaying tactics in court.

4645 The Ninth Circuit ignores the hard earned lesson that  
4646 when immigrants in removal proceedings are not detained,  
4647 they abscond and become fugitives. That is why over half a  
4648 million fugitives are now roaming our streets. This  
4649 legislation allows DHS to detain criminal immigrants in  
4650 removal proceedings.

4651 The Keep Our Communities Safe Act is desperately  
4652 needed. We cannot continue to let dangerous criminal  
4653 immigrants slip through the cracks of our legal justice  
4654 system. While we are too late to prevent some tragedies,  
4655 let us act today and next week to prevent many more.

4656 We have a responsibility to make sure the laws of this

4657 land protect Americans rather than endanger them. I urge my  
4658 colleagues to support this legislation.

4659 And I now recognize the ranking member, Mr. Conyers,  
4660 the gentleman from Michigan?

4661 Mr. Conyers. Thank you, Chairman Smith.

4662 I agree with you about the tragedy of the half dozen  
4663 cases you have cited. But we are dealing here with a  
4664 constitutional question that I am not sure we will be going  
4665 right up against as *Zadvydas v. Davis*, which has already  
4666 held that serious constitutional concerns raised by the  
4667 indefinite detention of a non-citizen ordered removed, but  
4668 for whose removal is not significantly likely to occur in  
4669 the reasonable future, that such a person can be released or  
4670 can be detained.

4671 And for the several thousand cases that you cited, the  
4672 overwhelming majority of them were not violent, were not  
4673 criminals. Some were not even found or convicted. And the  
4674 overwhelming majority, just by a rough estimate, way over 90  
4675 percent of them did not create any problem at all. So, what  
4676 we are saying here is that a Supreme Court case deserves to  
4677 be overturned because of the conduct of a very few people.

4678 Now, we can agree that there are situations where  
4679 indefinite detention may be warranted for the dangerous  
4680 ones, but there is a way to do it in a manner that meets  
4681 constitutional scrutiny. However, rather than heeding the

4682 Court's warning, the measure that we are introducing this  
4683 afternoon will allow indefinite detention of persons who  
4684 present absolutely no danger. And that is what I would like  
4685 the committee to concentrate on. That is the problem. If  
4686 it were not for that, I think we would be in a lot more  
4687 agreement.

4688 What we are doing now is trampling due process rights,  
4689 a constitutional guarantee. And because we bring all of  
4690 these cases, it will bring the court business to a  
4691 standstill in the District Court of the District of Columbia  
4692 where these matters must be brought. It would subject  
4693 thousands of immigrant detainees to mandatory detention with  
4694 no opportunity for even a bond hearing.

4695 Let us consider the scope and breadth of what is  
4696 involved in H.R. 1932. No bond hearing, even if they pose  
4697 no risk to the public and no risk of flight. This goes far  
4698 beyond keeping dangerous people off our streets. These  
4699 provisions would reach asylum seekers fleeing prosecution  
4700 and long-term legal permanent residents who pose absolutely  
4701 no danger to society.

4702 And if the human costs of denying liberty is not  
4703 enough, think of the costs involved. We already spend over  
4704 \$2 billion a year on detention costs alone, and that price  
4705 will obviously skyrocket if this measure were to ever become  
4706 law. It costs \$122 a day or more in taxpayer dollars to

4707 detain on average a single person. That is \$45,000 a year  
4708 and rising. And I do not think that is an appropriate cost  
4709 to detain a person who, by agreement with the prosecutor,  
4710 poses no threat to our communities, no flight risk, and  
4711 whose only crime, if this is a crime, of being an immigrant.

4712 I cannot help but note the irony that frequently this  
4713 committee has considered amending our Constitution to curb  
4714 spending and balance the budget, and other committees. But  
4715 today we are considering a bill that will create astonishing  
4716 costs while simultaneously reducing constitutional rights.

4717 I ask for one additional minute.

4718 Chairman Smith. Without objection, the gentleman is  
4719 recognized for an additional minute.

4720 Mr. Conyers. Thank you. The bill also tramples due  
4721 process rights, which is also a constitutional guarantee for  
4722 all people in the country, not just U.S. citizens. But  
4723 under this legislation, detainees with final orders of  
4724 removal can be held indefinitely simply by the stroke of the  
4725 pen from the Secretary of Homeland Security or the director  
4726 of the Immigration and Customs Enforcement.

4727 And so, this means that our process would be allowed  
4728 to condemn a person to indefinite detention without a  
4729 hearing before a neutral body or so much as a personal  
4730 interview. And so, I urge that we give this a little more  
4731 thought as the process moves forward.

