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MARKUP OF H.R. 5546, THE CREDIT CARD FAIR FEE ACT OF 2008;  
H.R. 4854, THE FALSE CLAIMS ACT CORRECTION ACT OF 2007; H.R.  
4081, THE PREVENT ALL CIGARETTE TRAFFICKING ACT OF 2007 OR  
PACT ACT; H.R. 6083, TO AUTHORIZE FUNDING FOR THE NATIONAL  
ADVOCACY CENTER; H.R. 5167, THE JUSTICE FOR VICTIMS OF  
TORTURE AND TERRORISM ACT; H.R. 2575, FOR THE PRIVATE RELIEF  
OF MIKAEL ALVAREZ; H.R. 5221, FOR THE PRIVATE RELIEF OF KUMI  
IIZUKA-BARCENA; AND H.R. 6034, TO AMEND THE IMMIGRATION AND  
NATIONALITY ACT TO PROVIDE FOR RELIEF TO SURVIVING SPOUSES  
AND CHILDREN

Wednesday, July 16, 2008

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

The committee met, pursuant to call, at 10:25 a.m., in  
Room 2141, Rayburn House Office Building, Hon. John Conyers,

Jr. [chairman of the committee] presiding.

Present: Representatives Conyers, Berman, Boucher, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Wexler, Sánchez, Cohen, Johnson, Sutton, Gutierrez, Sherman, Baldwin, Weiner, Schiff, Davis, Wasserman Schultz, Ellison, Smith, Sensenbrenner, Coble, Gallegly, Goodlatte, Chabot, Lungren, Cannon, Keller, Issa, Pence, Forbes, King, Feeney, Franks, Gohmert, and Jordan.

Staff Present: Perry Apelbaum, Staff Director/Chief Counsel; Ted Kalo, General Counsel/Deputy Staff Director; George Slover, Legislative Counsel/Parliamentarian; Sean McLaughlin, Minority Chief of Staff/General Counsel; Allison Halataei, Minority Deputy Chief of Staff/Parliamentarian; and Anita Johnson, Clerk.

Chairman Conyers. Good morning. The committee will come to order pursuant to notice. I call up bill H.R. 5546, the Credit Card Fair Fee Act of 2008 for purposes of markup. Would the clerk please report the bill.

The Clerk. H.R. 5546, a bill to amend the antitrust laws to ensure competitive market based rates and terms for merchant's access to electronic payment services.

Chairman Conyers. Without objection, the bill is considered read and open for amendment at any point.

[The information follows:]

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Chairman Conyers. May I describe the measure before us members of the committee? In my view, this represents a critical first step toward leveling what is right now an unlevel playing field involving major credit card companies and financial issuers on the one hand, and the various merchants on the other, and so we are trying to deal with a balancing of the considerations on each side of this issue. What does the bill do, what does the bill not do. First, the bill does not regulate the industry.

Second, the bill addresses anticompetitive aspects of interchange fees. Third, the bill asserts that lower interchange fees will help merchants and consumers in many ways, particularly in the form of lower prices. Now, some think that we set price controls. And I want to try to disabuse as many people as I can of that premise. Encouraging parties to negotiate is not regulation. The aim of the bill is to supply retailers a seat at the table that they currently don't have. And so retailers are now forced to enter a more or less take it or leave it contractual relationship before they can accept Visa and MasterCard at their stores. And so what the measure before us does is simply level the playing field and encourage negotiation. Now, let us look at the anticompetitive aspects of interchange fees. After two hearings, it appears clear that

there are serious anticompetitive concerns in the industry which can't be resolved by litigation alone. As things presently stand we have two dominant players who appear to be able to use market power presence of themselves and their issuers to put out these take it or leave it terms on the merchants directly and on the consumers indirectly. Given the realities of our electronic economy, most merchants believe it impossible to compete without the benefit of their electronic payment networks.

And so what is before us addresses the issue in an even-handed manner by encouraging a greater give and take in negotiations between the parties. Now, here is how lower interchange fees will help merchants and consumers and lower prices. In the year 2006, U.S. households paid an average of more than \$300 per family for hidden interchange fees, including households that don't even use credit cards. This legislation lowers those costs for all households as a result of the more even playing field. The result will be greater competition and increased consumer benefits. Merchants, we all know, are now some struggling to survive in the current economic environment.

One such businessman told me he was going to have to get rid of health benefits for his employees because interchange fees are so high. In Detroit, General Motors is announcing that their health benefits are going to be

seriously reduced because of their own and not problems related to the subject matter of this legislation. But we have seen numerous reports of gas stations going out of business. It is not surprising considering that last year credit card fees cost convenience stores \$7.6 billion, more than double the industry's profits of \$3.4 billion.

Now, I have a managers amendment that will shortly be offered to respond to many of the good faith concerns expressed by a number of members on the committee on both sides of the aisle. And so I remain receptive to other suggestions. Let us work together to fine-tune the legislation. And I would now conclude my statement and invite our ranking member, Lamar Smith, for his.

Mr. Smith. Thank you, Mr. Chairman. This committee has already conducted two hearings on the issue of credit card interchange fees. Retailers claim that Visa and MasterCard are charging excessive fees for use of their cards and that these fees are ultimately paid for by the consumers. A group of merchants has brought a series of Federal antitrust suits challenging the way that Visa and MasterCard set these interchange fees and they are pending in the Eastern District of New York now. For their part, the credit card companies maintain that setting credit card interchange fees is a necessary part of their business that maximizes the number of consumers who are willing to carry

their cards and the number of merchants who are willing to accept them. Today the committee is considering H.R. 5546, the Credit Card Fair Fee Act of 2008. This bill would mark a departure from the current system by establishing an antitrust exemption covering tens of thousands of banks and hundreds of thousands, if not millions, of merchants. The exemption would allow the banks and merchants to negotiate collectively over interchange fees. If they failed to reach an agreement, a three-judge panel would set the rates for them for a period of 3 years. After the antitrust task force hearing on this issue in May, I requested from the Department of Justice and the Federal Trade Commission that they provide their views on this legislation.

Both agencies expressed strong concerns about the bill, particularly the three-judge panel. To his credit, Chairman Conyers tried to address those concerns with a managers amendment. I appreciate his willingness to work to achieve a comprised bill. At this point, though, after talking with the stakeholders, I do not think that there is a compromise acceptable to both sides. That said, to me the fees that MasterCard and Visa set are too similar for mere coincidence. I do not feel they face the necessary and beneficial competitive restraints on their pricing. It does not appear that cash, checks or even other cards, such as American Express or Discover, significantly constrain Visa

and MasterCard's ability to set or raise rates on merchants and ultimately consumers.

While this bill is not the solution, my hope is that the banks and credit card companies will take the initiative to engage the merchants in a constructive dialogue that could lead to more transparency and a reevaluation of the interchange fees. Mr. Chairman, I yield back.

Chairman Conyers. Thank you very much, Lamar. Members, I have a managers amendment at the desk, and I ask the clerk to report the amendment.

The Clerk. Amendment to H.R. 5546 offered by Mr. Conyers of Michigan, also Mr. Cannon of Utah and Ms. Jackson Lee of Texas. Page 3 strike lines 4 through 8 and make such technical and conforming changes as may be appropriate. Page 3, line 18, strike quotation mark base year, end of quotation, and insert quotation calendar year immediately preceding the year.

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

[The information follows:]

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



Chairman Conyers. And I want to point out that Chris Cannon and Sheila Jackson Lee have been very helpful in crafting this managers amendment. And it does three things: First, it removes the three-judge panel from the bill. Secondly, the managers amendment allows small banks and credit unions to exempt themselves from the negotiation process if they don't believe it serves their best interest. And finally the managers amendment ensures that savings resulting from the negotiations are passed on to consumers. There is a lot of resistance to this three-judge panel, and so we have taken it out.

In response to concerns expressed by members of many different persuasions on the committee that the panel was overly intrusive and could lead to price controls, it retains provisions allowing for good faith negotiation between the parties and to ensure that the parties don't, in any way, abuse their powers. Now, we allow small banks and credit unions to exempt themselves from the negotiation process if they don't want it. This responds again to concerns that these small players are not responsible for competitive balance and rely on the income stream that credit card interchange fees afford in order to provide free checking and other services to their members and customers.

And then how do the consumers benefit? Members have

expressed concerns that merchants would simply pocket any savings under the bill instead of passing them through to their customers. And I applaud the gentlelady from Texas for drafting the important pro-consumer part of this measure. So we have had a lot of hearings. This managers amendment is hot off the press with what I think are fundamental improvements and revisions. And I hope that it satisfies those members who have brought these matters to the attention to me and my staff. Lamar Smith.

Mr. Smith. Thank you, Mr. Chairman. Mr. Chairman, I continue to appreciate your willingness to try to work on a compromised bill. After talking with the stakeholders, though, I have to say that I continue to have doubts about this compromise and I cannot support it. This managers amendment is a radical change from the bill that the antitrust task force considered in May. It is also very different from the bill that the Department of Justice and the Federal Trade Commission commented on in June. In fact, we just saw the text of the amendment for the first time late last night. Actually, I saw it this morning for the first time. Given the significant burdens that this amendment might place on the Department of Justice, I would like to hear their views on this proposed compromise.

There are other aspects of this amendment that deserve scrutiny. For example, how would these opt out provisions

for the small banks and credit unions impact the negotiations among other banks. While I cannot support the managers amendment, I will continue to work with the chairman and the stakeholders to try to improve the legislation. Mr. Chairman, I will yield back.

Chairman Conyers. Thank you very much.

Mr. Watt. Mr. Chairman.

Chairman Conyers. Who speaks? Mel Watt.

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

Chairman Conyers. The gentleman is recognized.

Mr. Watt. Thank you, Mr. Chairman. I think it was probably 2 years or more ago that I first raised concerns in the Financial Services Committee about interchange fees. So I have been concerned about interchange fees and the equity of interchange fees for quite a while. But I am concerned that this bill has some serious problems with it. The managers amendment may make it better. I am not sure whether it does or not because I just saw it for the first time myself this morning. And I have expressed to the chairman's staff my concerns about moving forward with marking up legislation when we really don't know the impact of what we are doing.

I have heard both the chairman and the ranking member say that the committee has had two hearings about this bill. I don't think that is true. A task force that I am not a

member of had some hearings, I am told. But if we -- I am not sure where this is going. This is the Judiciary Committee. And if there are concerns and problems with the bill, it would seem to me that this would be the appropriate place to address those concerns and problems. I don't know how they can be addressed between now and the floor of the House. There is no effective means of having hearings between now and the House Floor unless the Rules Committee is going to have those hearings. There is probably not any effective means of amending the bill unless the manager does it between now and the Floor. So I am not sure why we are doing this today as if we were a subcommittee of the full Judiciary Committee. Perhaps if this were a subcommittee and the full committee were going to have hearings on it at some subsequent time I would keep my peace and wait and try to have the input. But after the full committee acts on this bill, I don't know what the end game is, to be honest with you.

Chairman Conyers. I will tell you.

Mr. Watt. Okay. Well, I will yield to the chairman and maybe you can tell me and address the concerns that I have.

Chairman Conyers. I am going to try real hard. First of all, I would like you to consider membership on the antitrust task force in the next Congress. The second thing

I would like to point out --

Mr. Watt. But we are considering this bill, Mr. Chairman, in this Congress. Okay. I yield back to the Chair.

Chairman Conyers. Okay. All right. Now, the second thing is that we can -- this is not dispositive. Whatever we do here today is not the end of the road. We can come up with another managers amendment. That this is not the end of it, if that would satisfy the gentleman. So what I am saying is that if this bill is reported out, we don't -- it is not that we are for it or against it. We can still work to perfect it. And of course, I have always held that out, to you in particular, because you were so effective when we were considering bankruptcy legislation a number of years ago. So because of your interest in this subject matter I definitely want to keep the doors open, not just to you, but to everybody on the committee, that we can gain some perfection. So I thank the gentleman.

Mr. Watt. I thank the gentleman for his response. I would say to the Chair that I trust the Chair that he will try to keep the door open.

Chairman Conyers. You bet.

Mr. Watt. But I think the way to keep the door open for revising and evaluating a piece of major legislation, which may set up at least two tiers of fee structures and

maybe more in the credit card field, would be to evaluate the impact of it in this committee, not between now and the floor when the kind of input that people could have is going to be minimal at best. So I have expressed my concerns. I am sure that I will continue to work with the Chair --

Chairman Conyers. Thank you.

Mr. Watt. -- as we go forward. But I don't think I can -- the Chair says it is not an indication of whether you are for or against the bill when you vote for it. I am not sure I understand that concept.

Chairman Conyers. Could I give the gentleman another --

Mr. Watt. I know exactly what casting a vote was.

Chairman Conyers. Let me give you a couple of more minutes.

Mr. Watt. And I will yield to you.

Chairman Conyers. Because what I want to do is find out what the problem is that I would be looking forward to fixing with you. I mean, just tell me. There are no tiers in this bill, it is not two-tiered.

Mr. Watt. Let me tell you what my concern is. You have set up a system that allows the top ten merchants to have a set of negotiations and other people the opportunity to have a series of negotiations. It seems to me that if we were trying to reach a satisfactory resolution of

interchange fees, we ought be looking to try to make them more consistent rather than opening the door to make them less consistent. And I think you are going to end up with smaller merchants at a substantial disadvantage. And there really are no guidelines for the negotiation in this bill. So I am not sure what the antitrust division or what the Department of Justice is supervising if we haven't given them criteria for what they are looking for as outcomes. So those are the concerns I have. I will yield to the chairman.

Chairman Conyers. Here is the thing. We are trying to create a level playing field. The whole reason we brought the bill up is that it is not level now. And trying to have one uniform rate is the kind of regulation that a lot of the members on this committee are not for. And variable rates are what we think the merchants, the small -- the little guys want and need, Mel. That is why it is set up this way. It is set up to make things level and make things fair for the little guy so that there isn't the domination that exists in the market right now. Most everybody knows that right now the big guys run it. Take it or leave it. And I am trying to change that. And it may be a good way --

Mr. Watt. Mr. Chairman, I am way over my time. I have expressed my concerns. I think we are going to open the door for more differentials under this bill.

Chairman Conyers. Okay.

Mr. Watt. And I personally -- and maybe there are people on the committee who think that creating more negotiation and variability in the rates is the answer. I happen to think that creating more uniformity in the rates with some kind of controls on them is a better answer. So maybe we are just out of sync in what we are trying to achieve. So I yield back and I appreciate the gentleman giving me the extra time.

Chairman Conyers. Thank you.

Mr. Cannon. Mr. Chairman.

Chairman Conyers. Chris Cannon, one of the people who have worked on this, is recognized.

Mr. Cannon. Thank you, Mr. Chairman. I move to strike the last word.

Chairman Conyers. The gentleman is recognized.

Mr. Cannon. This is an issue that we have worked closely on. And as the gentleman knows and the chairman knows, I actually was more reluctant to drop the three-judge panel than he. But I think in talking about that, we get to maybe Mr. Watt's concerns over, and also Mr. Smith's concerns over what we are trying to accomplish here. This is a complex issue, and it is complex because it is highly vastly profitable. And the banks would wish to make it more simple than it is while they benefit from the complexity.



And in the middle of that complexity what we have are merchants who don't have the ability to negotiate the bulk of the cost of credit cards. So they can go to their merchant bank and negotiate the cost of the services from that merchant bank, but they can't get to the underlying cost.

And Mr. Watt apparently is concerned, I may not understand exactly what that concern is, so Mr. Watt, if you want to correct me, I would appreciate that. But apparently the concern Mr. Watt has raised is that you might have ten of the largest merchants who then negotiate as part of this exemption and leave the smaller people out of the process. Mr. Watt, is that essentially what you are concerned about.

Mr. Watt. That is one of the things I am concerned about, yes.

Mr. Cannon. As a practical matter, the larger merchants actually have the ability to work with the banks at a level that allows them to deal with the interchange fee. And so as a practical matter, this exemption is not about them, it is about the bulk of merchants. And my sense is from talking with merchants and seeing how they are organized, is that you would, in fact, have one negotiation, and that one negotiation would actually represent the bulk of people that are, or the bulk of merchants that are doing the transactions using credit cards today. That is

profoundly important. I think one of the amendments that we are going to see offered today would be an amendment that would limit this exemption to companies that have 50 or fewer employees.

And of course, that would be the opposite effect of what I think you are worried about Mr. Watt. The fact is with fewer than 50 employees, you probably don't have the money to engage in actual negotiations, and so we end up with no ability to deal with what is now an inherent monopoly, a situation or a duopoly, a situation -- Mr. Chairman, the committee is not in order. Thank you. It is now in order.

What we have now is essentially a monopoly that has grown up around us, and a complex system created by that monopoly to protect itself and its profits. The only way to deal with that is to open up an antitrust exemption so that the people that are -- the customers of that monopoly, the merchants, and ultimately consumers, have the ability to take a look at, to negotiate, to work on, a competitive environment, which will mean less profits for the banks naturally, but at the same time, a more competitive system that will yield benefits for consumers and merchants.

So as I have heard people's opening statements and as the discussion has gone forward, it just occurs to me there are some things that we ought to be focused on. Is it

acceptable to leave a whole raft of America outside of the ability to negotiate because of antitrust laws which are intended to actually protect the public, those people that are actually prevented, from monopolistic practices because of a historic anomaly, or do we create a context for people to negotiate?

Can we create a context, are we going to create a context to bring this out of the shadows and into the light? As a practical matter, the banks have been very well organized on this issue. This is their golden goose and their golden eggs that continue to be laid. The merchants haven't been as well organized, but the merchants represent more people and consumers represent more people than the banks do. And I hope as we move forward with amendments today, that people will recognize that interest and that we will do the rational thing and that, in fact, what we will end up with is not necessarily legislation, but a change in the economic environment that allows, or in which the banks recognize their difficulties and actually decide to work with their customers and their consumers and come up with a rational system that may transcend what we can do here in Congress. Thank you, Mr. Chairman, I yield back.

Ms. Lofgren. Mr. Chairman.

Chairman Conyers. Thank you. Zoe Lofgren.

Ms. Lofgren. Thank you, Mr. Chairman. I move to

strike the last word.

Chairman Conyers. The gentlelady is recognized.

Ms. Lofgren. I am a co-sponsor of the original bill and recognize that your job as chairman of the committee is not an easy one; to try and mind consensus among members who have different points of view so that we can make progress and move forward. And so I am certainly not critical of your efforts. However, I do want to express my disappointment at the removal of the three-judge panel. I agree, Mr. Cannon, that the ability of the little guys to kind of ride on the coattails of the big guys is a useful concept. I think that is sound. But I do worry that the three-judge panel removal is going to potentially obviate the vitality of the remaining legislation. Having said that, we are now late in the legislative year.

We don't know whether we will get everything done to get a piece of legislation on the President's desk or not. We are certainly trying hard. But I am mindful that the parties that caused us concern and caused us to introduce the bill are watching what we are doing here. And just a word in defense of the antitrust task force, we do have a limitation on the number of subcommittees that we are permitted to have. And the task force is an opportunity to focus our attention in a way that is consistent with the rules to look at antitrust. And it is an inclusive process.

Members who want to participate do so. And I will note that the antitrust task force meetings that I have attended are better attended than some of the subcommittee hearings that we have.

So I think that the process being used is bipartisan and creative and really well serves the committee, especially since it is more inclusive than subcommittee membership. And I think the hearings made it very clear that there is a problem here, there is a problem here. And it is adverse to consumers, and the current situation is adverse to merchants, and the bill that I was happy to be an original co-sponsor for was an attempt and I thought a rational attempt to deal with this. If this bill or a variation of the bill does not actually get to the President's desk this year, you know, we are going to see where we are next January, and whether there has been movement away from the abusive processes that caught our attention.

And I am happy to move forward today, but also, Mr. Chairman, to work very closely with you in a very tough mannered way in the next Congress if we don't actually get this to the President's desk and if the abuses that we saw and examined so carefully continue. And I thank the chairman for yielding.

Chairman Conyers. Would the gentlelady yield for me --

Ms. Lofgren. I certainly will yield.

Chairman Conyers. -- just to say that I like the three-judge panel.

Ms. Lofgren. I know you do.

Chairman Conyers. But it was in the spirit of reaching a significant majority in the judiciary that I dropped it.

Ms. Lofgren. I understand. Reclaiming my time, I think you and I are, in terms of what we wanted, our names are on the original bill indicating our interest in the three-judge panel. I understand as chairman you have to help the committee reach consensus so we can move forward. I respect that role. But it may be that if this does not succeed we will have to revisit the three-judge panel in the 111th Congress. I yield back.

Chairman Conyers. True. Who seeks recognition? Dan Lungren.

Mr. Lungren. Mr. Chairman, thank you very much. I am not a member of the antitrust task force this time around. Oh, I move to strike the requisite number of words.

Chairman Conyers. The gentleman is recognized.

Mr. Lungren. I am not a member of the task force this time around, but very interested in the subject. And as a result, I asked for all parties to come to my office and we had a nice free-for-all where I got to ask them questions and to see what the story was. One of the things that

concerned me was the three-judge panel, particularly when those in support of it told me that we should look at the way that major league baseball has handled things and how well that has worked. They didn't realize that that has been one of my bugaboos for 20 years because I don't see how people barely hitting 200 and can't field their position make millions of dollars because somebody accepts one of the two offers.

So that was not really a persuasive argument in my judgment. I am pleased that we have gotten rid of the three-judge panel in this instance. I think we ought to understand that both sides bring benefits to the table and both sides have problems. Years ago, when I was in high school, I worked for a department store in southern California and saw how credit worked then. In those days, if you had a credit card for a particular company, that company had a credit department where they had individuals, almost exclusively women, who had ear phones. And you would call up when someone made a purchase and presented their card, and you would be on chairs like this, on rollers, and you would roll to the manual file and you would look up and see if they were current on their payment.

Chairman Conyers. What year was this?

Mr. Lungren. So it was not that long ago. But the point I am trying to make is the companies themselves

assumed the responsibility for extending the credit and all the capital investment necessary for it. And if there were losses, they accepted that. Move forward to where we are now where the credit card companies have assumed that responsibility of the capital investment necessary for making the transactions work, by the dint of technology advances, it is now instantaneous, and in most cases, these major credit card companies, they are the ones subjected to the losses, if, in fact, there is a false charge made.