4732 I thank you for the additional time.

4733 Chairman Smith. Thank you, Mr. Conyers.

4734 The gentleman from California, Mr. Gallegly, is  
4735 recognized?

4736 Mr. Gallegly. Thank you very much, Mr. Chairman.

4737 I want to indicate my strong support for H.R. 1932,  
4738 Keep Our Communities Safe Act. The Subcommittee on  
4739 Immigration Policy and Enforcement held a hearing on this  
4740 legislation back on the 24th of May. During the hearing,  
4741 the subcommittee heard about the brutal murder of 16-year-  
4742 old Ashton Kline McMurray. Ashton, was a disabled person  
4743 with cerebral palsy, was killed while walking home from a  
4744 football game outside of Boston. One of the attackers, an  
4745 illegal immigrant, could not be deported after serving a  
4746 very lenient criminal sentence because his native Cambodia  
4747 refused to take him back.

4748 Because of the Supreme Court's *Zadvydas* decision, the  
4749 criminal alien was released onto our streets instead of  
4750 being held in a detention facility by the U.S. Bureau of  
4751 Immigration and Customs Enforcement.

4752 The bill Mr. Smith, our chairman, has introduced  
4753 effectively deals with the problems caused by the *Zadvydas*  
4754 case. As a result, we will be able to rest assured knowing  
4755 that violent criminal immigrants will not be released onto  
4756 our communities, and the American public will be kept much

4757 safer from issues like the one I just mentioned.

4758           Again, I want to thank Chairman Smith for introducing  
4759 H.R. 1932, and I strongly urge my colleagues to support this  
4760 legislation.

4761           Chairman Smith. Would the gentleman yield?

4762           Mr. Gallegly. Yes, I will yield.

4763           Chairman Smith. Thank the gentleman for yielding. I  
4764 just want to reassure the ranking member that the language  
4765 in this bill is specifically written so that we are trying  
4766 to keep the dangerous criminal aliens off the streets and  
4767 out of our communities, not individuals who are not going to  
4768 present a danger. And furthermore, rather than being non-  
4769 reviewable indefinitely, there are provisions in the bill  
4770 that allow the detention to be reviewed every six months.  
4771 And so, we do believe it is constitutional for those  
4772 reasons.

4773           I thank the gentleman for yielding. And I now will  
4774 recognize the gentlewoman from California, Ms. Lofgren, the  
4775 ranking member of the Immigration Subcommittee, for her  
4776 opening statement?

4777           Ms. Lofgren. Thank you, Mr. Chairman.

4778           The Congress, this Congress, began with the new  
4779 majority reading the United States Constitution aloud on the  
4780 House floor. The due process clause of the 5th Amendment to  
4781 the Constitution says "No person shall be deprived of life,

4782 liberty, or property without due process of law." And for  
4783 more than 110 years, the Supreme Court has recognized that  
4784 the due process clause applies to all persons within the  
4785 United States, including aliens, whether their presence here  
4786 is lawful, unlawful, temporary, or permanent.

4787         The bill before us today violates this fundamental  
4788 constitutional guarantee and would cost taxpayers a huge  
4789 amount of money. As Mr. Conyers has noted, ICE currently  
4790 spend about \$2 billion a year on detention alone, and this  
4791 would add to that very substantial expenditure.

4792         Parts of this bill authorizing indefinite and possibly  
4793 permanent detention of civil immigration detainees are a  
4794 response to the Supreme Court's 2001 decision in *Zadvydas v.*  
4795 *Davis*. There, the Court said, and I quote, "Freedom from  
4796 imprisonment from government custody detention or other  
4797 forms of physical restraint lie at the heart of the liberty  
4798 that the due process clause protects."

4799         H.R. 1932 not only ignores this constitutional  
4800 warning, but it goes further than past bills and authorizes  
4801 the prolonged and, in some cases, mandatory detention of  
4802 immigrants throughout removal proceedings with no limit in  
4803 time, few procedural protections, and no consideration of  
4804 whether detention is even necessary from a safety  
4805 standpoint.

4806         Now, we have heard about some individuals who have

4807 been released and have gone on to commit very serious  
4808 crimes. Those are terrible cases, and the holes that they  
4809 expose in our system should be address. But this bill  
4810 reaches far beyond dealing with these dangerous individuals.  
4811 The bill authorizes with almost no procedural checks the  
4812 extremely lengthy detention of asylum seekers and lawful  
4813 permanent residents, including those who have won their  
4814 cases at every level, but whose cases remain on appeal by  
4815 DHS.

4816 Our current removal process is far from perfect for or  
4817 thousands of people languishing in immigration detention for  
4818 prolonged periods of time, sometimes far longer than six  
4819 months or one year, while their cases work their way through  
4820 the system. Delays in our overburdened immigration courts  
4821 are substantial, and ICE's current enforcement priorities  
4822 are expected to lead to even greater delays. But this bill  
4823 does not fix the underlying problems of inefficiencies in  
4824 the removal process or our immigration detention system.