Also, the retailer, even the small retailer, is basically guaranteed payment minus whatever the charge is. They don't have to go through the collection, they don't have to go through the loss, they don't have to go through all of that. So we ought to understand the system has developed in a way in which the merchants do benefit. And so it is not just that Visa and MasterCard and the others are the big bad guys and the merchants are the ones that are held by the throat. Having said that, it seems to me that we need to set up some sort of system where there can be an opportunity for true negotiations, which I don't think exists now. I think the bill moves us in that direction. Repeatedly in the free-for-all I have in my office, when I would talk to the folks from Visa or MasterCard and say to them the merchants say they can't negotiate, they would say, well, we are ready to negotiate, they can negotiate at any



time, they can get together and negotiate.

And so I suggested that then they obviously would not be opposed to an antitrust exemption to allow them to have some comparative size or comparative power positions from which to negotiate. And I think this bill does that. The other concern though raised, I think legitimately on the part of the credit card providers was, well, what about unlawful boycotts, will you allow that. And after considering that I decided to prepare an amendment that I will present a little bit later which will not allow boycotts on either side known as unlawful boycotts as they exist under current law, because I think, again, what we are attempting to do with this bill is to try and bring them to the table to negotiate so that really ultimately, it is not whether it is fair to one side or the other, it is whether it is fair to the consumer and whether the consumer has the opportunity to benefit from what we do believe is a system that allows competition, negotiations and transparency.

This is not a perfect bill, even with the chairman's managers amendment, but I think it is a good bill moving us in the right direction. And I would hope that we would move it forward.

Chairman Conyers. Would the gentleman yield?

Mr. Lungren. I would be happy to yield.

Chairman Conyers. I want him to know that we have been

thinking about this, precluding both sides from entering into boycott activity. And I think we want to look carefully at your amendment if and when it comes up.

Mr. Lungren. Thank you very much.

Ms. Jackson Lee. Mr. Chairman.

Mr. Cannon. Would the gentleman yield?

Chairman Conyers. I would be happy to yield.

Mr. Cannon. Thank you. If the gentleman has any remaining time. Let me just make a couple of points very briefly, Mr. Chairman. That is that it is unfortunate that everybody on this committee was not able to be part of the antitrust task force. Because the hearings that we had on this issue were profound and frankly under oath. I don't recall if we did them under oath, but at least the witnesses suffered the possibility of lying to Congress which is similar to perjury as opposed to the meetings that I had in my office, and I think Mr. Lungren has had in his office, where a lot of wild and crazy things were said by both sides. I know they lied to me. They probably said the same thing to you too. Not everybody lying all the time, but there is a lot of misinformation and a lot of prioritization that doesn't happen appropriately here. And this bill does derive from those hearings and what we learned in those hearings. I wanted to say the boycott amendment that Mr. Lungren is going to offer is actually a good amendment, and

I am going to support that. But one correction, and that is merchants are, in fact, liable for their losses. That is, merchants have typically a relationship with the bank where they are liable. So the issue is much more complicated. And I want to thank the chairman for his work on this bill because it really does cut through all those complications and get to a solution, which Mr. Lungren has pointed out, which is the solution that drives people to the table to negotiate and avoids the current system which is unworkable, I believe.

Mr. Lungren. Thank you.

Chairman Conyers. Thank you. Ms. Sheila Jackson Lee.

Ms. Jackson Lee. Thank you Mr. Chairman. I think the premise of our discussion should be that this is an enormously complex issue on many counts, particularly, Mr. Chairman, on how you have tried to balance the concerns that have been expressed and the distinct positions of very unique and different parties. And I think you should be commended on trying to strike that balance. And more importantly, I think there is an important message this morning that as we pass this managers amendment, which I support, and the ultimate bill, which I have come to in a distant manner embrace and look for its future that you are willing to look at many aspects of this initiative. And I would offer this: As we listen to the discussion, and I

know why you took out the three judge court, there may be some option of having a two-tier process, a negotiated process, an antitrust division process and then a look-see by a three-court panel.

Chairman Conyers. But I told Mel Watt there aren't any tiers in this bill.

Ms. Jackson Lee. Pardon?

Chairman Conyers. I told Mel Watt there aren't any tiers in this bill.

Ms. Jackson Lee. Well, as we go forward there is a Mel Watt position, and I just heard the gentlelady from California, so in trying to find a balance, maybe there will be a meeting of the minds. I offer that as a thought. It will not be an amendment that I offer today. But the reason why I say that is because there lies a complexity which some supporting the three-judge court or three-judge panel raising the concern about it. But I want to emphasize that one of the points that we glean from the antitrust hearings is how to weave our way through this. And under the underlying bill, for example, we give the opportunity for comparing the interchange rates in current use in 10 foreign countries having the highest volume of credit card transactions. Why do we do that? We are trying to find a fair balance for the merchants.

And so I would hope that as we look at this bill we

will recognize the angst of the credit card companies. And I intend to continue meeting because their constant concern is the suspension of the antitrust laws. And I am hearing their concerns. But I think we can find again a common ground. I want to acknowledge in the managers amendment the idea that I offered which would require that the interchange savings be passed on to consumers. And I don't think anyone would refute the need for consumers to get a fair shake in this climate that we are addressing and as we go forward. I also hope that we will be able to clarify the language on some matters dealing with monetary savings and employees, and I look forward to working with the chairman on that. And I just would like to offer a thought.

Mr. Johnson. Would the gentlewoman yield?

Ms. Jackson Lee. I would be happy to yield to the gentleman.

Mr. Johnson. I have heard the justification for the overall bill being to help protect merchants from these escalating fees. But now if the amendment provides that any savings gleaned by the merchants from the lowered interchange fees, any savings, and that must be passed on to the consumers, how does that positively impact the merchants?

Ms. Jackson Lee. Because they have already saved by having a lower fee. And so they benefit by the product

itself or how they are, and the product of course is the utilization of the MasterCard or the credit card, and then a portion of the benefit goes to the consumers who are using the card, which makes the merchant more attractive on the marketplace. So they benefit in that manner.

Mr. Johnson. This legislation does not impact the amount of the processing fee which is paid by the merchant bank or the acquirer to the card holders bank, the issuer, and it doesn't impact the amount of the association fee, the association assessment fee, which is paid by the issuing bank to the card issuer, or MasterCard or Visa. And so that being the case, how would the merchants under this legislation, and this would not be just a question for you, but how would the, anyone can answer this question, how would the merchants be protected from a rise in the association assessment fee and/or the processing fee, which could rise to cover the loss or reduction in the interchange fee caused by this legislation?

Chairman Conyers. The gentlelady's time has expired.

Ms. Jackson Lee. Mr. Chairman would you yield me an additional minute without objection?

Chairman Conyers. Of course.

Ms. Jackson Lee. Thank you. First of all, I think the benefit of this legislation is something phenomenal that has not occurred before, which is the merchants having the clear

ability to be at the table of the negotiation, which makes the clear distinction of what we have had in the past, and that means that equals of sorts are now at the table on the interchange fee. I think the minimal benefit that comes that we have added in the managers amendment does not undermine the fact that we take away the dominance of saying by one group here is what the fee will be, so the negotiation represents an asset. So Mr. Chairman, let me conclude my remarks by saying that I support the amendment. I think we have made great progress. I think there is some issues dealing with small banks and small businesses. But I would like to be able to work with the chairman on that as we move forward. And I conclude by supporting the amendment that is presently being discussed. I yield back.

Chairman Conyers. I thank the gentlelady. Can I tell Judge Gohmert, I am going to recognize him, but first, and Steve King, but first, I would like to get a vote on the managers amendment so that we can go into the amending process immediately thereafter. And so if I might call for the question on the managers amendment. All those in favor say aye. All those opposed say no. The ayes have it. And I would now like to recognize the gentleman from California Dan Lungren for an amendment.

Mr. Lungren. Report the amendment at the desk, Mr. Chairman.

Chairman Conyers. The clerk will report the amendment.

The Clerk. Amendment to H.R. 5546 offered by Mr. Dan E. Lungren of California, page 6 line 10 strike --

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

[The information follows:]

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



Chairman Conyers. Without objection. The gentleman is recognized in support of his amendment.

Mr. Lungren. Mr. Chairman this is the simple little amendment that I referred to before, which I offer and hope that it might bring parties closer together in the underlying bill. As I mentioned before, I want to have the opportunity to have some good give and take in my office on this. I tried to figure out some ways in which we might bring the parties closer together, and where in my judgment at least there would be fair treatment of both sides. If you accept the proposition, as the managers amendment does, that even though you don't have the three-judge panel, you do have the antitrust immunity granted to the retailers, it just seems to me to be a point of fairness that we not have an opportunity for boycotts. One thing that stood out when I had the parties in my office was everyone seemed to be in agreement that they are willing to negotiate. As I say, the retailers fear they might run afoul of the antitrust laws if they work with one another in trying to determine a position of negotiations.

And conversely, concerns were raised, legitimately I think, by the credit card companies, that this antitrust exemption would lead, not just the opportunity to have it, but would lead to the prospect of a boycott.

So the conundrum is the basis for my amendment. If, as I believe it will, the provision of an antitrust exemption would facilitate negotiation in fear of a potential boycott and would not become the obstacle to our ability on this committee to advance the bill. In this regard, my amendment provides that the antitrust exemption provided in H.R. 5564 "shall not apply to a provider of the single covered electronic payment system or to a merchant during any period in which such provider or such merchant is engaged in any unlawful boycott." And unlawful boycott is a term of art that is defined in the law already. We do nothing to change that.

So my amendment would basically track the scope of the exemption to ensure that it will be used appropriately. And so I would ask for the support of my colleagues on this and yield back the balance of my time.

Mr. Davis. Mr. Chairman.

Chairman Conyers. I recognize Artur Davis.

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

Chairman Conyers. The gentleman is recognized in support of his amendment.

Mr. Davis. Mr. Chairman, thank you for recognizing me. Let me start at the outset by saying that for people who don't know this issue this is probably a little bit of a

confusing markup. I mean, you have got Davis and Watt on one side and the chairman and Mr. Lungren on the other and Johnson and Jackson Lee on different sides. It may be confusing to people. But I think it is a good thing because a lot of what we do in this committee, frankly, tends to be party line, a lot of it tends to be very ideological. I think it is a good thing that we are here today with people actually thinking about the issue, people wrestling with the issue and frankly taking off their party filters to do it. Second observation, Mr. Chairman, let me thank you for your courtesy.

As you know, six of us, I believe, signed a letter to you last week and raised a number of very pointed questions about moving forward with this bill, and you have been very courteous to us. And that is something that this member from Alabama appreciates. I want to make a broad substantive point about this bill to my friends on the committee. We have, at its core, Mr. Lungren's comments and Mr. Cannon's comments make clear, a dispute between two sets of business interests. We have the credit card industry on one side, we have the retailers on the other side. Of course, as in all disputes, both purport to speak for the consumer. Whenever we have a dispute between business interests, at least one member's opinion, we are going to drive the resolution of that dispute, is what is genuinely

in the best interest of the consumer, and we have to know that to resolve the question.

That is why Mr. Watt's point is well taken. Some of us don't have the privilege of serving on the antitrust task force, some of us do. I happen to not be on it. But the broad question is, we don't know, we don't have the benefit of a GAO analysis, we don't have the benefit of more extensive full committee hearings, we don't know whether or not this bill, even with the amendments that are being offered today, are going to accrue a single benefit to consumers. There are multiple possibilities.

Here is one very simple one. That some retailers who receive the benefit of this change, of this interchange fee differential, will decide to pass on to consumers, some won't. Even with the managers amendment we can't guarantee that. There could be litigation over it.

There is also another possibility, that the credit card companies could decide to if we are not making money in box A, we are going to make money over here in box B by raising the rates on consumers. That is a possibility beyond the ability of a managers amendment to limit, but it is a realistic economic possibility.

There are other scenarios. Mr. Watt identified the possibility you could have unfair differentials within the merchant structure, and you could have one class of

merchants who benefit, another who don't benefit, and we could get less unfairness as opposed to, or less fairness, as opposed to more fairness. There are multiple things we don't know about this bill. So as I conclude, Mr. Chairman, I think we would benefit from a longer look at this. I think we all agree the U.S. Senate's likelihood of moving this bill is next to nothing. We are going to come back here and --

Chairman Conyers. It is a little higher than that.

Mr. Davis. Maybe 1 percent, Mr. Chairman. But if I can just conclude by saying those of us on this side of the aisle believe we are going have President Obama in January and a Justice Department and an antitrust department at DOJ that will make a very searching analysis of what our antitrust laws are. A lot of us believe we are going to have an expanded majority in the House and the Senate for the Democratic side. And there may be a much broader credit card relief bill targeted squarely at consumers. Those two windows of time; a broader credit card bill next year and a new --

Mr. Issa. Regular order, Mr. Chairman.

Chairman Conyers. Additional 10 second, Mr. Chairman.

Mr. Issa. Regular order, Mr. Chairman.

Mr. Davis. I am not going to argue over ten seconds but I think a number of people have exceeded it today.

Mr. Issa. This cannot be a campaign event.

Mr. Davis. I don't appreciate the gentleman's discourtesy.

Chairman Conyers. The gentleman from Alabama will conclude.

Mr. Davis. I simply want to conclude, Mr. Chairman, by saying that there will be two windows next year; a different Congress and a new antitrust division, to take the kind of searching analysis that we need to take and I will yield back.

Chairman Conyers. Well, I appreciate the gentleman's congratulating us on our nonpartisanship in this discussion, but it seemed that he didn't take his own advice very seriously.

Mr. Davis. I didn't mean to hurt Mr. Issa's feelings. Apparently I did.

Chairman Conyers. Who seeks -- the gentleman from Texas, the ranking member.

Mr. Smith. Thank you, Mr. Chairman. I too actually appreciate the comments by the gentleman from Alabama. And I might say to him that I might have occasion some time in the future to remind us all of his suggestion that if it is a party line vote, maybe we aren't thinking enough about the issue. That frankly happens all too often. Mr. Chairman, on this amendment I do support it because I think it is good

public policy. Even though merchants might like to be able to force Visa and MasterCard to negotiate through such a boycott the effect of such a boycott on consumers would be devastating. Also a boycott would hurt consumers if the banks decided that a class of merchants could no longer use their credit card unless the merchants agreed to the fees that the banks wanted to set. This amendment has precedent. When Congress passed the McCarren-Ferguson Act which among other things gave the insurance industry an antitrust exemption, it expressly carved out boycotts from that exemption. Similarly when this committee considered the Community Pharmacy Fairness Act a few months ago we passed an amendment that said that community pharmacists could not use the exemption to boycott pharmacy benefits managers.

So this amendment, I believe, Mr. Chairman, is a good one, it has good precedent and I think will improve the bill. I will yield back.

Mr. Cannon. Would the gentleman yield?

Mr. Smith. I will be happy to yield to the gentleman from Utah.

Mr. Cannon. Thank you. I would just like to make a couple of points in response to Mr. Davis. The fact is, you can't guarantee that the benefits of this bill will go to consumers. That should be obvious on its face. That is not the point. The point is to create a market that works more

efficiently and that takes this artificial profitability out of the system in a way that makes sense to everyone. In the second place, you also can't prohibit the banks from taking their fees from box A to box B. But what you can do is say box A is not transparent, we don't know what that is, and if they move those fees to box B, at least people know what they are doing, what they are paying and what the cost is, and the economy, the people, the merchants and others can see what that is.

So transparency is a major part of what we are trying to do with this bill. Nobody, I don't believe -- I am not sure if nobody, but I don't want to constrain the profits of the banks or the Visa and MasterCard groups. I just want people to understand what those fees are, how they are assessed and allow people to negotiate in the proper fashion. I don't think we can force, and I hate the idea of trying to force an outcome. What we want is an open transparent market. And with that, Mr. Smith, I yield back to you.

Mr. Smith. Mr. Chairman, I yield the balance of my time to the gentleman from Florida, Mr. Keller, but he may want to take his own time as well depending on how much time he wants to use.

Mr. Keller. Thank you. I may just move to strike the last word and have my own time.



Mr. Smith. Mr. Chairman I yield back.

Chairman Conyers. Thank you. I recognize the gentleman from Florida, Mr. Keller.

Mr. Keller. Thank you Mr. Chairman. I am going to support this amendment and address a different topic with my time. I have heard from Mr. Watt and some others about they heard there were some hearings, but it wasn't a full committee level. I was the ranking member on the antitrust task force. I don't know anybody that has probably spent more time than you and I on this issue. I read every single lawsuit on it, every single deposition, everything, on both sides.

And for folks who feel like this is a confusing issue and they are not quite sure of the facts, and maybe we need an Obama administration or some other inference to get to the findings of facts, I will just give you objectively what I believe the findings of facts are as fair as I think to both sides as I have made it. Question number one, have interchange fees gone up over the last 10 years? The electronic payment coalition says no, they haven't, they have remained flat. The merchants say yes they have gone up. They have gone up. They have gone up an average from about 1 percent to 2 percent. That is a finding of fact that we have got from the hearings.

Question number two, are retailers required to accept

the premium credit cards which can have interchange rates of as high as 3 or 4 percent? The answer to that is yes, they are. Question number three, has there been a big increase in the total number and percentage of these expensive premium cards over the past 10 years? Yes, there have been. Next key question, are the grocery stores, gas stations and retailers required to accept these expensive premium credit cards on a take it or leave it basis? Yes, they are. Next question, has it been proven over the course of our hearings that Visa, MasterCard and the banks have engaged in illegal collusive and price fixing behavior in violation of the antitrust laws? No, that has not been proven. There have been conclusory allegations along those lines, there have been conclusory allegations in lawsuits. But we have not seen the smoking gun, we have not seen the disgruntled ex-employee who witnessed a conversation, we have not seen the e-mails, we have not seen the documents to prove it.

There is no proof of illegal behavior, in my opinion. There is proof that both MasterCard and Visa, for example, offer their single lowest rate to grocery stores at 1.2 percent and they happened to pick the exact same rate. Is that purely coincidence? I don't know. But we haven't proven illegal behavior.

Next question, has it been shown that merchants lack the bargaining power to negotiate lower rates with the bank,

MasterCard and Visa? Yes, I think they do lack the bargaining power. MasterCard and Visa have an 80 percent market share. If the biggest company in the world, Wal-Mart, a Fortune 100 company -- Fortune 1, has to file suit over these interchange rates because they don't feel they have the bargaining power, just imagine the fellow who owns the corner grocery store or gas station, what bargaining power does he have?

And so while there is no evidence that they have engaged in illegal behavior, there is a hell of a lot of evidence that they have the bargaining power to set the rates at whatever they want and it is a take-it-or-leave-it basis. The final issue is what impact does this have on folks on the ultimate problem we face today; gas prices? Like every other thing dealing with this issue, it is a mixed bag. Gas station owners are paying more to the banks and interchange fees than they are making in profits. Consumers when they fill up their gas tank at \$4 a gallon are paying roughly \$0.08 in interchange fees.

Yes, it is hurting these retailers. Yes, it is hurting consumers. But now we see Visa and MasterCard have taken steps voluntarily to lower their interchange fee rates. And some folks make fun of them and say you didn't do enough, but I think that is positive. And so it is not a case of black and white, evil here and bad guy there. I just lay it

out for folks who weren't a part of our task force, Mr. Chairman. Those are my findings of facts. You can take it or leave it for what it is worth. But I have tried to look at it objectively and those are my honest conclusions from looking at the facts. And I yield back the balance of my time.

Chairman Conyers. I thank the gentleman.

Mr. Watt. Mr. Chairman.

Chairman Conyers. Yes. Mel Watt.

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

Chairman Conyers. The gentleman is recognized.

Mr. Watt. And I will be brief. First of all, I want to thank Mr. Keller for summarizing the findings that the task force made. I think that is important for us to focus on. And his step-by-step, question-by-question and answer-by-answer summary was an excellent one. The one thing it did not address was whether the substance of this bill is going to solve the problems that the task force has. Or whether it is going to create a whole series of other concerns that have not been anticipated and adequately discussed. Or if we don't answer those questions here in this committee who is going to answer them ultimately? And those are the concerns that I am raising. I appreciate the factual basis that we start from, but that is the starting point, that is not the finishing point. And so I will yield

back. I have made my points. And I think this is not --

Mr. Sensenbrenner. Mr. Chairman.

Mr. Watt. The way to resolve this is for us to do it in this committee rather than kicking the ball further down the road to a point where there is no apparent resolution outside the committee structure. And that is what I am suggesting we ought be doing today. I yield back.

Chairman Conyers. Thank you, Mr. Watt. The Chair recognizes Jim Sensenbrenner.

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

Chairman Conyers. The gentleman is recognized.

Mr. Sensenbrenner. Mr. Chairman I would like to agree with the gentleman from North Carolina and the gentleman from Alabama that this is premature for us to mark this bill up and basically lose control over it and send it out to the wolves of the Rules Committee or the leadership or all of our colleagues on the floor. This is a very technical issue. And it is an issue that if it is not done right, we are going to be paying the cost of the unintended consequences.

We are talking about an antitrust exemption here. And whenever we give out antitrust exemptions, which I think we should do very sparingly, we have got to be very precise in assessing what the consequences are to allowing activity

which we know from the outset will be anticompetitive, because that is why an antitrust exemption is necessary. And I think we ought to step back and look at this because I agree with people who have said this; that the chance of this legislation becoming law this year is slim to none.

Now, the reason I am interested in this is when I started practicing law it was before the age of plastic. Granted, we had to chase the dinosaurs off the streets in order for commerce to be done. But one of the major clients of the firm that hired me was a mom-and-pop grocery store in a town of about 7,000 people. And they had a lot of store charge accounts where people came in, picked up their food and put it on the cuff. And most people paid their bills, but there were a few that didn't. And the few that didn't had five figure debts. And that is when my partners and I heard about it. We filed actions, we got the full judgments, they were all uncollectible.

And as a result, the merchant ended up having to assume the risk and writing off the amount of the debt that was uncollectible. Now we have got no more store charge accounts and maybe no more mom-and-pop grocery stores, but we have got plastic and everybody uses plastic.

RPTS STRICKLAND

DCMN ROSEN

[11:30 A.M.]

Mr. Sensenbrenner. And in most occasions the risk of a default or the risk of a delinquency ends up being transferred to the credit card issuer, not in all cases, but in most cases. And one of the things that the interchange fees pay for is the transferring of that risk.

And I agree with what the gentleman from Alabama has said is that the risk is not going to be eaten by the credit card company any more than it was eaten by the mom and pop grocery store. It will be a cost shift to people who do pay their bills up as agreed. So it will be a transfer from box A to box B.

Now, the other thing that I think has come out of this debate, that is really important in my mind is the complaints that I have heard from merchants about the interchange fees being higher for premium credit cards. Who elects to get a premium credit card? It is the consumer. And usually the premium credit cards have a higher annual fee than the nonpremium credit cards and the consumer decides to pay this higher fee because they want rebates at the gas pump, which some credit cards offer and which are certainly necessary with \$4 a gallon gas, or frequent flyer miles or trinkets or whatever is being offered.

This is advertising that the credit card companies use in order to get people to sign up for their credit cards. And advertising is paid for by the consumer. Now who are the consumers of credit card services? It is the merchants. So they have to pay for the advertising of the credit card companies that they accept when people come into their stores to charge their purchases.

So it will end up being that the consumer would be hurt if we decide to go after premium credit cards with higher interchange fees because consumers have elected to get those premium credit cards. Now if the premiums that are offered are a part of advertising, the consumer pays for it just as consumer pays for the coupons that the grocery store sends all of us out week by week. Though are not free. Those discounts are not free. Those are used to entice people to patronize the grocery store that sends out the coupons and the consumer is going to end up paying for this in the end.

I agree with what I heard on this side of the aisle -- I ask unanimous consent for 30 seconds.

Chairman Conyers. Without objection.

Mr. Sensenbrenner. I agree with what I heard on this side of the aisle. That what is happening here is nothing that the consumer will end up benefiting from. This is a fight between the merchants and the credit card companies. And it seems to me that we should not bless this with an



antitrust exemption, because doing away with the antitrust laws mean that monopolistic activity will end up being blessed by this committee.

I yield back the balance of my time.

Chairman Conyers. I thank the gentleman. And I would like to call for the question on the Lungren amendment.

All in favor of the Lungren amendment, say aye.

Opposed, no. The ayes have it. The amendment is agreed to.

The Chair recognized Debbie Wasserman Schultz.

Ms. Wasserman Schultz. Thank you, Mr. Chairman. I have an amendment at desk.

Chairman Conyers. The Clerk will report the amendment.

The Clerk. Amendment by Ms. Wasserman Schultz --

[The information follows:]

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

Ms. Wasserman Schultz. Mr. Chairman, I ask unanimous consent to have the amendment considered as read.

Chairman Conyers. Without objection, so ordered. The gentlewoman is recognized in support of her amendment.

Ms. Wasserman Schultz. Thank you. Let me first say I appreciate the chairman taking into consideration the concerns that I and my colleagues wrote to him about earlier this week regarding ensuring what we have been talking about here today, that any benefit was this legislation are actually being passed on to consumers.

However, I am troubled that the legislation will not ensure that a single benefit is provided to consumers in spite the chairman's intention. Without some type of enforcement mechanism, some kind of teeth, the broad requirement in the legislation will not save consumers any money at all. Instead it will wind up costing them.

According to proponents of this bill, H.R. 5546 is supposed to be about saving consumers money. In fact, if you look at the ads with a person pumping gas with a screw sticking in their back in every major Capitol Hill publication that has been out in the last several weeks, that is clear that that is the message that the proponents of this legislation are trying to send. But nothing in the bill or the amendment that you adopted earlier actually

ensures that the consumer will save money.

There is nowhere that the amendment says that a consumer will pay less for a tank of gas or a gallon of milk or anything else. Instead of making sure is that the consumers can save money at the pump, the managers amendment would let companies pass on the benefits that they receive in the bill in the form of increased bonuses for executives or more direct catalogs for their consumers. That is not what we are here to support today.

In fact, I do serve on the antitrust task force, and the individual who testified on behalf of the convenience store retailers specifically said that they would pocket the difference, pocket the margin that they receive on this bill and they testified to that.

We should not be allowing merchants to decide what a consumer benefit is or to lavish such benefits on CEOs or other senior executives. We should make sure that consumers may less for the products they buy. It is just that simple. We only have to look the at experience in Australia to know that there is no way that the consumer is going to benefit from this. When Australia interfered in their exchange market, merchants paid less. But they did not pass the benefits on to consumers. The consumers paid the same amount for gas for groceries and for everything else.

They paid more for their credit card services as well.

The banks and credit cards had to make up their lost revenue, as the gentleman from Wisconsin said, in other ways. If they wanted to offer some types of services to their clients, they had to charge them more money. And those that elected not to wound up decreasing benefit services to customers, including important identity theft, fraud, and consumer protection services.

In fact, that is the reason why the Department of Justice's antitrust division has come out in opposition to this bill. They don't want to repeat the mistakes that occurred in Australia.

That is why myself and Mr. Davis from Alabama and Mr. Wexler from Florida have prepared an amendment that would provide a real enforcement mechanism. Our amendment would simply do this: It would require that 100 percent of the cost savings and other benefits be passed along to the consumers in the form of reduced prices for goods and services. The amount of the benefit would be measured against the rates and terms the merchants were paying before enactment.

More importantly, our amendment has a certification provision that requires that all merchants file annually with the antitrust division of the Department of Justice a sworn affidavit signed by its president, chief executive officer, owner and chief financial officer simply stating

that they have passed along the benefit of this bill to the consumer.

The bottom line here Mr. Chairman is that we have ensure that the benefits that are generated by this bill are actually passed on to the consumer.

Chairman Conyers. Would the gentlelady yield?

Ms. Wasserman Schultz. Happy to yield, Mr. Chairman.

Chairman Conyers. Tell me if this is the correct interpretation of your amendment. What you do is that in effect make the Jackson Lee consumer savings amendment stronger by requiring certification language.

Ms. Wasserman Schultz. Reclaiming my time, Mr. Chairman. In answer to your question, the Jackson Lee amendment gives benefits to employees. This amendment ensures -- this amendment ensures that the benefits from this bill are directly passed on to consumers. And it simply adds an enforcement mechanism to ensure that the executive officers of these merchants, companies, actually have to certify that they are doing that. That is the only way that we can actually ensure that the consumer does not end up with the screw in their back as the advertisements have purported.

Ms. Lofgren. Will the gentlelady yield?

Ms. Wasserman Schultz. No, I have a couple more things to add. Just look at the front page of The Washington Post

today. The headline is Economy Thrown Into Turmoil. We have got to make sure that the benefits legislation like there do directly benefit the consumer. I know that the chairman is well intentioned and I have the utmost respect for him and he has certainly been a lifelong champion of the consumer. But do I believe that this amendment needs to be adopted to improve the good intentions of this bill and ensure that we make sure that the consumers directly benefit. And with that I yield the balance of my time. Mr. Chairman, I yield the balance of my time to the gentleman from Alabama.

Chairman Conyers. You don't have any.

Ms. Wasserman Schultz. I was interrupted while I was trying to do that.

Chairman Conyers. The gentlelady is given an additional minute.

Ms. Wasserman Schultz. Thank you, Mr. Chairman. I yield that --

Mr. Davis. Thank you, Mr. Chairman. I would also move to strike the last word.

Chairman Conyers. The last word to what?

Mr. Davis. At the conclusion of my minute, just to facilitate the conversation.

Chairman Conyers. That is premature.

Mr. Davis. Let me take my minute then I will move at

that point. Let me echo Ms. Wasserman Schultz' comments. Let me feed on something that Mr. Cannon said earlier. Mr. Cannon made what I think is a correct philosophic observation that many of his side of the aisle are indifferent of the results of this bill; they simply want to ensure more competition. Mr. Cannon with all due respect while that is a correct statement of your side of the aisle, it is not a correct statement of this side of the aisle.

The Chairman, Ms. Lofgren, Ms. Jackson Lee, many of the other cosponsors of this bill are very certain about what they want the outcome to be. They want to be the outcome to be more savings for consumers. Frankly, not more savings for merchants but more savings for consumers.

The importance of Ms. Wasserman Schultz' amendment, the one I offer with her, is that it frankly acts on the Chairman's intent. The Democratic Caucus would not be endorsing this legislation if it did not intend 100 percent of these savings to be passed on to consumers.

I move to strike the last word. I won't be more than another minute.

Chairman Conyers. Can I yield the gentleman 2 additional minutes.

Mr. Davis. Thank you, Mr. Chairman. This is about effecting the goal of I think all the Democratic members of this committee. It is also about frankly effecting the

stated goal of the many retailers who are represented in this room. I have sat in on a lot of the lobbying meetings as well. Every retailer who has come into my office have said it is not about me, it is about the consumer. Every now and then you run the risk if you say something that people might believe you, even in Washington, D.C.

And given that, I think it is important -- and Mr. Chairman, you do it in your manager's amendment. You add a good provision, but there is only one problem with it. You refer to savings being passed on to employees. Here is an example. 99 percent of retailers represented here wouldn't do this, but there is 1 percent out there, perhaps more, who would decide, you know what, I am going to pass the savings on to my manager who happens to be an employee. And if someone says it is not right and it is not fair, a Democratic Congress passed a bill to let me do it.

Chairman Conyers. The gentleman's time has expired. Let me -- let me make this proposal. Because I agree with the tenor of the amendment of the gentlelady from Florida and the gentleman's comments from Alabama. Suppose, with the gentlelady from Texas's approval, we strike the reference to employees in her language in this bill, wherever it occurs --

Ms. Jackson Lee. Will the gentleman yield?

Chairman Conyers. Yes.



Ms. Jackson Lee. First of all, let me thank the sponsor of the legislation, Ms. Wasserman Schultz, and Mr. Chairman, in my remarks I offered when I supported the amendment to strike the "employees." In fact, I had amendments to do so and was convinced that it was a technical change. So this is something that I would agree with because I had intended to do so any how.

The amendment that I had, of course deals with consumers. I think the Wasserman Schultz amendment perfects and enhances the concept already and I just wanted to acknowledge that we were offering to strike "the employees" as well as strike the language benefiting the employee savings and so I yield back to the gentleman.

Chairman Conyers. Let me finish the proposal. We have got the concurrence of the gentlewoman from Texas. Now I turn to the gentlewoman from Florida and seek to insert into the language her -- import her clause, the Wasserman Schultz amendment regarding certification, at end of that. And we have, through unanimous consent that I ask for now --

Mr. Watt. I think I object to the second part of that.

Ms. Lofgren. I object.

Chairman Conyers. Here is what I would have liked to have done, is to have taken the certification part of the gentlewoman from Florida's amendment and read it to the gentlewoman from Texas's amendment who has agreed with this.

I yield to the gentlewoman that Florida.

Ms. Wasserman Schultz. Thank you very much. And I appreciate the chairman's consideration and suggestion, and if I could ask that this amendment be temporarily postponed so that our staff can work out and incorporate some of these --

Chairman Conyers. The gentlewoman asks to withdraw her amendment.

Mr. Nadler. Mr. Chairman?

Chairman Conyers. Does the gentlelady from Florida have yet another amendment?

Mr. Nadler. Mr. Chairman, can I comment on the existing amendment before we go to another one?

Chairman Conyers. She has withdrawn --

Ms. Wasserman Schultz. No, Mr. Chairman, I have not withdrawn the amendment. I just asked that the amendment be postponed so that we can work out the suggested language and bring it up again.

Chairman Conyers. Okay. That is permissible.

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

Chairman Conyers. Now Mr. Nadler I have to go to the other side of the committee. I recognize the gentleman from Utah.

Mr. Cannon. Thank you. I only assert myself because my name was used in the debate and I want to make a couple

of clear points. In the first place, I don't think I used the term indifferent as to my views. I believe I said the market will do only what the market will do. And you can't force it no matter how pure your motives may be. So in the context of this bill, we have to let the market work.

Therefore, let me suggest as we are considering any kind of adjustment to Ms. Wasserman Schultz's amendment that if you include a certification, you may well lose some of the Republican votes that we have. And that would be very difficult for the passage of this bill. The fact is we are not trying to force the market. At least those -- the context of concurrence between Republicans and Democrats on this bill relates to letting the market work instead of forcing the market. A certification would force the market.

That means a criminal liability in a context where you have many different ebbs and flows of money, it is impossible for a CFO to certify with clarity and that means any CFO who certifies is going to be subject to some kind of perjury charge if somebody decides the Justice Department to pursue that.

Mr. Watt. Will the gentleman yield?

Mr. Cannon. Happy to yield in just one moment. Let me make just the point that while Mr. Davis may think that all Democrats agree, we all agree, we all want consumers to be better off. But in practice the difference may be between

the two sides as to how we allow the market to work.

Mr. Davis. Will the gentleman yield?

Mr. Cannon. In a moment. I suspect that most Democrats actually believe that the market works and we are trying to enhance market mechanisms. And for purpose of this discussion, Mr. Watt asked me to yield and then I will yield to Mr. Davis.

Ms. Lofgren. I would ask that you yield as well.

Mr. Cannon. Yes.

Mr. Watt. Thank you. I just wanted to say briefly that it is not just the prospect of criminal liability, but the notion that we would have every merchant in America filing a certification with the Justice Department. I think it is just -- I mean, I understand the intent here. But I just think that goes too far.

Mr. Cannon. Reclaiming my time. Pardon me, I understand that several people would like for me to yield and I would be happy to. As I understand Mr. Watt, the essence of this amendment is going to be a poison pill which will make a good bill impossible to be supported. So I hope as staff and the gentlewoman are looking at the bill they will consider what makes sense to do. And I think you will come back to the language that I think Ms. Jackson Lee suggested for the manager's amendment.

Ms. Lofgren. Will the gentleman yield?

Mr. Cannon. I am happy to yield to Ms. Lofgren first.

Mr. Davis. I think I requested first.

Mr. Cannon. If you have a question, go ahead -- pardon me -- let me yield for a question very briefly.

Mr. Davis. Thank you for keeping your promise to yield, Mr. Cannon. I would respond to your observation by saying that this is an important point to the Democrats on this side of the aisle. Because as Mr. Sensenbrenner correctly points, it is a very unusual thing for this committee to wade into a dispute between businesses and create a new antitrust exemption.

Mr. Cannon. Reclaiming my time, I appreciate that. This is --

Mr. Davis. So we shouldn't do it unless we know that consumers are going to benefit.

Mr. Cannon. I think the question here is will the market benefit and I think many Democrats would agree with that. I understand that many Democrats want to force the system, but that probably won't work. And I yield to the gentlelady.

Ms. Lofgren. Thank you, Mr. Cannon. And I think you have got this exactly right. First this is a poison pill and kills the bill. Second, there are many things that businesses need to do. If I am running the gas station and my employees are in the UFCW, I may need to use a portion of

what I am saving for their health care benefits. I may need to use a portion of what I am saving to do environmental upgrades to my station. Or I may need to use a portion to lower prices to be competitive.

So, and additionally to think that every gas station, every grocery store, every restaurant in America would have to file a document under penalty -- that is absurd. And I thank the gentleman.

Mr. Cannon. Reclaiming my time, it is Stalinistic. That is what it is. And I yield to the gentleman from California.

Mr. Lungren. Here is my problem with it. What if you have a business that is actually going under and the margin is the savings that they will have here. This bill makes its illegal or this amendment makes it illegal for that person to stay in business because they would be violating the law. It is a poison pill.

Ms. Wasserman Schultz. Will the gentleman yield?

Mr. Lungren. No, I will not. The lady has had plenty of time to talk about this on the other side. And for someone to say on the other side that somehow Democrats are for the consumer and Republicans are not, not only interjects a partisan note here, but it vastly misstates the sense of the economy. If you, in fact, believe in markets, if you believe in the capitalist system -- and maybe some

don't on that side -- but if you believe that ultimately the consumer is benefited, and what we are trying to say is if you have something that interferes with transparency in the marketplace, that may, in fact, create a situation in which you have totally unequal bargaining positions so that the market can't work properly, if you somehow by legislation enact a law that will provide transparency and allow the marketplace to work the way it should, consumers would ultimately be benefited. That is not to say we are not for consumers being benefited.

Chairman Conyers. The gentleman's time has expired.

Mr. Cannon. Back to --

Chairman Conyers. This has been the most stimulating conversation on an amendment that has been postponed that I have ever heard in my career on the Judiciary Committee.

The Chair recognizes the gentleman from Wisconsin.

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

Mr. Nadler. Mr. Chairman?

Chairman Conyers. The Clerk will report the amendment.

The Clerk. Amendment to H.R. 5546 offered by Mr. Sensenbrenner of Wisconsin --

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

Chairman Conyers. Without objection, the gentleman is

recognized in support of his amendment.

[The information follows:]

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



Mr. Sensenbrenner. Thank you very much, Mr. Chairman. This amendment grants the antitrust exemption to small businesses which are defined as one that accepts credit cards for goods and services that they provide and employs fewer than 50 employees for each working day during each of the 20 or more calendar work weeks in the preceding calendar year.

Let me say that I think that we should be very careful in granting antitrust exemption. And since the passage of the Sherman Act over 100 years ago, American antitrust law has been designed to benefit consumers, which is contrasted to European antitrust law which is designed to protect competitors.

Now, if we pass this bill without the amendment, the 50 largest retailers in the country that have got stores all over the place can get together and use the antitrust exemption basically to negotiate better interchange fees which will have the result of helping put small businesses, the mom and pop stores, the few that are remaining, out of business because they will not have the power to -- the smaller stores will not have the power to end up forcing the lower interchange fees which will make them much less competitive.

And with the definition of "merchant" contained in the

original bill, it creates a loophole which gives large retailers a benefit at the expense of both consumers, community banks, credit unions, and smaller retailers. And the amendment would prevent the large retailers from getting a special deal.

I would hope that we would stand up and be in favor of small business here. They are the ones that need the antitrust exemption. The big retailers do not need the antitrust exemption, and I believe that we ought to narrow the scope of this bill to only the people who need the antitrust exemption to stay in business and to help consumers by providing competition to the bigger retailers that have the huger volumes.

Mr. Cannon. Will the gentleman yield?

Mr. Sensenbrenner. Happy to yield to the gentleman from Utah.

Mr. Cannon. I hope we can handle this without my claiming time. But I thought I could perhaps clarify this a little bit. What happens to a company that maybe fails this test by one employee and ends up negotiating? Has he violated the antitrust laws by participating improperly in negotiation?

Mr. Sensenbrenner. The answer to that question is yes. But when we define small business in a whole host of statutes we have an arbitrary limit on the number of

employees that they have. So this has an arbitrary limit in the number of employees that they have. If you want to make it a different number, I would be happy to agree to a unanimous consent to make it a different number. But you have to make a definition on who qualifies and who does not.

Mr. Cannon. I am not sure the number is so important as the effect. In other words, if a small business ended up improperly negotiating, that business would be subject to having violated the antitrust laws because he would no longer fit in the exemption. Is that the intent of the gentleman?

Mr. Sensenbrenner. Reclaiming my time, the answer is yes. But the Small Business Administration definition contains similar limitations and if a small business fails by one employee on those limitations, then they are ineligible to get SBA guaranteed loans to help keep them in business.

Mr. Cannon. Would the gentleman yield again?

Mr. Sensenbrenner. I made my point. Would the gentleman from North Carolina want me to yield?

Mr. Watt. I think I will get my own time.

Mr. Cannon. Mr. Sensenbrenner, if you would yield, there is another point I would like to clarify.

Mr. Sensenbrenner. Of course.

Mr. Cannon. Thank you, my friend. I think the point

of what you are saying is that if a small business fails the test, they violated antitrust laws by participating in the negotiations. I think that is a problem.

Secondly, companies that have fewer than 50 employees also are generally speaking not well capitalized and therefore would have a hard time carrying the cost of the kind of negotiation the gentleman is suggesting. So while large companies actually can negotiate and can carry the burden of the cost, if you limit this to small business companies --

Mr. Sensenbrenner. Reclaiming my time, which is about ready to expire, this argument would be made by the 50 largest retailers that would like to get an antitrust exemption. I reiterate the point that for over 100 years, American antitrust law has been designed to benefit consumers, not to protect competitors. And without giving an antitrust exemption to small business, however it is defined, they are not going to get any protection to be able to provide competition for consumers. And I yield back.

Chairman Conyers. The Chair recognizes the gentleman from New York, Jerry Nadler.

Mr. Nadler. Thank you, Mr. Chairman. I am opposed to this amendment. I think antitrust laws ought to benefit the consumers and competitors and having said that I would like to refer back to Ms. Wasserman Schultz's amendment, which I

am also opposed to, and I want to point out a couple of things about it.

Number one, either you can enforce a requirement that 100 percent of the benefit of the negotiation be passed to the consumers or you cannot. If you cannot, there is no point to it. And you can, it is self-defeating. Because if the merchants are not going to get any of the benefit of negotiations which we are mandating through this bill with the credit card companies, then they have no incentive to use this exemption in the first place. They have no incentive to hire a lawyer or anybody else and go negotiate if they are not going to get any of the benefit at all at the end. Which means the entire bill will be negated because nothing will happen.

So if you mandate that 100 percent of the benefit of that negotiation be passed through to somebody else, namely the consumers, and if you enforce that, then no one is going to do that negotiation. It is not going to happen and you have eliminated the entire point of the bill.

So maybe you want to mandate that some percentage of the benefits be passed through to consumers, and maybe you can enforce that. I am not sure you can. But to the extent you can, you cannot mandate that 100 percent be passed through because it negates the entire point of the bill.

And having said that, I will simply add that I agree

with Ms. Lofgren that you can also not say that such merchants' cost savings and other benefits should be measured against the rates and terms of access to the merchant prior to the date of enactment, because that allows for no inflation of any sort or any other expenses, and it would guarantee again that you would never have any use of this bill.