4825 We also know that thousands of people each year spend  
4826 more than six months in immigration custody beyond the date  
4827 of their final order of removal solely because their  
4828 governments refuse to cooperate with repatriation. We need  
4829 to improve our ability to remove people in our custody who  
4830 have final orders of removal. And I would note that the  
4831 case cited by the chairman of the Cambodian individual who

4832 committed a heinous crime would not be the case today  
4833 because the Cambodia now repatriates its individuals.

4834         And so, ICE and the State Department have recently  
4835 signed a memorandum of understanding that lays out a series  
4836 of escalating steps that can be taken to influence the  
4837 decisions of foreign governments so that they will take  
4838 their citizens back when there is a final order of  
4839 deportation. And I am hopeful that the MOU will improve the  
4840 situation, but this bill does not do anything about that  
4841 problem.

4842         Finally, we know that no matter what we do, there may  
4843 be some people who we are unable to remove from the United  
4844 States. In some cases, they are stateless as Mr. Zadvydas  
4845 himself was. There was no home country to be deported to  
4846 because there is no home country. And in that case, we have  
4847 to have a way to ensure public safety.

4848         Federal law permits the involuntary commitment of  
4849 persons who should not be released from custody at the end  
4850 of their prison sentences because they present a danger to  
4851 the public that cannot be mitigated. The law provides for  
4852 appointment of counsel, requires the government to prove its  
4853 case by clear and convincing evidence. And States also have  
4854 civil commitment procedures which are available for persons  
4855 being released from immigration custody.

4856         Current immigration regulations also provide for

4857 further detention in limited circumstances and require ICE  
4858 to prove its case to an immigration judge. Now, these  
4859 procedures meet the due process requirements of the  
4860 Constitution, and I recommend that we look to those statutes  
4861 for the remedies we need when there is a problem.

4862         If the current immigration regulations and the  
4863 availability of State civil commitment proceedings are  
4864 insufficient, there may be a third problem we have to solve.  
4865 But we need to design a system that is constitutional and  
4866 narrowly tailored. Today's bill allows for indefinite  
4867 detention in a broad category of cases without a hearing or  
4868 even a personal interview.

4869         As we began the 112th Congress, we consistently heard  
4870 two main themes from those on the other side of the aisle.  
4871 First, honor the Constitution and protect basic civil  
4872 liberties, and, second, cut the budget, exercise fiscal  
4873 responsibility. This bill falls short in both of those  
4874 areas. We need to take a look at our legitimate problems,  
4875 but we need to do so in a way that does not violate the  
4876 Constitution. And we should also do it in a way that is  
4877 prudent financially.

4878         And I now the chairman disagreed with the  
4879 categorization made by Mr. Conyers about the bill. I regret  
4880 in a way that the opening statements are separated from the  
4881 markup itself. I am sure that the chairman, as always, is

4882 sincere in his --

4883 Chairman Smith. If the gentlewoman would like to  
4884 expedite the markup, we could always start tomorrow morning  
4885 at 10:00, and I am more than happy --

4886 Ms. Lofgren. The chairman calls the schedule, not us.  
4887 But I would just note that, as always, I know the chairman  
4888 if sincere. But I think your statement is incorrect, and  
4889 the markup will do much to indicate why your statement is  
4890 falls short of the actual requirements in the bill.

4891 And with that, my time is up, and I would yield back.

4892 Mr. Conyers. Mr. Chairman, could the gentlelady have  
4893 an additional minute?

4894 Chairman Smith. Yes.

4895 Ms. Lofgren. No, no, I do not need it. If you want  
4896 me to get an additional minute and yield to you --

4897 Mr. Conyers. There is a reason --

4898 Ms. Lofgren. -- Mr. Conyers, I would ask for that.

4899 Mr. Conyers. Thank you very much.

4900 Chairman Smith. The gentleman from Michigan is  
4901 recognized.

4902 Mr. Conyers. I would just like to remind you that the  
4903 former chairwoman of the subcommittee has a large number of  
4904 letters from constitutional law professors, immigration  
4905 experts, and others that all are opposed to this bill. And  
4906 I think we ought to consider carefully including the

4907 Conference of Catholic Bishops, Lutheran Immigration Refugee  
4908 Services, Hebrew Immigrant Aid Society.

4909           The other thing, Chairman Smith, is that no one making  
4910 opening statements here have raised any response to the half  
4911 dozen constitutional and other disqualifying reasons of  
4912 logic against this bill. And I look forward to the  
4913 amendment process. I am rereading the hearing that we had  
4914 earlier on. But it seems to me that this could be a -- if  
4915 we do not do this carefully, we are working into a  
4916 constitutional problem in which a law that we have all  
4917 reviewed that we have examined, and because of a few  
4918 tragedies, we are now going to go in the other direction.  
4919 And so, I urge that the committee proceed with caution.

4920           And I thank you for the time.

4921           Chairman Smith. Thank you, Mr. Conyers. Thank you,  
4922 Ms. Lofgren.

4923           The committee will stand adjourned.

4924           [Whereupon, at 4:45 p.m., the committee was  
4925 adjourned.]