So I suspect -- I would to urge that this and Ms. Lee's amendment, if the bill is going to operate at all, has to be rethought. And I reiterate my opposition to the amendment that is under discussion at the moment.

Chairman Conyers. I have got to go to the other side. The Chair recognizes Darrell Issa -- excuse me. I recognize Lamar Smith.

Mr. Smith. Thank you, Mr. Chairman. I am tempted to say that maybe the way to get the focus back on the pending amendment is to postpone it. But I think I will go on and address in any case.

Mr. Chairman, I reluctantly oppose this amendment. My reluctance is strong simply because I know the gentleman from Wisconsin has the best of intentions and I understand the concerns that the credit card issuers have with allowing large merchants such as Wal-Mart to join together to negotiate interchange fees. This amendment seeks to limit the class of merchants that would be able to take advantage

of this exemption. There are possibly two problems with this amendment.

First, while it is true that Wal-Mart is not a mom-and-pop operation, it is equally true that Visa, MasterCard, Bank of America and Citibank, to name a few, are not exactly the neighborhood bank either. If the large banks and credit card companies can negotiate under this exemption, then large merchants should be able to negotiate as well.

Second, under the manager's amendment, credit unions and small banks can opt out of the negotiations in this bill. That amendment coupled with this provision would mean that the only entities that would be negotiating under this proposal are the very large banks and the very small merchants. This hardly seems like a fair fight to me. Mr. Chairman, I reluctantly oppose the amendment and yield back the balance of my time.

Chairman Conyers. The Chair recognizes Adam Schiff.

Mr. Schiff. Thank you, Mr. Chairman. I wanted to comment in support of the Sensenbrenner amendment. I also want to comment on the Wasserman Schultz amendment and the bill as a whole.

At the outset in terms of the pending amendment, I wish to speak in support of this. I do think that the goal of this legislation or any other ought to be to enhance the

benefit to the consumer, and I think that to the degree that we have been contemplating an antitrust exemption, it should be focused on the smaller merchants and not on those industry players that already have the bargaining power and the leverage, vis-a-vis the credit card companies and the banks. So I support the Sensenbrenner amendment.

I also support the concept of the Wasserman Schultz amendment because again, as so often is the case in some of the statutory changes that we make that were made in the name of consumers, the benefits never actually flow to the consumer and I think the spirit of this amendment is designed to insist that the savings be passed on. I do question whether the final provision of that that mandates filings by merchant is practicable and I encourage the author of that amendment to reconsider at least that portion of it. But I support the general requirement that the savings be passed on to the consumers.

And with respect to my colleague from New York's argument, Mr. Nadler, I would say that there is a benefit to the merchant passing on the savings from any change in this area to the consumer and that is that the goods will cost less in theory to the consumer. The consumer then will buy more of the products because they cost less and patronize the merchants more frequently and have more resources to do it.



But that assumes and this gets to the broader issue of the bill, that assumes that the bill works as intended to lower costs for consumers. And I still have some very substantial questions remaining about whether that will be the ultimate impact of the bill. The provision that most troubled me is the provision that the chairman -- and I want to thank him -- has removed from the bill. That dealing with the arbitration panel. I know that that is a provision that some of the my other colleagues most wanted to see in the bill. But the concern that I have over the arbitration panel is that I think it has an unworkable standard. What was the panel being asked to adjudicate? What standard was it being asked to apply? So I think it was a positive step forward to remove the panel.

But I am left at the end of the day both with the amendments that we are offering and the amendments that are yet to be offered, and the substantial change that was made in the manager's amendment, I am left at this point in the hearing still very unclear about the ultimate impact on the consumer. And I share the sentiments that were raised by my colleague, Mr. Davis's, letter to the committee. And I wonder whether it would be worthwhile when we conclude the business of the committee today, to reserve final action on the bill until we have more time to digest the bill's new form and what impact it may have. Because I would love to

have the benefit of more insight into the new form of the bill.

I had a wonderful antitrust professor in law school but that was a long time ago, Phil Aritta, who is now no longer with us unfortunately. He used to begin his lectures with "If I were the Ayatollah of antitrust, this is what I would do." A phrase that probably does not have as much currency today but we would benefit from the Phil Arittas of the world and their input. And if that is an option, I would encourage us to defer any final action on the bill until we have a greater opportunity to study it and I thank the chairman hear his consideration and yield back.

Chairman Conyers. The Chair is going to --

Mr. Watt. Mr. Chairman?

Chairman Conyers. I am going to recognize Howard Berman, and after that I am going to ask for a vote on the Sensenbrenner amendment. Mr. Berman.

Mr. Berman. Mr. Chairman, a comment on the Sensenbrenner amendment and then since it is apparently the way things are going, a comment on the Wasserman Schultz amendment.

On the Sensenbrenner amendment, he raises an important point that I have not heard anyone address. To the extent you open this up completely, can the big guys negotiate an agreement for lower rates which essentially leaves the

smaller guys open to having to pay larger rates because they don't have the bargaining clout? There is nothing in here that defines this as the whole.

My problem with the Sensenbrenner amendment is his hypothetical is the 50 largest, but his amendment is about 50 or less employees. There is a huge difference in between. Last night I was at a dinner where the ambassador, the Egyptian ambassador said that the annual revenues of Wal-Mart are three times greater than the gross domestic product of Egypt. Perhaps the gross domestic product of Egypt should be the defining point for the exemption.

But my only point is I am inclined to vote against Sensenbrenner because I think there are a lot of mid-sized retailers who in the context of these negotiations don't have any clout. But the general notion of differentiating between the very largest and the others makes some sense to me.

On the Wasserman Schultz amendment, as they rewrite it, I would like to understand better how one determines the savings and rebates it. One does not know at the time how many of a particular item are going to be charged over the year. How do they let the first purchaser get the benefit of the savings?

And secondly, to what extent is this something you can't ascertain with certainty because perhaps the deal that

is negotiated is one to get the rate protection that now exists for the next 10 years, rather than for the next year and you are now anticipating the savings are what might have been charged had you not entered into this kind of contract. Some mechanism that says what the savings are, unless it is fairly illusory what benefits we are actually giving to the consumer.

Mr. Watt. Will the gentleman yield to me before he yields back?

Mr. Berman. Sure.

Mr. Watt. Since the Chairman has indicated he is not going to recognize me. I could just use the rest of his time.

Mr. Berman. I yield to you for the rest of my time in this debate.

Mr. Watt. I actually support the thrust of the Sensenbrenner amendment. I support the thrust of the Wasserman Schultz amendment. But I think the concerns that have been raised by both of these amendments illustrate the point that I have been making all along in this markup that this is such a complex issue for us to be dealing with it in kind of this willy-nilly fashion, just seems to me not a prudent course. I won't say that again, Mr. Chairman. I think I have made the point over and over again.

These are legitimate concerns, trying to figure out

what is a small enough business to be covered by an antitrust exemption. What the unintended consequences of having every merchant in America file a piece of paper with the Justice Department or somebody in government. These are -- there are a lot of unintended consequences that I don't think we have carefully thought through and that is the point I think I want to keep making and I don't want to make it to get to the chairman's nerves. But I just want him to hear it.

Chairman Conyers. Well, what was it that you just said, sir?

I am appreciative of the gentleman from North Carolina's observation. And I just wanted to ask the gentleman from California what was the reference that he made to the Gross National Product of Egypt?

Mr. Berman. Well, my general point was there is a long way between the Sensenbrenner 50 largest retailers and a definition of covered merchants that employ fewer than 50 each day. And I am not sure -- to me there is a lot of retailers in the middle that perhaps deserve the benefit of this antitrust exemption for the purposes of their lack of bargaining power against a couple of very large credit card companies and banks. And I am not sure his -- his point is right, I think, but his mark where he has drawn the line I think is way too low.

Chairman Conyers. The question occurs on the Sensenbrenner amendment.

All those in favor, signify by saying aye.

Opposed, no.

In the noes have it. The amendment is not successful.

Does the gentlewoman from Florida have yet another amendment?

Ms. Wasserman Schultz. I do, Mr. Chairman.

Chairman Conyers. The gentlewoman is recognized.

Ms. Wasserman Schultz. Thank you, Mr. Chairman. Mr. Chairman, one of the issues that my colleagues raised this week that has not been addressed in this legislation at all is the unforeseen consequences on our smaller banks and credit unions, currently credit and debit card issuers incur substantial --

Chairman Conyers. The Clerk has not reported the amendment yet.

The Clerk. Amendment to H.R. 5546 offered by --

Ms. Wasserman Schultz. I ask unanimous consent that the amendment be considered as read.

[The information follows:]

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

Chairman Conyers. Without objection, so ordered. The gentlewoman recognized in support of her amendment.

Ms. Wasserman Schultz. Thank you. Currently debit and credit card issuers incur substantial cost when a merchant suffers a breach of data security. These costs include fraud losses and the cost of reissuing cards to customers whose accounts are misused. For many smaller issuers, interchange is the primary financial means by which they are able to protect their customers in the event of a merchant data breach. In other words, the revenue they generate from that, they use to be able to cover the losses of a consumer.

Under the status quo, merchants enjoy a tremendous benefit. They don't have to ever deal with the fraud losses that they cause by data breaches and that is, in large part, because the interchange fee pays for it. For retailers of all sizes, the acceptance of plastic guarantees payment protecting them against risk of fraud.

I believe if we are going to undo this grand bargain whereby issuing banks have assumed the responsibility for reissuing cards and whereby credit card companies have assured their customers that they will not be responsible for fraudulent charges, then we also need to reconsider the benefits to the merchants as well as other costs.

A recent community bank survey indicated that

70 percent of banks had to reissue cards due to data breaches three times or more in the last 2 years. For smaller issuers, the cost of responding to a data breach are significantly higher than those of the largest issuers based on economies of scale. For example, while a large bank might pay only \$3 to preprint and mail cards and cancel and create new accounts, it would cost many smaller banks and credit unions upwards of \$20 per account. That is real money and has to come from somewhere and for smaller banks it has to come from the benefits that they receive from interchange. So this not only impacts the small banks and credit unions, but it hurts consumers as well.

These protections are too important to lose and as we learned in Australia issuing banks will cut down on those services or charge more for them if interchange is depressed. It is the consumer that will be burdened.

My amendment simply states that any negotiated access agreement under this Act must include a requirement that merchants that suffer a breach of data security reimburse any card providers for the cost incurred as a result of such a breach. It also says that the reimbursement provided shall be in direct proportion to the reduction in access rates that the merchant receives as a result of the agreement. That seems only fair. If we are going to legislate in as much of a hurry as we seem to be today, we



need to make sure that we have thought all of the consequences through for the smaller banks and credit unions. My amendment will help protect them, and I hope it gains the support of the members of the committee. Thank you, I yield back the balance of my time.

Chairman Conyers. Thank you very much. Does the gentleman from Texas seek to be recognized?

Mr. Smith. Yes, Mr. Chairman, I do. I oppose the amendment.

Chairman Conyers. The gentleman is recognized for 5 minutes.

Mr. Smith. Thank you, Mr. Chairman. While I am generally supportive of data security measures, I oppose this amendment because it applies only to breaches that affect merchants. And it is a good idea and I am cosponsor of other legislation that addresses data security, then it should apply to both banks and merchants.

But let me address a couple of questions to the mover of the amendment, the gentlewoman from Florida. The amendment has three provisions and I have a question about each of the three provision.

The first provision is that the Act shall -- the merchant shall reimburse the provider for any cost associated with the data security breach. That sounds to me like on a mandate that occurs whether the merchant is

negligent or not and the merchant is going to be held liable.

On the second paragraph, if I can get all three questions in, it said that reimbursement has to be in direct proportion. I don't know how you determine direct proportion. And if I could give an example there, that would be helpful.

And in the third paragraph, you mention that breach of security is defined as information that could be used to commit financial fraud. That is speculative and prospective. And therefore I don't know how you would show prospectively that it could be used to commit financial fraud without going through a series of lawsuits.

Those are my questions about the amendment. And because of those questions and my additional above-mentioned concerns I oppose the amendment. And I will be happy to yield to the gentlewoman from Florida.

Ms. Wasserman Schultz. Thank you. I appreciate the gentleman from Texas' questions. The bottom line here is that there is a benefit that merchants receive now that is covered when there is a data security breach. That would no longer be covered if this legislation becomes law. So in order to make sure that the consumer is protected, which is what this bill is purportedly designed to do, we have to make sure that the consumer themselves does not suffer from

that data security breach and that the protection can continue to be paid for.

Who else would pay for it if this fee is no longer available to do that? So that is what the amendment is designed to do.

In terms of the second paragraph, there is a proportion under which the merchant is going to benefit by the reduction in the interchange fee. The second paragraph simply states that the reimbursement that would have to be provided would have to be in proportion to the reduction in the rates that they are no longer paying.

And forgive me on your third question related to the definition?

Mr. Smith. Let me reclaim my time quickly, in regard to your answer to my first question, I don't question your intentions. I know they are of the highest order, but I don't think you answered my question about the merchant being liable whether they are negligent or not.

But to answer your question on the third question was about the speculative nature, the prospective nature of saying that the information could be used to commit financial fraud. I think the only way you are going to be able to prove that is to go to court and that is going to tie up the process beyond what you or I would want.

Ms. Wasserman Schultz. Will the gentleman yield?

Mr. Smith. Happy to yield.

Ms. Wasserman Schultz. Thank you very much. I offered this amendment to raise what I think is an important omission. And that is one that has the bill moves forward, needs to be addressed. This is an amendment that certainly could be perfected. I am not saying it is written absolutely perfectly, but the point is that as has been stated over the course of the last hour, there are some significant deficiencies in spite of the intention, very good intentions of the sponsor of this bill, this bill it would be far better if we could leave this bill in the Judiciary Committee so that we could continue to work on these deficiencies rather than pass it along where a lot less likely that most of us would be involved in the development of this legislation.

So this particular amendment is an important one, and I will withdraw it at this time. But I do want to make sure that it is understood that this is a major deficiency that again would not allow the consumer the protection that they have now.

Mr. Smith. I thank the gentleman and I yield back.

Chairman Conyers. The gentlewoman withdraws her amendment.

We have been summoned to the House floor for four votes. And I know Brad Sherman has an amendment but we will

take it up immediately after we come back from the floor.

The committee stands recessed.

[Recess.]

RPTS MERCHANT

DCMN HERZFELD

[1:25 p.m.]

Chairman Conyers. The committee will come to order. Everyone please take seats. The Chair recognizes the gentlelady from Florida Debbie Wasserman Schultz.

Ms. Wasserman Schultz. Thank you, Mr. Chairman, and I appreciate the opportunity to work with the Chairman and others in the interim before we returned. At this time I would like to withdraw my previous amendment and instead offer the amendment at the desk.

Chairman Conyers. The clerk will report the amendment.

The Clerk. Amendment to --

Ms. Wasserman Schultz. And then I would ask unanimous consent to have the amendment considered as read.

Chairman Conyers. Without objection, so ordered.

[The information follows:]

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

Chairman Conyers. The gentlelady is recognized in pursuit of her amendment.

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

And this amendment is now very simple. It simply severs the enforcement mechanism that was the second section of this amendment that required the savings to be certified by the executives of a merchant, and simply says that 100 percent of the savings and other benefits obtained in connection with the reduction in the interchange fees needs to be passed on to the consumer.

The purpose of this legislation has been reported, and I trust that the intentions of the sponsor are to ensure that the consumer is provided with savings. That is the attention of this amendment to further ensure that that is the case.

Mr. Nadler. Will the gentlelady yield for a question?

Ms. Wasserman Schultz. I will be happy to yield.

Mr. Nadler. Thank you.

This says that 100 percent of the cost savings and benefits, however measured, should go to consumers, correct?

Ms. Wasserman Schultz. Yes.

Mr. Nadler. Well, since the point of the bill is that we will give an antitrust exemption to merchants, who will thereupon have to hire lawyers and so forth and negotiate

with the banks or with Visa and MasterCard if they are going to use the bill, if all the benefit goes to somebody else, what incentive will they have to do that, and wouldn't this amendment, in effect, negate the entire bill because no one will ever use it; and if not, why not?

Ms. Wasserman Schultz. Reclaiming my time, no, not at all. On the contrary. The competitive nature of the business environment will automatically ensure that there will be many, many businesses that will pass those savings on to the consumer because the language will require that. And then when they do, they will, by the very nature of the competition, ensure that other businesses follow suit.

Mr. Nadler. Will the gentlelady yield again?

Ms. Wasserman Schultz. Yes, I will be happy to yield.

Mr. Nadler. Yes, but that is after the fact. My question is why would they bother negotiating in the first place? Why would they bother hiring a lawyer and go negotiate, take advantage of the bill's antitrust exemption, they are going to negotiate the banks to get a lower rate in the first place, if, in fact, all the benefit goes to somebody else?

Ms. Wasserman Schultz. Reclaiming my time. Because lowering prices for the consumer makes them more competitive, and it enhances the bottom line for their business.



Mr. Sherman. Will the gentlelady yield?

Ms. Wasserman Schultz. I will be happy to yield.

Mr. Sherman. Your amendment uses the term "merchants' cost savings." I assume that if I save \$100,000, but I have to chip in 10 grand for the lawyer, I only have to pass \$90,000 of benefit to my consumers, right?

Ms. Wasserman Schultz. I would believe that is correct.

Mr. Sherman. So the lawyer's fee doesn't cost me anything, and I am able to lower the price to my consumers by \$90,000, making me more competitive?

Ms. Wasserman Schultz. That is exactly right.

Mr. Sherman. Thank you.

Mr. Cannon. Will the gentlelady yield?

Ms. Wasserman Schultz. I would be happy to yield.

Mr. Cannon. I am trying to follow why it would make the merchant more competitive with other merchants if they all have the same benefit and have to pass it on to consumers so there is no net benefit to the merchant. Why would the merchant gamble the \$10,000 or the \$100,000 or the million dollars in negotiations if he is not sure that he is going have any kind of benefit for his business on the back side?

Ms. Wasserman Schultz. Because of the headline in the Washington Post today: An Economy Thrown into Turmoil.

There is a significant need for merchants to be able to enhance the benefit that they provide to consumers to enhance the competition that is out in the marketplace. And the great likelihood is that merchants will take this opportunity to lower costs for their customers and bring in more business and be in a more competitive position.

Mr. Cannon. Would the gentlelady continue to yield?

Ms. Wasserman Schultz. Yes, I will be happy to continue to yield.

Mr. Cannon. I am very pleased to hear that we actually fundamentally agree that this is an important enough issue that it would actually affect the turmoil in our markets.

Ms. Wasserman Schultz. Reclaiming my time. It is. It is just that if we don't include this provision in the language of the bill, then there is no guarantee that the consumer will save anything, and we will only ensure savings for the merchants and eliminate the fees, which benefits consumers not at all.

Mr. Cannon. Would the gentlelady yield?

Ms. Wasserman Schultz. I will be happy to yield.

Mr. Cannon. I think, of course, that we made the argument on this side and on your side that improving the transparency and fluidity in the market makes a great deal of sense, and that is likely to benefit consumers. But what Mr. Nadler is asking is why would a merchant invest what may

be \$10,000, it may be \$1 million, in the process if there is no financial incentive for him to do that?

Ms. Wasserman Schultz. Let me reclaim my time, and I would like to yield to the gentleman from Alabama.

Mr. Davis. Let me thank the gentlelady for yielding.

I may be speaking to Mr. Cannon's, or I may be speaking to points that others raise. If the argument is that a given merchant would not have an incentive to take advantage of the antitrust exemption, I think that does miss a reality of the market, Mr. Nadler. As a practical matter what you may have in some instances is a variety of companies, a variety of merchants who are able to pass savings on to the consumers. If for whatever reason you are not able to participate in that, then you have suffered, and you have exposed yourself to a relative competitive disadvantage.

But I want to return it to the square point that we are talking about today. This is not an academic argument about who bears the cost and who doesn't. What some of us on this committee believe is that whether you are a Democrat or Republican, conservative or a liberal, you ought to have a very cautious notion of Congress wading into the antitrust area and picking sides between corporate interests. The only principal time for us to pick sides between corporate interests is, frankly, not in the name of competition. There is a Justice Department and courts to interpret the

antitrust laws. But it is if there is a net gain for the consumer.

I support Ms. Wasserman Schultz's new amendment. I think it would create a net gain for the consumer. And again, it takes us back to the central question of the day. There is a very strong likelihood that if credit card companies lose money, they are going to make up for it by passing the costs on to consumers in terms of direct transactions with them. So where can you guarantee the consumer get a benefit? Well, Ms. Wasserman Schultz's amendment would guarantee it by requiring that the savings be passed through. If we don't do that, we are simply an 800-pound gorilla coming in and putting our foot on one side of the scale depending on which corporate interest we like better. That is not a very conservative thing to do.

Ms. Wasserman Schultz. Mr. Chairman, I yield back the balance of my time.

Chairman Conyers. The gentlelady's time has expired.

The Chair recognizes Mr. Smith.

Mr. Smith. Thank you, Mr. Chairman.

I oppose this amendment, though I certainly acknowledge it has been improved in the way it has been altered. One of my main concerns with this legislation is how it will impact consumers, and I have to say I think individuals on both sides of the podium do have concerns about consumers. After

all, they are the people who ultimately pay the interchange fees in the form of higher prices. However, I have concerns with any amendment that mandates a pass-through of the savings. In particular, I fear that this will open merchants up to class-action lawsuits alleging they have not passed on every last cent of the interchange fee savings to consumers.

The amendment as it now reads contains the phrase that 100 percent price reduction must equal 100 percent of such merchant's cost savings and other benefits. I don't know how you are going to determine what other benefits are; put a monetary figure on that. I am not even sure if I know you can determine what 100 percent of the merchant's savings are going to be. And as a result, if you can't prove it or can't determine it, I don't know how it can be enforced. So that is an additional concern I have.

But, Mr. Chairman, let me confess that while I talk and I know many others talk about our interest in making sure that the savings are passed on to consumers, I have to confess that I agree with that, and I certainly hope that most of the savings are passed on to consumers, but I don't begrudge the small business owner if they have a slight increase in their profit margin. And I am thinking particularly of a half an hour I spent with the owner of a breakfast-lunch -- I wouldn't even call it a cafe; it is

sort of a sandwich shop -- about 10 feet wide, no tables. All there is is a row of rounded chairs next to the counter. And I talked to this individual about his profit margin, about how small it was, and how even in the winter months it really wasn't worth staying open, but he did so just to keep the business going. Now, if he happens to make a little bit more than the \$19,000 he made last year, I am not going to begrudge him that even though --

Mr. Nadler. Would the gentleman yield?

Mr. Smith. -- even though technically not every part of the savings is passed on to consumers. But as I say, I hope in most instances most of the savings will be passed on.

Mr. Nadler. Would the gentleman yield?

Mr. Smith. Let me just finish this thought. Who is asking me to yield? Mr. Nadler. Just a minute, and I will yield to the gentleman from New York.

So I have concerns about the 100 percent mandate, both in the 100 percent and also in determining how and how much those cost savings are going to be, and also how you determine what other benefits are. So I just don't think it is enforceable, even though I appreciate and actually support the idea of trying to make sure that most of the savings are passed on to consumers.

And now I will be happy to yield to the gentleman from

New York Mr. Nadler

Mr. Nadler. Thank you.

I could not resist the urge to ask the gentleman to yield to express agreement, and one of the very few times I agree with the gentleman.

I thought the whole point of the proponents of this bill was to help the struggling small merchant. I don't see anything wrong with trying to help the small merchant as well as the consumer. Frankly, I thought that the point of the bill was to help the merchant, not the consumer. And if it were to help the consumer, that is fine; if it is to help the merchant, that is fine; if it is to help a combination of the two of them, that is also fine.

I am not going to repeat my argument that I think the amendment would negate the entire bill. I still think it will. But I will say one thing to comment to what Mr. Davis said, and that is that how will the merchant benefit, why will he have an incentive to use this bill if he has got to pass on all the savings, because he will be able to pass on the savings and have a competitive advantage?

The reality is that this bill says let the merchants get together to negotiate as a bloc with the big banks that are, in effect, a bloc. And if they do that, and if the bill passes, and if the bill works, they will negotiate as a bloc, and they will get a lower interchange rate maybe. But

that lower interchange rate will be the same for all of them, and none of them will get a competitive advantage one against the other, and therefore they can't compete one against the other. And therefore, there is still no incentive to use it if they have to pass all the benefit through to the consumer. So again, it entirely negates the point of the bill.

Mr. Chairman, I hope the gentleman from New York will look for other occasions with which to agree with me.

Mr. Davis. Will the gentleman yield?

Mr. Smith. I will be happy to yield to the gentleman from Alabama.

Mr. Davis. Thank you, Mr. Smith. I will be brief. I would simply make one point.

Why not -- this is an argument from Mr. Watt's proposition earlier, I think -- why not allow a new Justice Department and a new Antitrust Division to make an analysis of whether it is wise to grant this exemption and let us hear from them? And if the new Justice Department and the new Antitrust Division says this is a good idea, we can come back and take it up next year.

Mr. Nadler. Will the gentleman yield?

Mr. Davis. It was not my time to yield.

Mr. Nadler. Will the gentleman yield for 10 seconds?

Mr. Smith. I will yield again to the gentleman from



New York only under the condition that he agrees with me again.

Mr. Nadler. Well, I think I do. But I wanted to answer the question. I didn't I say I thought it was a good idea or a bad idea to create this exemption. I simply said that if you are going to create this exemption, don't do it in a way where it won't take effect, which is what this amendment would do.

I yield back.

Ms. Lofgren. Will the gentleman yield?

Mr. Smith. Let me yield to the gentlewoman from California.

Ms. Lofgren. Thank you. Because we often do agree, as it turns out, on various things.

Mr. Smith. I will continue to yield in that case.

Ms. Lofgren. And I just want to say that we are all for consumers, but to assume that in sort of Soviet style we know the best way to help consumers is a mistake. I mean, there are lots of ways that a smart merchant could provide benefit for customers. For example, if you are filling out things by hand, you could computerize your operation and reduce prices in that way. That would be prohibited under this amendment. You could decide that you need continuity of your employees, and therefore you want to do health care for your employees.

Chairman Conyers. The time of the gentleman has expired.

Mr. Smith. May I have an additional 30 seconds to yield to gentleman from California Mr. Sherman, who had his hand up before my time was up?

Chairman Conyers. Yes.

Mr. Sherman. I was seeking recognition to address a different aspect of the bill, and maybe someone could answer the question.

Mr. Smith. Let me yield back the balance of my time.

Mr. Sherman. I yield back to the gentleman.

Mr. Smith. Thank you.

Chairman Conyers. Ladies and gentleman, I support the concept of a pass-through of a savings to consumers, and the bill as drafted provides some assurances in that regard. So whether this amendment is successful or not, I intend to continue the work on both sides of the aisle, who really seem to be working more and more closely toward the same objective.

Now, the last person to speak on this amendment before we vote on it is going to be Brad Sherman.

You don't want to speak on it.

Mr. Issa. Mr. Chairman, I will speak against it, if you would like.

Chairman Conyers. Well, I was going to recognize you

separately, but if you would rather speak on this measure, I will recognize Darrell Issa.

Mr. Issa. I thank the Chair.

I move to strike the last word. Although this is last onerous than it was before, as somebody who understands that many retailers are losing money, inherently this amendment is presently flawed in a way that ensures that a company that gets this savings cannot keep itself from going out of business by breaking even, but rather would have to pass it on. So I think it inherently, between now and the final markup of this bill, it might behoove the author to reconsider how one tries to pass on appropriate savings, because Circuit City, a public company, easy to understand, they are losing money. If they get this savings, they are going to invest in ways to stop losing money. And the consumer certainly has appreciated companies like Circuit City and others for many years and the low prices that they deliver, but they also have to make a profit in order to stay in business.

I will take this opportunity very briefly, though, to say that this underlying bill I appreciate the Chairman working on. I intend to try and continue it moving. I have notified your staff that if all things were perfect, at the conclusion of today's debate and amendments we would refer this back to the subcommittee to give it an opportunity for

some additional work. I know that is not in regular order, regularly the order of the day, but I believe that the Chair has seen so much progress today, that hopefully we will hold control of this long enough to have a final perfecting markup rather than going to the floor.

This was said earlier, that under a structured rule, we often lose any opportunity to have the kind of dialogue we have had here today. Having said that, this is my first and perhaps only time to speak today, Mr. Chairman. I think all of us on the Antitrust Task Force have become convinced that there is a flaw in the system. And notwithstanding the gentlelady from Florida, if we were mandating that her husband's bank, for example, pass on savings, we wouldn't have to have this problem, because, in fact, over the several years in which interchange fees have gone up, computerization has reduced costs. So we do have a problem that we understand.

Last but not least, as to the gentlelady from Florida's amendment, what is amazing about it is that in a perfect world, it probably would offer retailers a great opportunity. One of the things we discovered that is not addressed by this bill that I wish was is that I only carry credit cards that give me free miles. Now, the reason I do it is because the retailers are essentially prohibited from having a staggered rate where they charge me a percent more

if it costs them a percent more to handle it. I refuse as a consumer to, in fact, use a card that gives me no benefits just because it saves the retailer money when it isn't passed on.

Don't write the number down. Louie is going to town on this card. I will give you the miles, thank you.

Mr. Chairman, it is very clear that one of the things we have to look at is that we have a dysfunctional market; one in which if I use a debit card, I could save the retailer 1 or 2 or 3 percent, but I get no benefit from it. If I use the Mileage Plus card, I get the benefit, but it costs the retailer several percentage more. This is dysfunctional. So I hope that between now and final markup that we take a good look at the fact that this is part of the flaw in the absence of a fair negotiation. So although I am not -- and I have told both sides I am not -- thrilled with all the solutions, I have become convinced that the problem must be addressed. I appreciate the fact that today you were moving us toward addressing it.

And I would yield to the Chairman for whatever he wants.

Chairman Conyers. I want to agree with you that there is work that can be done between now and its moving to the next stage. I do not intend to postpone this measure though. We have put too many hours on it today. And I am

going to recognize --

Mr. Lungren. Mr. Chairman.

Mr. Issa. Mr. Chairman, I am reclaiming my time. I would like to yield time to the gentleman from California.

Mr. Lungren. Will the gentleman tell me that if, in fact, a company can't use the savings in order to stay in business such as Circuit City and they go out of business, how does that ensure consumers benefit?

Mr. Issa. Reclaiming my time. The gentleman is absolutely right. If we take this on its face, it not only mandates that for every difference in the rate, essentially you would have to have a difference in retail pricing, but, as you said, a company losing money would be prohibited from keeping these monies in order to stay in business. And that is simply wrong. The more companies that stay in business, the more competition there is, the better opportunity the consumer has.

And so I agree with the gentleman. That is one of the reasons I will be opposing this amendment and supporting moving this bill in a way that hopefully will be better.

Mr. Chairman, with that I yield back, and thank you very much.

Chairman Conyers. The Chair's intention is to recognize Mr. Keller and Mr. King, and then to vote on the Wasserman Schultz amendment.

Mr. Keller is recognized.

Mr. Keller. Thank you, Mr. Chairman.

I oppose this amendment for three specific reasons. I am going to be crystal clear, although I appreciate my friend and colleague's intention here.

First, the existing language that you have on page 8 and 9 of your manager's amendment that we have approved is so much better and fair and more balanced. And let me be crystal clear. It says the merchant shall pass the benefits of any reduction and fees on to its customers or employees, and to be balanced it says, the financial institution shall pass the benefits of any such fees on to its customers or employees. What Ms. Wasserman Schultz says is, no, only the merchants have to pass along the savings and not the banks. It is as completely one-sided amendment, 100 percent in favor of the banks, and it is not balanced. I like the intent, but let us do it to both sides.

The second flaw with it is the existing language is superior because it says, pass along the savings to customers or employees. Ms. Wasserman Schultz strikes out the word "employees." Let me show you why that is a flawed idea.

Let us say the small corner grocery store with five employees gets a better interchange fee rate, and they save 100 bucks. And they decide that they will use 95 bucks to

pass along savings to consumers, but their health insurance for one of their employees went up, and so they are going to use 5 percent of that money to make sure that that lady still has health insurance who works the cash register. That would be illegal under Ms. Wasserman Schultz's amendment because they didn't pass 100 percent on to customers. But under your existing language, it is just fine.

The third and final flaw with Ms. Wasserman Schultz's well-intended amendment is she said as the basis for it, well, when the convenience stores people were here, and you asked them what they were going to do with the money, they are just going to put it all in their pocket as profit. Well, I happened to be the guy who did the cross-examination on that issue, and as an old trial lawyer I couldn't have been more crystal clear on that issue. And I am just going to read you what was exactly said.

Mr. Robby Robinson, who was here testifying.

Mr. Robinson, you have heard that you are not going to pass along any of the savings to your consumers. Let me just ask you point blank, if you have a favorable result, either through legislation or litigation, where you pay a lower interchange fee, are you going to pass along these savings to consumers, or are you going to take all the money and put it in your pocket as additional profits?



Mr. Robinson's response to my question: Well, petroleum retailing is a fiercely competitive business. Generally when costs go up or benefits increase, we pass along the savings to the consumer.

Representative Keller: Let me be crystal clear. Let us say that you are paying 2 percent in interchange fees now, and Conyer's bill passes, and you go to the arbitrator and the arbitrator says, I agree with you 100 percent, and it is only going to be a 1 percent interchange fee. Will Rotten Robby's customers get a discount when they go to buy doughnuts or gasoline or Coca-Cola as a result of taking interchange fees from 2 percent to 1 percent?

Well, I don't think the marketplace works exactly that way, but ultimately the answer to your question is the consumer will benefit.

So clearly they said the consumer will benefit. It didn't say, I would take all the money and put it in my pocket.

I guess the point of this is I appreciate Ms. Wasserman Schultz's intention. I don't question any of the motives. In fact, savings are passed along. But the existing language is pretty darn good, and it already achieves that intention, and it does it in a way that is fair to both sides. And so I ask that we support the existing language in the manager's amendment and reject Ms. Wasserman

Schultz's amendment for the three reasons I have articulated, and I would yield back the balance of my time.

Chairman Conyers. Mr. King.

Mr. King. Thank you, Mr. Chairman.

I do think the gentleman from Florida has articulated a lot of my concerns. But I wanted to come back to a point that, as I listened to the beginning of this in your opening statement, and then as I go down the line and I remember Ms. Jackson Lee and Mr. Davis and Ms. Wasserman Schultz talk about how we are going to ensure that these savings get directed to the consumer, I appreciate the way that Mr. Keller has articulated that, but why are we here in this way in the first place? And that is because the small merchant retailers don't have any leverage. And they are the ones that are paying the extra premium on an interchange fee when somebody walks in with a credit card to purchase a pack of gum or a pack of cigarettes, and the margin is gone, and it becomes a net loss. That is what this is about.

And I think we are presuming that the retailers, because of competition, will provide the best bargain they can for their customers and still maintain enough profit margin so that they can keep their doors open. That is the balance of the free market system, and that actually is the essence of the invisible hand. And for us to sit here in this committee and evaluate how we are going to determine

that savings get passed along to the consumer, it is the invisible hand that Adam Smith actually didn't write about, but was written about in his analysis that makes that determination. The consumer will make that determination, and the competition in the retail marketplace will make that determination.

And I, for one, think it is inappropriate for us to make that determination here and direct that that flow through, because I think it becomes what Ms. Lofgren called the Soviet style means of controlling commerce in this country. I am very much a free market person, and to be a sponsor on this legislation was a very difficult position for me to get to. I need to get to the point where I see the effects of a de facto monopoly before I can get to that point where I think we ought to intervene and say at least come to the table and bargain.

But where we are now with the Wasserman Schultz amendment, I wanted to remind our colleagues on this committee that this bill, this bill that has some bipartisan support and some bipartisan disagreement, rises or falls on this amendment that is before us. If this amendment passes, I believe the bill falls. Or, excuse me, and if this amendment fails, I believe we move forward with it, and it goes to the floor.

So I wanted to articulate that and say that this is the

killer amendment. The bill is either up or down on this amendment. I oppose the Wasserman Schultz amendment because I don't believe that you can direct that the savings go through to the consumer without negating the very purpose of this bill in the first place, which was to provide a negotiating position for the retailers who are at a negotiating disadvantage right now.

So with that, Mr. Chairman, I would yield back.

Chairman Conyers. Thank you.

I had said there would be only two speakers, but Sheila Jackson Lee has again prevailed upon me to be the last one.

Ms. Jackson Lee. Thank you Mr. Chairman.

I think following the distinguished gentleman from Iowa, I might want to offer that this is not really as black and white as he has perceived it, and I appreciate his very firm stand on the Wasserman Schultz amendment.

I think the underlying premise, Mr. Chairman, of what you tried to do and the language that I wrote in the manager's amendment and what Ms. Wasserman Schultz is speaking to are the rights of consumers. And I think consumers balanced with merchants are a key part of why we are moving forward.

I do think it is important, however, to include the banking element in it, which is not, as I understand it, included in the present amendment. But I would hope because

we have this mutual interest that as this legislation moves to the floor, the concerns addressing the question of consumers can be further enhanced and that the bill can respond to the many concerns.

I think the underlying language in the manager's amendment speaks to the flexibility that we are all talking about. I think there is some debate on the question of consumers and employees. And I would offer the idea that this particular provision have oversight particularly be pronounced in the language that designs the Antitrust Division's oversight, and as well, even though there was a promise about a two-tier system, I do think it is important to look at the option of a three-panel as we move forward in this legislation so there be some enforcement to ensure that merchants and consumers, and if there is some other options, be enforced. And I do think that the underlying language in the manager's amendment effectively lays out the groundwork for consumers and gives flexibility to the merchants.

And with that I yield back.

Mr. Conyers. The question before us is whether we support or reject the amendment by Debbie Wasserman Schultz. All those in favor, say aye.

All those opposed, say no.

The noes have it, and the amendment is defeated.

The Chair recognizes the gentleman from California

Mr. Sherman, Brad Sherman.

Mr. Sherman. I have an amendment at the desk.

Chairman Conyers. The clerk will report the amendment.

The Clerk. Amendment to H.R. 5546 offered by

Mr. Sherman of California. Page 4, strike lines 21 through 23.

Chairman Conyers. Without objection, the amendment is considered read, and the gentleman is recognized in support of his amendment.

[The information follows:]

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

Mr. Sherman. This amendment is a clear theft of intellectual property, mainly Mr. Sensenbrenner's amendment, but it has been modified to recognize and to tangibilitize --

Mr. Sensenbrenner. Will the gentleman yield?

Mr. Sherman. I will yield to the gentleman, yes.

Mr. Sensenbrenner. You will get the bill for my royalty fee in the mail at the end of the month.

Mr. Sherman. Thank you. I think I can get myself classified as a radio station and avoid it.

Returning to this amendment, it has been modified to reflect the wisdom of Mr. Berman, who, in the discussion of Mr. Sensenbrenner's amendment, pointed out that drawing the line at 50 employees might be too low, that we might want to go above that. So what the amendment provides is that "merchant" is defined as an employer of 500 or fewer employees. That clearly includes everybody we have been talking about here. I have heard --

Mr. Ellison. Will the gentleman yield?

Mr. Sherman. I will yield.

Mr. Ellison. Over here. I originally thought the Sensenbrenner amendment had a lot of merit, and I still think it does. But, of course, a lot of small merchants are represented by trade associations, which I would presume

would argue on their behalf.

Do you agree that small merchants do sort of bring themselves together and can sort of approximate the kind of power that a larger retailer might have so that they can get the benefits of the negotiation as well?

Mr. Sherman. Well, you could argue that we would not need this bill at all; that these groups could get together and negotiate. But as I understand our antitrust law, that is what we are trying to do is let merchants get together and negotiate collectively. The question is which merchants.

Mr. Ellison. No, I agree with the premise of the Sensenbrenner amendment; that bigger merchants will cut their own deal and then be able to lower the price versus the smaller merchants. But, you know, I guess I was thinking that, okay, you deal with a Target, a Wal-Mart and others, those folks can do that. But isn't it true that smaller merchants have trade associations which can pretty much put themselves in a similar bargaining position?

Mr. Sherman. Reclaiming my time. Obviously Wal-Mart can go in and negotiate with Visa. And as Mr. Berman pointed out, they have got GDP of three times -- they have got a turnover of three times Egypt's GDP. Revenue, not GDP? Okay. The revenue or turnover of Wal-Mart is three times the GDP of Egypt, and sorry for spending time on that.



Getting back to the gentleman's question, it is my understanding that if you took the California association of gas station owners, and they went in to Visa, that that would be a violation of antitrust law. The purpose of this bill, as written now, is to allow groups of merchants to go in and negotiate with Visa. The question is what kind of groups are we going to allow? The bill as written would allow Wal-Mart to get together with Target to get together with whoever, and I am not sure that that is where we want to go.

Mr. Cannon. Would the gentleman yield? Over here.

Mr. Sherman. Yes, I will yield.

Mr. Cannon. Thank you. I hope we can get this done on one set of time.

First of all, I wanted the gentleman to know that we are used to having our intellectual property stolen because, after all, we work with the Senate all the time. And then to make the more serious point that I think that Mr. Ellison is making, although I am not quite sure; that is, that small merchants can accumulate their voice in associations.

If we create an arbitrary cut-off at 500 employees or 50 employees or whatever, we create a terrific distortion in the process that has a normalcy to it that will work. What we are trying to do with this bill is create a context for negotiations and discussions between merchants and banks.

And an arbitrary number, whether it is 50 or 500, I appreciate the gentleman to move it to a more rational context, but 500 does not change the underlying problem. And I hope the panel will vote down this amendment.

Mr. Berman. Will the gentleman yield?

Mr. Sherman. I am reclaiming my time and yielding to the gentleman from San Fernando Valley.

Mr. Berman. The appeal of this amendment, although I would find it more appealing if it were at a figure like 5,000 than 500, is what the gentleman from Wisconsin raised in passing. He didn't dwell on it, but he said under the construct of this proposal, the largest guys could form, in effect, a self-created bargaining unit and negotiate with the credit card companies a preferred rate. And maybe they would have the clout to succeed. And they could do it because they had an antitrust exemption. They wouldn't include the vast majority of retailers in that unit. The credit card companies would then say, we will have to use our superior clout on the midsize and smaller guys to make up for that which we are losing in our negotiations with the larger guys, and that an unintended consequence of this bill could be to increase fees, because the smaller guys, left alone, cannot put together the bargaining clout to ensure that they get the same protections.

So the question is, is this the way to go, an

exemption, and what is the level; or is there something that essentially prohibits large retailers separating themselves from the universe of retailers? Is this a comprehensive bargaining unit for all merchants, or is this a self-declared, self-defining group of people who decided to get together and the consequence of which is to allow the others who don't have that clout to -- in effect, the savings that they are getting may or may not go to the consumers, but the costs will go for sure to the guy with the sandwich shop and the round chairs who would like to close in the winter if he could.

Mr. Cannon. Would the gentleman yield?

Mr. Sherman. Reclaiming my time, and then I will yield to the gentleman.

There is this dream that we could just get all the sandwich shop owners together, and they would form one mighty lead, more powerful than Wal-Mart's by a factor of 10. That doesn't work. I have seen power in Washington. I have seen what it takes to put together trade associations, bargaining units, and I have seen what it takes to try to put together a couple hundred, let alone thousands, of gas station owners.

I want to make sure this bill aids the people we are trying to help. And the focus in all of the discussion, the description of those we are trying to help, has tended to be

the small merchant. As the gentleman from California points out, if we don't limit this bill to the small or the small and medium-size merchant, it is not just that they are going to be left behind and not helped by the bill, it may mean that they are hurt by the bill, because Wal-Mart and Target can get together quickly and negotiate a deal. So the question here is do we want to limit this bill to small and medium-sized merchants, and if so, is 500 the right number?

Mr. Weiner. Will the gentleman yield?

Mr. Sherman. I will yield.

Mr. Weiner. The purpose, the overarching purpose, of the bill is not to create equity among the different merchants, it is to give the merchants relative power as a group against the credit card companies that are negotiating. You are still going to have big players and small players under Mr. Cannon's bill.

I don't think this bill seeks to create some kind of nirvana of power. It is to as a group say in the balance of power between merchants and the credit card companies to create a counterbalance. And I think we want to kind of let the marketplace work to the greatest extent possible. I think this is something that we are both unified by. If we wanted to really be heavy-handed, we would go in and set fees, which, of course, we are not doing.

Mr. Sherman. Reclaiming my time --

Chairman Conyers. The gentleman's time has expired.

The question is on the amendment by Mr. Sherman. All those in favor, say aye.

All those opposed, say no.

The noes have it.

Mr. Sherman. I would ask for a recorded vote.

Chairman Conyers. A recorded vote is requested. The clerk will call the roll.

The Clerk. Mr. Conyers.

Chairman Conyers. No.

The Clerk. Mr. Conyers votes no.

Mr. Berman.

Mr. Berman. No.

The Clerk. Mr. Berman votes no.

Mr. Boucher.

[No response.]

The Clerk. Mr. Nadler.

[No response.]

The Clerk. Mr. Scott.

[No response.]

The Clerk. Mr. Watt.

Mr. Watt. Aye.

The Clerk. Mr. Watt votes aye.

Ms. Lofgren.

Ms. Lofgren. No.

The Clerk. Ms. Lofgren votes no.

Ms. Jackson Lee.

Ms. Jackson Lee. No.

The Clerk. Ms. Jackson Lee votes no.

Ms. Waters.

[No response.]

The Clerk. Mr. Delahunt.

[No response.]

The Clerk. Mr. Wexler.

[No response.]

The Clerk. Ms. Sanchez.

Ms. Sanchez. No.

The Clerk. Ms. Sanchez votes no.

Mr. Cohen.

[No response.]

The Clerk. Mr. Johnson.

Mr. Johnson. No.

The Clerk. Mr. Johnson votes no.

Ms. Sutton.

[No response.]

The Clerk. Mr. Gutierrez.

[No response.]

The Clerk. Mr. Sherman.

Mr. Sherman. Yes.

The Clerk. Mr. Sherman votes aye.

Ms. Baldwin.

[No response.]

The Clerk. Mr. Weiner.

Mr. Weiner. No.

The Clerk. Mr. Weiner votes no.

Mr. Schiff.

[No response.]

The Clerk. Mr. Davis.

Mr. Davis. Aye.

The Clerk. Mr. Davis votes aye.

Ms. Wasserman Schultz.

Ms. Wasserman Schultz. Aye.

The Clerk. Ms. Wasserman Schultz votes aye.

Mr. Ellison.

Mr. Ellison. Yes.

The Clerk. Mr. Ellison votes aye.

Mr. Smith.

Mr. Smith. No.

The Clerk. Mr. Smith votes no.

Mr. Sensenbrenner.

Mr. Sensenbrenner. Aye.

The Clerk. Mr. Sensenbrenner votes aye.

Mr. Coble.

[No response.]

The Clerk. Mr. Gallegly.

Mr. Gallegly. No.

The Clerk. Mr. Gallegly votes no.

Mr. Goodlatte.

Mr. Goodlatte. No.

The Clerk. Mr. Goodlatte votes no.

Mr. Chabot.

[No response.]

The Clerk. Mr. Lungren.

Mr. Lungren. No.

The Clerk. Mr. Lungren votes no.

Mr. Cannon.

Mr. Cannon. No.

The Clerk. Mr. Cannon votes no.

Mr. Keller.

Mr. Keller. No.

The Clerk. Mr. Keller votes no.

Mr. Issa.

Mr. Issa. No.

The Clerk. Mr. Issa votes no.

Mr. Pence.

Mr. Pence. No.

The Clerk. Mr. Pence votes no.

Mr. Forbes.

Mr. Forbes. No.

The Clerk. Mr. Forbes votes no.



Mr. King.

Mr. King. No.

The Clerk. Mr. King votes no.

Mr. Feeney.

Mr. Feeney. Aye.

The Clerk. Mr. Feeney votes aye.

Mr. Franks.

Mr. Franks. Aye.

The Clerk. Mr. Franks votes aye.

Mr. Gohmert.

Mr. Gohmert. No.

The Clerk. Mr. Gohmert votes no.

Mr. Jordan.

Mr. Jordan. No.

The Clerk. Mr. Jordan votes no.

Chairman Conyers. Mr. Coble.

Mr. Coble. No.

The Clerk. Mr. Coble votes no.

Chairman Conyers. Mr. Chabot.

Mr. Chabot. Yes.

The Clerk. Mr. Chabot votes aye.

Chairman Conyers. Mr. Scott.

Mr. Scott. No.

The Clerk. Mr. Scott votes no.

Ms. Lofgren. How am I recorded?

Mr. Conyers. Ms. Lofgren.

The Clerk. Ms. Lofgren votes no.

Mr. Nadler. How am I recorded?

Chairman Conyers. Mr. Nadler.

The Clerk. Mr. Nadler is not recorded.

Mr. Nadler. I vote no.

The Clerk. Mr. Nadler votes no.

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

The clerk will report.

The Clerk. Mr. Chairman, 9 Members voted aye, 22 Members voted no.

Chairman Conyers. The amendment fails.

And if there are no further amendments, a reporting quorum being present --

Mr. Gohmert. Mr. Chairman.

Chairman Conyers. Judge Gohmert.

Mr. Gohmert. Thank you. I move to strike the last word.

Chairman Conyers. The gentleman is recognized.

Mr. Gohmert. Thank you, Mr. Chairman.

With regard to the manager's amendment, I know the Chairman has said that there are no tiers in the bill, but for those of us that have met with so many on both sides, apparently there are a lot of tears that have fallen on the

bill. But having tried to look at it from all sides, I think the pulling back of the three-judge panel for now was a good idea. And this is in response to some of the things that have been brought up by others, but it is my understanding that this will give us a chance to get a report from DOJ after it is put in place to see what might need to be done.

Could I yield to the Chairwoman for a response on that.

Chairman Conyers. Sure. We are not waiting for DOJ.

Mr. Gohmert. In this bill if we move forward, pass the bill as it is --

Chairman Conyers. Oh yes, I am sorry.

Mr. Gohmert. -- then we will get a report down the road of how this has actually affected --

Chairman Conyers. Exactly.

Mr. Gohmert. -- and whether or not there are any unintended consequences.

Chairman Conyers. No question about it.

Mr. Gohmert. And so that can happen with us moving forward today. In fact, before I heard that that might happen, I was in the process of drafting an amendment to try to use more market forces to enforce the ability to negotiate. And, in fact, I may be one of the only people in Congress that went to the trouble of going through certification as an international arbitrator, and having

done so, you see an awful lot of problems with arbitration, and there are some rules that create problems. But I began to think that perhaps if the parties were able to select their own arbitrators, and then they select one, that something like that might happen. But I can see that that might be more appropriate once we see how the bill all shakes out before we move to that type of enforcement.

Chairman Conyers. Mr. Gohmert, may I intervene?

Mr. Gohmert. Yes. I yield to the Chairman.

Chairman Conyers. The fact of the matter is there are Members here that I would like to consult even going to the Rules Committee about this, to be honest with you.

Mr. Gohmert. And I guess I am too dense to understand what you mean by that.

Chairman Conyers. Well, in other words, we are still working on the bill. That is a common practice --

Mr. Gohmert. Certainly.

Chairman Conyers. -- that the bill has alterations made when we go to the Rules Committee. But we are working to move this thing forward.

Mr. Gohmert. And I am for that.

Chairman Conyers. Yes, I know.

Mr. Gohmert. But I do think the manager's amendment was a good gesture in the right direction. And I think it will, even moving forward, give us a chance to continue to

look what is the best way, because certainly in this day and time right now, I mean, we are talking about housing problems, mortgage problems, we don't need to be hurting the banks. At the same time, we have heard from lots of merchants who are consumers, and they have lots of employees who are consumers, and we want them to continue to be consumers, so we don't need to be hurting those businesses.

And so I am glad that the amendments that have been proposed and failed so far have, because I think this is the right thing to do, but with caution that we don't create more problems than we already have in the marketplace right now.

Chairman Conyers. I thank the gentleman for his remarks.

Mr. Gohmert. I do appreciate the efforts and appreciate the ongoing looking to see if there are ways to improve before we hit the floor, and I yield back.

Chairman Conyers. A reporting quorum being present, the question is on reporting the bill, as amended, favorably to the House. All those in favor, say aye.

All those opposed, say no.

The ayes have it, and the bill, as amended --

Mr. Issa. Mr. Chairman, I am going to ask for the yeas and nays.

Chairman Conyers. A recorded vote is required. The

clerk will call the roll.

The Clerk. Mr. Conyers.

Chairman Conyers. Aye.

The Clerk. Mr. Conyers votes aye.

Mr. Berman.

Mr. Berman. Aye.

The Clerk. Mr. Berman votes aye.

Mr. Boucher.

[No response.]

The Clerk. Mr. Nadler.

[No response.]

The Clerk. Mr. Scott.

Mr. Scott. Aye.

The Clerk. Mr. Scott votes aye.

Mr. Watt.

Mr. Watt. No.

The Clerk. Mr. Watt votes no.

Ms. Lofgren.

Ms. Lofgren. Aye.

The Clerk. Ms. Lofgren votes aye.

Ms. Jackson Lee.

Ms. Jackson Lee. Aye.

The Clerk. Ms. Jackson Lee votes aye.

Ms. Waters.

[No response.]

The Clerk. Mr. Delahunt.

[No response.]

The Clerk. Mr. Wexler.

[No response.]

The Clerk. Ms. Sanchez.

Ms. Sanchez. Aye.

The Clerk. Ms. Sanchez votes aye.

Mr. Cohen.

[No response.]

The Clerk. Mr. Johnson.

Mr. Johnson. No.

The Clerk. Mr. Johnson votes no.

Ms. Sutton.

Ms. Sutton. Pass.

The Clerk. Ms. Sutton passes.

Mr. Gutierrez.

[No response.]

The Clerk. Mr. Sherman.

[No response.]

The Clerk. Ms. Baldwin.

[No response.]

The Clerk. Mr. Weiner.

Mr. Weiner. Aye.

The Clerk. Mr. Weiner votes aye.

Mr. Schiff.

Mr. Schiff. Pass.

The Clerk. Mr. Schiff passes.

Mr. Davis.

Mr. Davis. Pass.

The Clerk. Mr. Davis passes.

Ms. Wasserman Schultz.

Ms. Wasserman Schultz. Pass.

The Clerk. Ms. Wasserman Schultz passes.

Mr. Ellison.

Mr. Ellison. Aye.

The Clerk. Mr. Ellison votes aye.

Mr. Smith.

Mr. Smith. No.

The Clerk. Mr. Smith votes no.

Mr. Sensenbrenner.

Mr. Sensenbrenner. No.

The Clerk. Mr. Sensenbrenner votes no.

Mr. Coble.

Mr. Coble. Aye.

The Clerk. Mr. Coble votes aye.

Mr. Gallegly.

Mr. Gallegly. No.

The Clerk. Mr. Gallegly votes no.

Mr. Goodlatte.

Mr. Goodlatte. Aye.



The Clerk. Mr. Goodlatte votes aye.

Mr. Chabot.

Mr. Chabot. No.

The Clerk. Mr. Chabot votes no.

Mr. Lungren.

Mr. Lungren. Aye.

The Clerk. Mr. Lungren votes aye.

Mr. Cannon.

Mr. Cannon. Aye.

The Clerk. Mr. Cannon votes aye.

Mr. Keller.

Mr. Keller. Aye.

The Clerk. Mr. Keller votes aye.

Mr. Issa.

Mr. Issa. Aye.

The Clerk. Mr. Issa votes aye.

Mr. Pence.

Mr. Pence. Aye.

The Clerk. Mr. Pence votes aye.

Mr. Forbes.

Mr. Forbes. No.

The Clerk. Mr. Forbes votes no.

Mr. King.

Mr. King. Aye.

The Clerk. Mr. King votes aye.

Mr. Feeney.

Mr. Feeney. No.

The Clerk. Mr. Feeney votes no.

Mr. Franks.

Mr. Franks. No.

The Clerk. Mr. Franks votes no.

Mr. Gohmert.

Mr. Gohmert. Aye.

The Clerk. Mr. Gohmert votes aye.

Mr. Jordan.

Mr. Jordan. No.

The Clerk. Mr. Jordan votes no.

Chairman Conyers. Mr. Boucher.

Mr. Boucher. Votes no.

The Clerk. Mr. Boucher votes no.

Chairman Conyers. Anyone else choose to vote?

Mr. Wexler.

Mr. Wexler. No.

The Clerk. Mr. Wexler votes no.

Mr. Davis. How am I recorded, Mr. Chairman?

The Clerk. Mr. Davis passed.

Mr. Davis. No.

The Clerk. Mr. Davis votes no.

Ms. Wasserman Schultz. Mr. Chairman, how am I recorded?

The Clerk. Ms. Wasserman Schultz passed.

Ms. Wasserman Schultz. I vote no.

The Clerk. Ms. Wasserman Schultz votes no.

Chairman Conyers. Ms. Baldwin.

Ms. Baldwin. Aye.

The Clerk. Ms. Baldwin votes aye.

Chairman Conyers. Ms. Sutton.

Ms. Sutton. Aye.

The Clerk. Ms. Sutton votes aye.

Chairman Conyers. Mr. Schiff.

Mr. Schiff. No.

The Clerk. Mr. Schiff votes no.

Chairman Conyers. Mr. Nadler.

Mr. Nadler. Aye.

The Clerk. Mr. Nadler votes aye.

Ms. Sutton. How am I recorded Mr. Chairman?

The Clerk. Ms. Sutton votes aye.

Ms. Sutton. I will vote no.

The Clerk. Ms. Sutton votes no.

Chairman Conyers. Are there any other Members not recorded who wish to vote?

The clerk will report.

The Clerk. Mr. Chairman, 19 Members voted aye, 16 Members voted no.

Chairman Conyers. The bill is passed, and, without

objection, will be reported as a single amendment in the nature of a substitute incorporating the amendments adopted. And staff is authorized to make technical and conforming changes, and Members will have time to submit views.

Chairman Conyers. Pursuant to notice, I call up bill H.R. 4854, the False Claims Corrections Act, for purposes of markup. The clerk will report the bill.

The Clerk. H.R. 4854, a bill to amend the revisions of Title 31, United States Code, relating to false claims to clarify and make technical amendments to those provisions --

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

[The information follows:]

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

Chairman Conyers. And I recognize the distinguished gentleman of the Intellectual Property Subcommittee Mr. Howard Berman.

Mr. Berman. Thank you, Mr. Chairman.

When the False Claims Act became law during the Civil War, President Lincoln was fighting against defense contractors who were providing lame horses to the U.S. Army and barrels of sawdust instead of ammunition to the Union Army.

Sadly, when it comes to fraud and war profiteering, not much has changed in 145 years. A highly publicized false claims suit a few years back involved a contractor's fulfillment of an agreement to deliver trucks to provide security to convoys in Iraq. At one point 34 of the 36 trucks provided were inoperable. In the trial a U.S. service member testified that when he questioned the contractor as to the serviceability of the trucks, the contractor's response was, we were only told we had to deliver the trucks; the contract doesn't say they had to work.

False claims reform is crucially important today as fraud by unscrupulous individuals and entities remains unchecked, and the level of outsourcing by the Federal Government grows. The False Claims Act is a key weapon in

identifying fraud against the United States and penalizing those who cheat the government at taxpayers' expense.

Unfortunately, a series of adverse judicial decisions have damaged the False Claims Act and hampered the ability of the government and of whistleblowers to uncover fraud, so it is imperative that we consider legislation at this time to reconstitute this piece of legislation that has protected taxpayers.

In 1986, after the act had been largely unused for decades, massively weakened by amendments passed at the beginning of World War II, in 1986, Senator Grassley and I worked together to pass amendments to breathe new life into the beleaguered statute. The 1986 amendments created a host of new tools for the government and private citizens to utilize in order to make the law an effective tool against fraud once more.

I don't think anyone can question the False Claims Act's enormous success. Since the 1986 amendments were passed by Congress and signed into law by President Reagan, the act has recovered over \$20 billion of the taxpayers' money that have otherwise been lost forever. In my opinion, the amount of money saved through deterrence is probably even higher.

It is a success, but it doesn't mean it is as effective as it could be in recovering Federal funds lost to fraud.

Numerous decisions by the courts in those last several years have ignored the clear language and intent of the False Claims Act. Many of these rulings have made it harder for both the government and qui tam relators to file claims against fraud feasons.

For example, courts have thrown out cases in which the government has administered government programs and expended its funds through contractors and other agents as opposed to direct government expenditure. Many courts have barred whistleblowers from pursuing meritorious claims because they can't provide specific documentation at the time the lawsuit is brought, including billing documentation and the dates and identification number of invoicers, information ordinarily sought and obtained in discovery and unavailable before the suits to most whistleblowers. And in a decision handed down just last month, the Supreme Court narrowed key liability provisions in the False Claims Act by reading into the law several requirements not existent in either the plain language of the statute or the legislative history.

H.R. 4854 will undo the damage brought by these judicial opinions and strengthen this tool. Specifically, it extends the False Claims Act to apply to fraud committed by grantees and contractors and to funds administered by the United States. This change would close a wide gap in the law, exploited by many fraud feasons today, and ensure that



the False Claims Act can apply to thousands of contractors and grantees to whom government agencies and our military outsource work today.

The bill clarifies that the public disclosure bar, that is the bar that says you can't bring a qui tam suit in something that has been publicly disclosed, is meant as a tool for the government alone to dismiss actions brought by parasitic qui tam plaintiffs who, though they had nothing to add to a case, would diminish the government's recovery.

RPTS DEAN

DCMN HOFSTAD

[3:25 p.m.]

Mr. Berman. It expands protections for whistleblowers, their families and associates from forms of employer retaliation that have become more prevalent in recent years.

It replaces a tiered statute of limitations with a uniform period for all actions involving conduct covered by the False Claims Act.

It amends and streamlines the Justice Department's power to utilize its chief investigative tool, the civil investigative demand, in order to allow DOJ, where it deems it appropriate, to share information on a case with a relator.

I urge my colleagues to support this amendment.

Chairman Conyers. The Chair recognizes Lamar Smith.

Mr. Smith. Thank you, Mr. Chairman.

The False Claims Act is the Federal Government's primary tool for combatting fraud in federally funded programs, and the act has been successful in accomplishing that goal. Since 1986, when it was last amended, the Federal Government has recovered over \$20 billion under the False Claims Act. So the Federal Government has benefitted from the increased accountability that has resulted from the

act.

Proponents of H.R. 4854, the False Claims Act Correction Act of 2007, assert that changes are needed to further combat fraud against the United States, especially health-care fraud. However, under the law as currently written, recoveries by the United States include, for example, over \$700 million from the Hospital Corporation of America, over \$500 million from TAP Pharmaceuticals, and over \$400 million from Abbott Laboratories. Taxpayers Against Fraud calculates that over \$5.5 billion has been recovered from pharmaceutical manufacturers under the current False Claims Act.

The Justice Department, which has primary enforcement authority under the act, has concluded that the False Claims Act, in its present form, has worked well, and there is no pressing need for major amendments.

Government contractors, universities, hospitals, nonprofits and others who receive Federal funds also are concerned that H.R. 4854 will put nonfraudulent conduct under the False Claims Act while at the same time removing defenses to frivolous cases.

Chief among their concerns are these: H.R. 4854 will subject them to liability from the moment an overpayment is made, even if the overpayment will be subject to an end-of-the-year reconciliation process. H.R. 4854 will

exempt plaintiffs but not the Department of Justice from complying with Federal Rule of Civil Procedure 9(b). H.R. 4854 will take away a defendant's right to challenge sham cases that are based on information that is publicly available. H.R. 4854 will extend the statute of limitations from 6 years to 10 years. And, finally, H.R. 4854 will allow Government employees to bypass informing the Government of possible fraud they uncover in the course of their publicly funded duties and go straight to the courthouse to file a whistleblower suit.

I understand that this last concern, out of the five, will be addressed either in a manager's amendment or the stand-alone amendment.

These changes create a situation in which a hospital, for example, could be subject to liability for a 10-year-old overpayment that was already repaid to the Federal Government through a reconciliation process. A lawsuit seeking to reclaim this overpayment could be brought by a plaintiff who only has knowledge of the overpayment through a public discourse or by Government employees who learned of the overpayment in the routine course of his employment with the Federal Government. There would seem to be little fairness in subjecting a hospital to liability in such a situation.

Every member of this committee undoubtedly is concerned

with combating fraud against the Federal Government, but we have work to do to ensure that H.R. 4854 strikes the right balance and addresses the concerns that have been raised.

Mr. Chairman, I yield back.

Chairman Conyers. Thank you.

Chairman Berman has a manager's amendment. He is recognized.

The Clerk. "Amendment to H.R. 4854, offered by Mr. Berman of California."

[The information follows:]

\*\*\*\*\* INSERT 4-1 \*\*\*\*\*

Mr. Berman. Mr. Chairman, I ask unanimous consent that the manager's amendment be considered as read.

Chairman Conyers. Without objection. The gentleman is recognized in support of his amendment.

Mr. Berman. This addresses several of the issues that Mr. Smith just mentioned.

In the last few weeks of discussions, we have listened to some of the concerns regarding these amendments, and while many of them simply counter the goals of the existing False Claims Act, some have illustrated the potential for consequences that we never intended. And the manager's amendment covers a number of these situations.

First, on the issue of the overpayments, the underlying bill makes clear our intent that retention of an overpayment by the Government is a violation of the False Claims Act, and that is right. As the bill was introduced, though, concerns -- Mr. Smith just echoed some of them, and I think they are legitimate -- were raised that we are bringing under the False Claims Act umbrella overpayments that were merely temporary errors that would be reconciled regularly in short course as part of the normal process in a Government program. This was a concern both raised by universities and hospitals.

To make our intent clear, the manager's amendment

limits coverage of overpayments to those that, quote, "fail to comply with the statutory or contractual obligation to disclose an overpayment about which the person is on actual notice." No qui tam suit on overpayments will be allowed before the entire reconciliation process has been worked through and the person is now on actual notice from the Government that he has been overpaid.

Second, the amendment addresses concerns that the retaliation would allow recovery from an entity that had not discriminated against anyone. The amendment adds language clarifying that relief can only be obtained from the person who engaged in discrimination against the whistleblower.

Third, the manager's amendment lowers the statute of limitations in the bill from 10 years to 8 years. We had a tiered system where a false claims action might be brought within 6 years of the violation or within 3 years of when an appropriate Government official knew or should have learned of the fraud, whichever date was later, not to exceed 10 years from the date of the violation. This tiered system created complicated interpretations. We have compromised at 8 years, in the interest of keeping a straightforward time line for all False Claims Act-related actions.

And, finally, the manager's amendment responds to concerns that application of all of the provisions of the bill to both pending and future cases created a problem.

The manager's amendment applies the overpayment provision, the expansion of the retaliation provision, and the statute of limitations only to cases filed on or after the date of the enactment.

I think this amendment addresses many of the concerns.

And I do want to point out, at this point in the debate, that a number of the groups that don't like this bill didn't like the original False Claims Act, and I understand why. Because it opens them to a potential great deal of liability and a process by which fraud can be more readily discovered and acted upon --

Mr. Sensenbrenner. Will the gentleman yield?

Mr. Berman. -- without the 86 amendments.

Mr. Sensenbrenner. Will the gentleman yield?

Mr. Berman. I would be happy to yield.

Mr. Sensenbrenner. First of all, I think that the manager's amendment addresses many of the objections that the Justice Department raised in its letter.

The very important thing, however, is that the letter has a disclaimer that the Justice Department has not thoroughly analyzed the impact of the Allison Engine case that has been recently handed down by the U.S. Supreme Court, which has had the effect of exempting subcontractors from the coverage of the False Claims Act. Meaning, in order to be covered by the False Claims Act, you have to get



a direct check from the United States Government.

Now, many of these contracts, particularly in the medical care area, as well as in the reconstruction of Iraq and Afghanistan, a lot of the work is done by subcontractors. In my opinion, a little bit of fraud is like being a little bit pregnant. And the False Claims Act ought to reach down to the subcontractors, because, in effect, the Allison Engine case, because of how the existing law is drafted, gives a subcontractor who wishes to commit fraud a get-of-a-False-Claims-Act-free card.

And that is why this bill should pass with the manager's amendment. And I think when the Justice Department looks at the Allison Engine case a little bit more thoroughly -- they work slower than we do -- they will agree that there is this loophole created and this bill will plug that loophole.

I thank you.

Mr. Berman. Well, I thank the gentleman.

I reclaim whatever time I have left to simply say I agree with him completely. And I am absolutely convinced that, at the end of the day, the Justice Department will consider that issue perhaps the most important part of this bill. So much of what is done by the Government is now -- the Coalition Provisional Authority, under Allison, under that decision, Amtrak, under Allison, under that case, would

no -- fraud against those entities, which live on our Government expenditures, fraud against those entities could not be actionable under that decision.

Chairman Conyers. Lamar Smith?

Mr. Smith. Thank you, Mr. Chairman.

First of all, I want to thank Mr. Berman and Mr. Sensenbrenner for offering this manager's amendment in an attempt to improve the bill. And, in fact, it does.

Now, the manager's amendment does take steps toward correcting the problem the bill creates regarding the retention of overpayments, for example. It also clears up some, but not all, of the retroactivity problems with the bill.

However, I do not believe the manager's amendment goes far enough in narrowing the scope of this bill, so I continue to oppose it. The manager's amendment still does not resolve many of the concerns raised by the Department of Justice, Government contractors, hospitals, universities and other organizations. Rather, the manager's amendment stays on the edges of many of the concerns that have been raised regarding this bill. Unless we were able to reach a compromise that more directly addresses these concerns, I will have to stay opposed to the bill.

I will yield back.

Chairman Conyers. The question occurs on the manager's

amendment before you.

Your amendments are coming up.

All in favor of the manager's amendment of Mr. Berman's, please indicate by saying, "Aye."

All opposed, say, "No."

The ayes have it. So ordered.

Mr. Sensenbrenner. Mr. Chairman?

The Chair recognizes Jim Sensenbrenner.

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

Chairman Conyers. The Clerk will report the amendment.

The Clerk. "Amendment to H.R. 4854, offered by Mr. Sensenbrenner. Strike section 7 --"

[The information follows:]

\*\*\*\*\* INSERT 4-2 \*\*\*\*\*

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

And the gentleman from Wisconsin is recognized in support of his amendment.

Mr. Sensenbrenner. I thank the Chair.

Mr. Chairman, the amendment I am offering is simple and straightforward, to strike section 7 of the bill. This section explicitly permits Government employees to become qui tam whistleblowers, potentially putting their own personal financial interests in conflict with their duties to the Government.

Federal Government employees are dedicated individuals who have made a commitment to each of us as American taxpayers to put the interests of the Government first. Section 7, however, includes provisions that create the potential for conflicts with this commitment.

I strongly feel that this provision should be removed, for it undermines both the employee's loyalty to the Government and the public's confidence that the Government's decisions are based upon the public interest, rather than an individual employee's personal financial interest.

Moreover, under the current law, Government employees who even try to bring a qui tam action are routinely dismissed by the court.

In short, the current law is preferable, and I urge my colleagues to support the amendment.

Mr. Smith. Will the gentleman yield?

Mr. Sensenbrenner. I yield to the gentleman.

Mr. Smith. Mr. Chairman, I just want to say that I support the amendment. I agree with the statements and the reasons given by Mr. Sensenbrenner. And I hope all my colleagues will support it, as well.

Chairman Conyers. Howard Berman?

Mr. Sensenbrenner. I yield to the gentleman from California.

Mr. Berman. I thank the gentleman for yielding.

While in the ideal world the bill -- we tried to put constraints on when the Government employee can do it, I can see the situation where a Government employee is maybe more softly raising the issue of fraud to his supervisors and those in the Government who could act on it in the hopes of reaping the reward that would come from the qui tam case. And so I am prepared to accept that amendment, and hope that a combination of the manager's amendment and this amendment will make the ranking member like this bill even more.

Mr. Sensenbrenner. I reclaim my time. I am still whispering in his ear, and yield back the balance of my time.

Chairman Conyers. The vote is on the amendment of the

gentleman from Wisconsin.

All in favor, say, "Aye."

All opposed, say, "No."

The ayes have it, and the amendment is agreed to.

Mr. Weiner. Mr. Chairman?

The Chair recognizes Mr. Weiner.

Mr. Weiner. Mr. Chairman, I have an amendment at the desk. It is Weiner 104.

Chairman Conyers. The Clerk will report the amendment.

The Clerk. "Amendment to H.R. 4854, offered by Mr. Weiner of New York. Page 7, line 9 --"

[The information follows:]

\*\*\*\*\* INSERT 4-3 \*\*\*\*\*

Mr. Weiner. Request unanimous consent it be considered as read.

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

And the gentleman is recognized in support of his amendment.

Mr. Weiner. In Cook County v. U.S., States were exempted from False Claims Act claims. What this amendment would do is to give cities, counties and localities some protection by requiring, if you want to make a claim, you have to go through the Justice Department to do it, that essentially that should be the gatekeeper, to stop our mayors and our county executives from being deluged with these claims. And I would request a yea vote.

I yield back.

Chairman Conyers. Mr. Smith?

Mr. Smith. Mr. Chairman, I support the amendment for the reasons that have been given. I think it is good amendment. And we are certainly moving in the right direction, but we have still got a long ways to go, so I look forward to further amendments.

Mr. Berman. Mr. Chairman?

Chairman Conyers. Yes, Mr. Berman?

Mr. Berman. If the gentleman, on my time, would

respond. Originally I had talked to him about a two-step dance.

Mr. Weiner. Yeah, I decided to cut, in the interest of reducing the amount of dancing going on today, I decided to cut to the quick -- cut to the chase.

Mr. Berman. Are we mixing metaphors here?

Mr. Weiner. Yes.

Mr. Berman. Okay.

I accept this amendment -- I support this amendment -- or I go along with this amendment.

[Laughter.]

Not that I don't think there are local governments that couldn't be tempted to commit fraud against the Federal Government, but none that you were running.

Chairman Conyers. Any other discussion?

All in favor of the amendment offered by the gentleman from New York, say, "Aye."

All opposed, say, "No."

Ayes have it, and the amendment is agreed it.

The Chair recognizes the gentleman from New York.

Okay. All right.

Are there any other amendments?

Mr. Lungren. Mr. Chairman?

Chairman Conyers. Mr. Lungren.

Mr. Lungren. I ask to strike the requisite number of



words.

Chairman Conyers. The gentleman is recognized.

Mr. Lungren. Mr. Chairman, I rise in support of the underlying bill, and I would just like to say a couple things about it.

Number one, I would hope many of my friends on this side of the aisle would recognize that the underlying law was initially signed by Abraham Lincoln at a time that it was important to try and deal with the concerns the gentleman from California has expressed.

In 1986, there are at least a couple of us on this side of the aisle who voted for the reform of that bill that was signed by Ronald Reagan in order to ensure that we do the right thing and work against fraud, particularly fraud in situations of health.

And I would say, at this time when we have men and women in uniform fighting for us on foreign shores, that it is important that we make sure that this law works against anybody who would take advantage of them and take advantage of our war effort by committing fraud against the Government in places such as Iraq.

It is very important to underscore what the gentleman from California said about the Supreme Court decision, and what the gentleman from Wisconsin said. The criticism of the underlying bill that is presented in the analysis given

to us by the Justice Department is in the absence of any consideration of the Supreme Court decision. And I happen to think that is the most important thing that we are doing in this bill. Otherwise, at least as I read the Supreme Court decision, many of those who may have committed fraud in the Iraq war theater would not be able to be pursued under the False Claims Act.

Lastly, I would just say that the importance of the False Claims Act was underscored by a situation that occurred in northern California several years ago when a priest, an outstanding lecturer, Father John Corapi, had gone to a medical facility in northern California. And, as a result of the examination he had at that time, he was told that he needed open heart surgery. He thought that seemed to be somewhat extreme, so he sought a second opinion. He got that second opinion, and that second opinion was there was absolutely no evidence, zero evidence, that he needed that.

He was enraged by that finding and actually filed a False Claims Act lawsuit. The net result of the investigation that started with his False Claims Act lawsuit was four California doctors paying \$32.5 million to settle allegations that they performed unnecessary heart surgeries at the Redding Medical Center in Redding, California.

The entire practice changed up there. The number of

open heart surgeries had dropped dramatically. The institutions that were involved actually were reformed, and new leadership and new ownership took place.

As I understand it, under the new decision by the U.S. Supreme Court, someone like Father Corapi would not have been able to bring a False Claims Act lawsuit in the manner that he did. And I don't think that I could stand by and allow that to continue to happen when we have a chance to fix it.

I am very pleased that the chairman's manager's amendment made the changes it made. And I am particularly pleased that Mr. Sensenbrenner's amendment was adopted, because that is the one that gave me the most difficulty with respect to the original bill.

But looking at it in its totality, with respect to a situation as we found it in northern California, but, more importantly, from my standpoint, when we have men and women in uniform fighting for us, we ought to make sure that no one takes advantage of them or this Government in this particular time of need.

And if, in fact, the U.S. Supreme Court decision would make that difficult, if not impossible, then I would hope that we would act as soon as possible to ensure that this reform in the underlying law takes place so that it can be implemented as it was in Abraham Lincoln's time, as it was

when Ronald Reagan was President and currently.

And, with that, I would yield back the balance of my time.

Chairman Conyers. I thank the gentleman so much for his comments.

A reporting quorum being present, the question is on reporting the bill as amended favorably to the House.

Those in favor, say, "Aye."

Those opposed, say, "No."

The ayes have it, and the bill as amended is ordered reported favorably and, without objection, will be reported as a single amendment in the nature of the substitute, incorporating the amendments adopted, and authorizing the staff to make changes and to allow members to submit their own views.

The Chair, pursuant to notice, calls up H.R. 4081, the Prevent All Cigarette Trafficking Act of 2007, for purposes of markup.

And I ask the Clerk to report the bill.

The Clerk. "H.R. 4081, a bill to prevent tobacco smuggling, to ensure the collection of all tobacco taxes and for other purposes."

[The information follows:]

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

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

And I ask the Chair of the Crime Subcommittee, Bobby Scott, to explain this measure.

Mr. Scott. Thank you, Mr. Chairman, for holding the markup on H.R. 4081, the Prevent All Cigarette Trafficking Act, or PACT Act, and for your leadership in moving this bill expeditiously through the committee process on a bipartisan basis.

I commend the gentleman from New York, Mr. Weiner, for introducing the bill and the assistance of the full committee ranking member, Mr. Smith, for developing and moving the bill.

Tobacco smuggling is a global problem, with some estimates of trafficking numbering 600 million cigarettes nationwide. Tobacco smuggling contributes to the availability of cheap cigarettes and not only deprives the Government of needed tax revenue but also harms the health of our citizens.

The lost revenue from cigarette smuggling has been estimated to the range of billions of dollars per year. And it happens when -- there are a number of deceitful and illegal practices for financial gain. For example, a traffic might buy large quantities of cigarettes in States

where the cigarette tax is low and take them to States where cigarette taxes are high, selling them at a significant discount.

Traditional tobacco smuggling can be prosecuted under current laws, but some of the laws are either outdated or insufficiently enforced. There are also many dimensions in the smuggling problem that are not reflected in our current laws. For example, smuggling and tax evasion are prohibited under State law, but many States fail to enforce those laws.

Moreover, there are allegations that some wholesalers or manufacturers either facilitate or are complicit in smuggling operations. The Jenkins Act of 15 USC 375 requires cigarette vendors who sell and ship cigarettes into another State to anyone other than a licensed distributor to report the sale to the buyer's State tobacco tax collection officials. That Act prescribes misdemeanor penalties for violations, but, at the time that law was drafted, the bill did not address the nature of Internet-based sales, which now account for a substantial portion of tax-free diversion of cigarettes.

To close the gap in current law, the gentleman from New York, Mr. Weiner, introduced the PACT Act. It is a strong bill that is supported by a number of diverse groups and organizations, including the National Association of Convenience Stores; Altria, the parent company of Philip

Morris; Campaign for Tobacco-Free Kids; and the American wholesaler markets; and National Association of Attorneys General.

This act enhances State and Federal law enforcement authorities to go after out-of-State sellers engaging in illicit behavior by cutting off their method of delivery and provides a change from misdemeanor to felony for the penalty phases.

Although the shippers have expressed some concerns about the original anti-shipping provisions of the bill, the gentleman from New York has a manager's amendment that addresses some of those concerns. Those who enter into -- by giving an exemption from the provisions those who have entered into an agreement such as shippers have entered into in New York.

Finally, Mr. Chairman, the bill authorizes the ATF to inspect the premises and files of sellers who transfer more than 10,000 cigarettes or transfer more than 500 single-unit cans or packages of smokeless tobacco in a single month. For those major distributors, any failure to maintain records or allow inspection can result in a significant fine.

As I indicated, the gentleman from New York will introduce a manager's amendment with the support of the ranking member, the gentleman from Texas, Mr. Smith, which

addresses outstanding concerns with the bill. And some of those involve the tribal governments who had concerns and some of the recordkeeping amendments.

In closing, Mr. Chairman, I support the bill's objectives and urge my colleagues to support the bill and the manager's amendment, and yield back the balance of my time.

Chairman Conyers. Thank you.

Lamar Smith?

Mr. Smith. I thank you, Mr. Chairman.

Along with the gentleman from New York, Mr. Weiner, I am pleased to be a cosponsor of H.R. 4081, the Prevent All Cigarette Trafficking, or PACT, Act. This bill will help combat cigarette trafficking, which is a growing problem in America.

Taxes on cigarettes will greatly vary from State to State. The difference in tax rates creates a market for criminals and organized criminal syndicates to purchase cigarettes in one State and smuggle them to another State to resell them below market value without paying local taxes.

The PACT Act is a bipartisan legislation that closes loopholes in current tobacco trafficking laws and provides law enforcement officials with ways to combat the innovative methods being used by cigarette traffickers to distribute their products.



First, the legislation strengthens the Jenkins Act, as I believe Mr. Scott mentioned, a longstanding law that requires vendors who sell cigarettes to out-of-State buyers to report those sales to the buyer's State tobacco tax administrator. The PACT Act makes it a Federal felony for anyone who makes a sale via the telephone, the mail or the Internet, and fails to comply with all relevant State tax laws.

The PACT Act also requires Internet cigarette sellers to verify their purchasers' age and identity through easily accessible databases. This measure protects children and ensures that they cannot anonymously purchase cigarettes from the Internet.

The PACT Act empowers the Attorney General to compile a list of delivery sellers who fail to comply with State tax laws. Any seller who lands on that list will be prohibited from using the U.S. Postal Service or common carriers like FedEx or DHL to deliver their products.

The PACT Act prevents the loss of tax revenue, combats cigarette smuggling and limits children's access to cigarettes -- all good goals. I urge my colleagues to support the bill.

I yield back the balance of my time. And I suspect Mr. Weiner is more than ready to speak on the bill himself.

Chairman Conyers. But first, we may have a manager's

amendment.

Mr. Weiner. Will the chairman yield for that purpose?

Chairman Conyers. Of course.

Mr. Weiner. I have an amendment at the desk, Weiner  
001.

Chairman Conyers. The Clerk will report the bill.

The Clerk. "Amendment to H.R. 4081, offered by  
Mr. Weiner of New York --"

[The information follows:]

\*\*\*\*\* INSERT 4-4 \*\*\*\*\*

Mr. Weiner. Unanimous consent it be considered as read.

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

The gentleman is recognized in support of his amendment.

Mr. Weiner. I think my colleagues outlined the base bill well, and I thank them for their kindness. And I also thank the chairman for his quick consideration of this.

The manager's amendment seeks to address some legitimate concerns that were raised in the first reading of the bill. We want to incentivize carriers to enter into agreements with States where they are appropriate. Many carriers -- UPS, FedEx and DHL already have an agreement with the State of New York not to ship tobacco. So long as they continue that in all 50 States, this bill would not impact them. That is issue number one that is in the manager's amendment.

Some companies have expressed the desire to be able to ship niche products that are not sold widely. The bill would permit that under certain circumstances.

The ATF says that a lot of the problems that they have is that wholesalers are breaking the law. They want the ability to be able to inspect records without going and

getting a subpoena. This would permit them to do that.

Some of the tribes, I just want to clarify that they are exempt from the bill in many, if not all, cases. And this amendment seeks to do that.

And, finally, we have a provision of the bill to get on a do-not-ship list. This makes it clear there's a way to get off the list if you're in compliance.

And I would request a "yes" vote on the manager's amendment and a "yes" vote on the bill.

Chairman Conyers. Any further questions on the manager's amendment?

All in favor, say, "Aye."

All opposed, "No."

The ayes have it. The amendment is agreed to.

Are there any further amendments?

Mr. Goodlatte. Mr. Chairman?

Chairman Conyers. Yes, Mr. Goodlatte.

Mr. Goodlatte. Thank you, Mr. Chairman. I have an amendment on the desk.

Chairman Conyers. The Clerk will report the Goodlatte amendment.

The Clerk. "Amendment to H.R. 4081, offered by Mr. Goodlatte of Virginia. Add at the end the following --"

[The information follows:]

\*\*\*\*\* INSERT 4-5 \*\*\*\*\*

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

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

The gentleman from Virginia is recognized in support of his amendment.

Mr. Goodlatte. Well, thank you, Mr. Chairman.

Mr. Chairman, I agree with the goals of this legislation. However, I do note that I have concerns about the precedential effect that section 2(a) could have. Specifically, that section of the legislation treats out-of-State sales of these products as though the sales occurred, quote, "entirely within the specific State and place," end quote.

While this provision will surely help enforce State laws against abuses associated with online tobacco sales, it could also confuse the issue of what constitutes a sufficient nexus with a State to justify that State imposing taxes on the out-of-State entities.

The purpose of this amendment is to make clear that online tobacco sales constitute a unique situation with unique harms, including harms to minors, due to the lack of sufficient age-verification technology, and that this legislation is not intended to serve as a precedent for

future efforts to determine the appropriate nexus requirements that out-of-State entities must have with States before the States can impose taxes or tax-collection duties on those out-of-State entities.

Similar language was added to efforts to tighten remote tobacco sales laws back in the 108th Congress. And Representative Weiner included very similar language in his legislation to address this problem, H.R. 3749, which was also induced in the 108th Congress. It's my hope that the members of the committee will support this language.

I would note that I have amended the amendment at the request of Representative Weiner.

And I'd also mention that a number of members of this committee on both sides of the aisle support legislation that I and Congressman Boucher have introduced dealing with this whole issue of what constitutes sufficient nexus with the State to entitle the State to impose various types of taxes on an out-of-State entity. And that is my reason for offering this amendment.

And, Mr. Chairman, I hope at some point in time --

Ms. Lofgren. Will the gentleman yield?

Mr. Goodlatte. -- you will see fit to move that legislation, as well as this one. But, in the meantime, I hope you'll support my amendment.

Mr. Scott. Will the gentleman yield?

Mr. Goodlatte. I would be happy to yield. I yield to the gentleman from --

Mr. Scott. Thank you.

Mr. Chairman, I would like to rise in support of the amendment offered by my colleague from Virginia. It is an important amendment and I think would avoid other kinds of problems if this precedence statement were not made.

So I thank the gentleman for offering it and wish to support it.

Ms. Lofgren. Would the gentleman yield?

Mr. Goodlatte. Thank you.

I also yield to the gentleman from Texas.

Mr. Smith. Mr. Chairman, I just want to say I support the amendment for the reasons that Mr. Goodlatte gave and appreciate his offering it. And I'll yield back.

Mr. Goodlatte. The gentlewoman from California?

Ms. Lofgren. If the gentleman would yield, I think this is an important amendment. I support it. And I would note that, wherever members fall on the overall underlying issue, keeping this broad, bipartisan measure out of that other argument is a very smart thing to do.

And I thank the gentleman for yielding.

Mr. Goodlatte. I thank you.

Ms. Sanchez. Would the gentleman yield?

Mr. Goodlatte. I'd be happy to yield to the



gentlewoman from California.

Ms. Sanchez. Thank you. I thank the gentleman.

I just wanted to point out one small --

Mr. Goodlatte. I was on a roll. I thought I was getting --

[Laughter.]

Ms. Sanchez. You are on a roll. I'm not necessarily opposed to the amendment, and I understand the discussion of business activity tax. However, from the language in this amendment, it sounds more appropriately an issue of streamlined sales tax, because we are talking about sales through the Internet.

So if the gentleman is interested in the issue of streamlined sales tax as well, the Commercial and Administrative Law Subcommittee is the appropriate subcommittee of jurisdiction. And I would encourage him to approach us about working together on any future language respecting the collection of taxes of goods that are bought or sold online.

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

Mr. Goodlatte. Well, I thank the gentlewoman and reclaim my time.

This does apply to both the streamlined sales tax issue and the business activity tax issue. And we certainly would look forward to working with the Chair of that subcommittee

in the future, but we also think it's important to make it clear that this language separates this issue in this specific bill, which I support, from the issue in general, which we hope to address in the future.

Mr. Chairman, I yield back unless anybody else wants me to yield to them.

Mr. Coble. Mr. Chairman?

Chairman Conyers. The Chair recognizes Mr. Howard Coble, North Carolina.

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

Chairman Conyers. Without objection, the gentleman is recognized.

Mr. Coble. Mr. Chairman, today I feel not unlike a monkey on a stick. I've been going back and forth from Transportation to Judiciary, so bear with me. I want to speak in favor of the Goodlatte amendment and also about the bill in general.

In the 109th Congress, Mr. Chairman, you will recall we amended the Contraband Cigarette Trafficking Act to address cigarette smuggling schemes. The Justice Department linked some the smugglers to terrorist organizations, and one particular smuggling operation involving Hezbollah was located in Mr. Watt's and my State, North Carolina.

When we amended the act, it was on a bipartisan basis

and done in such a way that garnished support from all stakeholders and focused on preventing smuggling.

Today we are trying to prevent the illegal sale of cigarettes, I fear, with H.R. 4081. While cigarettes are a legal product -- legally grown, legally consumed, legally marketed -- and I'm not alleging that this legislation would make them illegal, but many legitimate stakeholders have serious reservations over various provisions.

I know the sponsors have attempted to address concerns of common carriers such as UPS, DHL, FedEx, but I understand they still have significant reservation about the bill.

I furthermore understand that North Carolina tobacco companies, Lorillard in particular, which is located in the county that Mr. Watt and I represent -- I have serious concerns that their legitimate and legal, legitimate business could be negatively impacted by 4081.

The intended purpose of H.R. 4081 is noble, and I support the premise of closing loopholes on contraband cigarettes. But I cannot support the legislation today without some assurances that we can address the concerns of the shipper and the common carriers and legitimate tobacco companies before this legislation is considered by the full House.

I didn't have a chance to review the language in the bill until early this morning, and this is not the process

that we used to amend the Contraband Cigarette Trafficking Act.

I hope we can address these concerns before the bill is considered by the full House or at least have the opportunity to permit stakeholders who are directly affected, so that we will know whether the bill is limited to illegal cigarette sales or has other unintended consequences.

And I will vote "aye" today but may withhold my support subsequently, depending upon what is accomplished in the meanwhile, Mr. Chairman.

And I thank you for recognizing me. I yield back the balance of my time.

Chairman Conyers. Well, I thank the gentleman.

Is there any further discussion?

If not, we will vote on the pending amendment.

All in favor, say, "Aye."

All opposed, say, "No."

The ayes have it. The amendment is passed.

Are there any further amendments to this measure?

A reporting quorum being present, the question is on reporting the bill as amended favorably to the House.

Those in favor, say, "Aye."

Those opposed, say, "No."

The ayes have it, and the bill as amended is ordered

reported favorably.

And, without objection, it will be reported as a single amendment in the nature of a substitute, incorporating amendments adopted, and authorizing the staff to make technical changes, and members will have time to submit additional views.

Pursuant to notice, I call up H.R. -- oh, that's right, we didn't.

I ask unanimous consent to have the manager's amendment reported as adopted. Without objection --

Mr. Scott. As amended.

Mr. Weiner. As amended.

Chairman Conyers. As amended, yes. As amended. Thank you.

Pursuant to notice, I call up the bill, H.R. 6083, to authorize funding for the National Advocacy Center.

And I ask the Clerk to report the bill.

The Clerk. "H.R. 6083, a bill to authorize funding for the National Advocacy Center."

[The information follows:]

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

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

And I recognize the Chair of the Crime Subcommittee, Bobby Scott, to describe the bill.

Mr. Scott. Thank you, Mr. Chairman.

This bill would authorize funding for the National Advocacy Center. And I will offer an amendment to authorize funding to conduct national training programs for State and local prosecutors.

This center has been funded for many years through the Byrne Grant Program. However, it is running into problems because the Byrne Grant Program has not been funded at adequate levels.

Mr. Chairman, this is a bill that's identical to a bill introduced by Senator Cardin in the Senate and has 18 cosponsors. And I'd ask unanimous consent to introduce my entire statement on the issue for the record.

Chairman Conyers. Without objection.

[The information follows:]

\*\*\*\*\* INSERT 4-6 \*\*\*\*\*

Mr. Scott. I yield back.

Chairman Conyers. Lamar Smith?

Mr. Smith. Again, thank you, Mr. Chairman.

H.R. 6083 authorizes funding for the Earnest F. Hollings National Advocacy Center in Columbia, South Carolina. The National Advocacy Center, a joint venture of the National District Attorneys Association and the U.S. Department of Justice, provides State and local prosecutors with specific skills needed to prosecute identity theft, gang-related activity, and other quickly emerging crimes facing our communities.

With technology evolving every day and criminal activities spreading from our streets to the Internet, it is critical that our Nation's prosecutors are properly trained and equipped to adapt to this changing landscape. It is also important that they are trained to coordinate these efforts.

I support the mission and efforts of the National Advocacy Center, and I urge my colleagues to vote for H.R. 6083.

Before yielding the balance of my time to the ranking member the Crime Subcommittee, Mr. Gohmert of Texas, let me say that I anticipate that Mr. Scott will be offering a technical amendment momentarily, and that I support that

amendment.

With that, I yield to the gentleman from Texas.

Mr. Gohmert. Thank you, Ranking Member Smith.

And thank you, Chairman, for bringing the bill to the committee today.

I, too, have a statement I would like the entirety of to be submitted for the record, without objection, or with unanimous consent.

But I do want to say our State and local prosecutors are the heart of our criminal justice system and prosecute the majority of violent crimes in this country. It is critical that our prosecutors are properly trained to adapt to changing trial practices and coordination efforts between Federal, State and local prosecutors.

So I do urge my colleagues to join me in supporting H.R. 6083, which will help continue on the great work of the National Advocacy Center.

With that, I yield back to the ranking member.

Mr. Smith. Mr. Chairman, I will yield back as well.

Chairman Conyers. Thank you.

I recognize Chairman Scott for a manager's amendment.

Mr. Gohmert. Point of order. Did I get a ruling on whether I could submit my entire written statement for the record?

Chairman Conyers. No, but you can. Without objection,



your statement will be incorporated into the record.

[The information follows:]

\*\*\*\*\* INSERT 4-7 \*\*\*\*\*

Chairman Conyers. Chairman Scott?

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

Chairman Conyers. The Clerk will report the amendment.

The Clerk. "Amendment in the nature of a substitute to H.R. 6083, offered by Mr. Scott of Virginia. Strike all after the enacting clause --"

[The information follows:]

\*\*\*\*\* INSERT 4-8 \*\*\*\*\*

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

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

And the gentleman, the chairman, is recognized in support of his amendment.

Mr. Scott. Thank you, Mr. Chairman.

Mr. Chairman, my substitute amendment makes a change in the bill, in that the funding will remain in the Department of Justice Office of Legal Education for training of State and local prosecutors. In its original form, the funding would go directly to the National Advocacy Center. This changes it to have the name of the bill changed from, "A bill to authorize funding for the National Advocacy Center," to, "A bill to authorize funding to conduct a national training program for State and local prosecutors."

The Attorney General will issue funds for the training. Presumably that training will take place at the National Training Center, but that decision will be made by the Department of Justice after all the issues of concern are considered.

The change has been made with the discussion with the minority, the Department of Justice, and with the chief sponsor, the gentleman from South Carolina, Mr. Spratt, who

is aware of the change and also concurs.

I urge the adoption of the amendment and subsequently the bill itself.

And I yield back the balance of my time.

Chairman Conyers. Thank you, Mr. Scott.

Is there any further discussion on the Scott substitute?

All in favor, say, "Aye."

All opposed, say, "No."

The ayes have it, and the substitute amendment is agreed to.

Are there any further amendments?

We do not have a reporting quorum, at this point, and so we'll postpone the vote on final passage.

I think there is one other measure remaining.

How many votes are there on the floor? Several?

We'll come back immediately after the vote and finish up.

Mr. Smith. Mr. Chairman, I would like to come back, because I would like to help you finish, but I will say we have special Republican conference call for 4:00, a special meeting with the Secretary of the Treasury that I think most Republican members are going to need to attend.

Chairman Conyers. Right. Well, then maybe we will have to reschedule this. Is there an opportunity for

tomorrow to finish up our work today? Would coming back at 5:00 be conducive, or 5:30?

Mr. Smith. I'll try my best to get our members here. I just can't speak to the --

Chairman Conyers. Well, you have to guarantee the appearance of your members, I'm sorry.

[Laughter.]

Mr. Smith. We'll try our best to be here, Mr. Chairman, at 5:00 or 5:30, whichever time you say.

Chairman Conyers. 5:30. So we will recess until 5:30.

Thank you very much.

[Recess.]

RPTS MERCHANT

DCMN HERZFELD

[5:50 p.m.]

Chairman Conyers. The committee will come to order. Pursuant to notice, I call up H.R. 6034, to amend the Immigration and Nationality Act to provide relief to surviving spouses and children.

The clerk, would you please report the bill?

The Clerk. H.R. 6034, a bill to amend the Immigration and Nationality Act to provide for relief to surviving spouses and children.

Chairman Conyers. Without objection, we will ask unanimous consent that the bill be considered as read.

[The information follows:]

\*\*\*\*\* INSERT 5-1 \*\*\*\*\*

Chairman Conyers. And I turn to the Chairwoman of the Immigration Subcommittee Zoe Lofgren of California for a statement.

Ms. Lofgren. Thank you, Mr. Chairman.

Under current law, United States citizens can file for legal permanent residence for their spouses who are citizens of another country. Once a petition is filed, it can often take several months and sometimes even years for the Department of Homeland Security to adjudicate the petition. When a couple is married less than 2 years, and the U.S. citizen petitioner dies before the petition is filed or adjudicated, the spouse is no longer eligible for permanent residence and must immediately return to either his or her home or be subject to deportation.

Widows and widowers often face difficult decisions when mourning the death of a spouse, including deciding whether to leave behind family they have come to love, and whether to separate their U.S. citizen children from their spouse's grandparents, parents and other family members. This widow penalty also causes exceptional hardship for U.S. citizen families who welcome the addition of their son or daughter's spouse to the family. Unfortunately upon the death of their child, the spouse they welcome faces deportation, and in many cases the spouse's deportation could result in the loss

of contact with grandchildren, one of the last few connections to their deceased child.

One of the private bills that the committee will consider in 2 weeks is an example of the problem. The Congressional Research Service reports that one of the two most common circumstances for granting private bill relief relates to a conditional permanent resident petition for an alien spouse not being approved before the untimely death of the U.S. citizen spouse. Those are the cases that have come to the attention of Congress through private bills, but there are at least 100 other spouses currently suffering from this problem in immigration law.

Take the example of Stephanie Pertel, a U.S. citizen from Virginia and mother of a deceased soldier. She not only mourns the loss of her son, she also faces the potential loss of her daughter-in-law and the U.S. citizen grandchild left behind after her son's death. Her son fell in love and married a foreign spouse, then he passed away soon after the birth of her child, leaving the widow with no way to adjust her immigration status. She told the committee that she and her family love their daughter-in-law and their grandchild, and she does not want to see them forcibly sent to another country.

Or consider the case of Maria Moncayo-Gigax, a citizen of Ecuador. She married John Gigax, a U.S. Border Patrol



agent, on August 28, 1998. Sadly, on November 7, 1991, Mr. Gigax was killed in the line of duty. The former INS had not adjudicated the immigration petition before Mr. Gigax passed away, thus exposing his widow to deportation. She since has received a stay of deportation, but she is in limbo, and the deportation stay could be lifted at any time.

And in yet another case from my part of the country, a young woman named Jacqueline met the love of her life in 2004 while studying at San Jose State University as a foreign student. She and Marlin Coats, a United States citizen, were later married in 2006. Soon after signing the petition to obtain permanent residency for his wife, he drowned while trying to rescue two young boys off San Francisco's Ocean Beach. Although Mr. Coats was a former lifeguard, he was caught in a riptide current during this rescue attempt, and even though his death was heroic and selfless, his widow now faces deportation.

This bill, H.R. 6034, has 27 bipartisan cosponsors, including Congressman Brian Bilbray, who is the leader of the Immigration Caucus in the House, as well as our own Congressman Dan Lungren. The ban would end the widow penalty by allowing the petition for permanent residency of a widow or widower to continue despite the death of the U.S. citizen petitioner. It would also allow widows and widowers

to self-petition if a petition was not filed before the death of a U.S. citizen spouse.

The Subcommittee on Immigration held a markup session on Thursday, July 10, 2008, and this bill was passed by voice vote with no amendments. I have and will offer at the appropriate time a technical amendment that I believe is bipartisan that doesn't change the substance, but creates a drafting error. But with that small change, I would urge my colleagues to support this bipartisan bill.

And I yield back, Mr. Chairman.

Chairman Conyers. Thanks, Ms. Lofgren.

Lamar Smith.

Mr. Smith. Thank you, Mr. Chairman.

When United States citizens die before they can secure a green card for their noncitizen spouses, the widow or widower left behind must not only cope with a terrible loss, but also with possible deportation. Under current law an immigrant whose United States citizen spouse dies can apply to receive a green card on their own, but eligibility is limited. A surviving spouse has 2 years to file a special self-petition for a green card if they were still married to the United States citizen at the time of death; however, they can only do so if they had been married to the United States citizen spouse for at least 2 years.

H.R. 6034 eliminates what is commonly referred to as

the widow penalty in current law. It allows a widowed immigrant spouse of a United States citizen to self-petition for a green card even if they had been married for less than 2 years. The bill conditions the approval of a green card on satisfactory proof that the marriage was legitimate. This requirement is essential. It serves to substitute for the Department of Homeland Security's investigation of a marriage that would otherwise take place when an immigrant seeks to remove the conditional status of their permanent residency.

This bill is a reasonable response to tragic circumstances. And I appreciate the arguments Mr. Lungren and Mr. Wolf made on behalf of constituents of theirs who were affected by the widow penalty. So I support this bill.

I also support the technical amendment that Ms. Lofgren referred to that she is going to offer momentarily. And I also support either both or whichever amendment the gentleman from Iowa offers in a minute as well.

And with that I will yield to the Ranking Member of the Immigration Subcommittee, the gentleman from Iowa Mr. King.

Mr. King. I thank the Ranking Member for yielding to me, and although we don't see the balance of this bill, I think, exactly right, I want to make this point that someone has to take a position on the immigration policy in this Congress that sets a hard cap on the overall numbers of

legal immigrants that we are going to allow into the United States. Right now that number is about 1.3 million. That number has gone up substantially over the last 10 and especially 20 years.

And I raise this issue consistently in committee, and I have raised it other places as well. And I have asked the members of the Immigration Subcommittee, come with your number; what do you think would be an appropriate number for legal immigration? And the silence convinces me that any amount is acceptable as long as we make sure that there isn't anyone who is inconvenienced by lack of having a particular visa class or category that they can come to the United States under.

And so I will oppose this bill, and I have an amendment to offer, but the overall cap is the central reason. And then additionally to that, the bill would grant green cards to aliens even if their spouses never had any intention of petitioning for them. And it doesn't allow any additional provisions to protect against fake documents of marriage, for example. Under the current law there requires 2 years of marriage. I think the Ranking Member addressed that. But the bill, without just cause, gives the same special benefit that is now granted to the spouses of soldiers who are killed in action or who die while in service-related injuries.

I think maybe if I paint it a little bit differently, we need more protections under this bill. We don't have a protection for good moral character. We don't have any provision that requires even that the spouse has ever been to the United States or wanted to come to the United States. To put it short, let us say a soldier, man or woman, could get drunk in Bangkok, wake up in the morning and be married, as will happen sometimes in places like Las Vegas or Bangkok, be killed the next day, and the spouse who was the product of the evening's celebration would have then a right to claim access to come to the United States under a green card.

I think we owe the citizens of America a better provision than that. And so I agree with the sentiment that is in this bill, but I would say that we cannot write an open-up classification to take care of every sad story that we have. If we do that, we are going to create a lot more sad stories here in the United States from the people who will take advantage of having this open provision.

So I would hope that we would have been able to negotiate the amendment that I am about to offer, and we weren't able to get that done. But I hope to offer that amendment at the appropriate time, and I will speak to the amendment then. And I appreciate the motive that comes in a bipartisan effort on this, but I disagree because there is

no cap, and I disagree because of what I think is a result that has not been considered by this committee adequately.

And I appreciate the yielding, and I yield back to the gentleman from Texas.

Ms. Lofgren. Mr. Chairman.

Chairman Conyers. Yes, ma'am.

Ms. Lofgren. I have an amendment at the desk.

Chairman Conyers. All right. The clerk will report the Lofgren amendment.

The Clerk. Amendment to H.R. 6034 offered by Ms. Zoe Lofgren of California.

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

Chairman Conyers. Without objection, so ordered.

[The information follows:]

\*\*\*\*\* INSERT 5-2 \*\*\*\*\*

Chairman Conyers. The gentlelady is recognized in support of her amendment.

Ms. Lofgren. Mr. Chairman, this amendment is technical in nature. Following the markup in the subcommittee, we discovered that while the intention behind section (1)(B)(ii) of the bill is clear, the way in which it is written is not as clear as we had hoped. Section (1)(B)(ii) is intended to provide a transition period where the U.S. citizen spouse died before the enactment of H.R. 6034, and the immigrant spouse is otherwise eligible for immediate relative status under section (1)(A) of H.R. 6034. Section (1)(B)(ii) is intended to allow the immigrant spouse to have 2 years from the date of enactment to file the petition for immediate relative status.

This technical amendment reflects the bipartisan work of the subcommittee and full committee staff to ensure that the intention of section (1)(B)(ii) is clear in the language of the bill. The amendment also makes a few other minor technical changes to the bill suggested by legislative counsel. It is supported by the Minority. And as I said, I believe it is technical in nature and should be approved unanimously. Whether or not you agree with the underlying bill, it ought to be clear.

Chairman Conyers. Thank you very much.

Yes, Ric Keller.

Mr. Keller. Thank you, Mr. Chairman.

I move to strike the last word. I will be supporting the amendment in the legislation. I would just like to tell you why. I think ending the widows' penalty is the humane thing to do. I don't hold myself out as an expert on the subject matter. I am just a guy that had a constituent that this impacted, and I got to see it up close and personal.

A young lady in my district, Dahianna Heard, was married to an American citizen. They have a 1-year-old boy who is a citizen. And her husband, who is a war hero and spent 12 years in the Army, was killed in Fallujah with a bullet through his head. And they were going to deport her, because even though she followed all the paperwork and done everything right, it was going to be an extra 2 months until they had been married 2 years, and they were going to deport her and her citizen child to Venezuela because her husband had been killed. And it just seemed so unfair to me.

And I am not someone known as being soft on immigration, but we had to go through a lot of hoops. And to make a long story short, she is going to be able to stay in this country. But I don't want what happened to me and my constituent to happen to anyone, and that is why I am in support of this legislation and urge my colleagues to support it as well.



Chairman Conyers. Any further discussion?

Mr. King. Mr. Chairman.

Chairman Conyers. Yes.

Mr. King. Move to strike the last word.

Chairman Conyers. Absolutely.

Mr. King. Thank you, Mr. Chairman.

And I do support this, I support this technical amendment. And I wanted to point out that the conditions that were described by Mr. Keller are already covered under current law. We have that provision already there. But again, I understand the sentiment, and I appreciate the improvement of the technical amendment that is here. I want to make that point.

And we also have passed legislation, of course, that will accelerate. We will accelerate citizenship of someone who has served in the Armed Forces during a time of war. We handle that in this committee as well. I think those are appropriate things.

I make that point, and I yield back, and I thank you.

Chairman Conyers. Thank you.

All in favor of the Lofgren technical amendment, say aye.

All opposed, say no.

The ayes have it, and the amendment is agreed to.

The gentleman from Iowa.

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

Chairman Conyers. The clerk will report the amendment.

Ms. Lofgren. Mr. Chairman, I reserve a point of order.

Chairman Conyers. The gentlelady reserves a point of order.

The Clerk. Amendment to H.R. 6034 offered by Mr. King of Iowa, page 2, line 3, after "benefit" insert the following: ", that the alien shared a residence in the United States with a citizen prior to the citizen's death. And that the alien is a person of good moral character."

[The information follows:]

\*\*\*\*\* INSERT 5-3 \*\*\*\*\*

Chairman Conyers. The gentlelady is recognized in support of her amendment.

Ms. Lofgren. It is Mr. King's amendment. I reserved the point of order.

Chairman Conyers. Right. The gentleman is recognized.

Mr. King. I thank the Chairman. In the aftermath of the technical correction of his microphone, now we can proceed.

Mr. Chairman, this amendment that I offer in its current form -- I will say this: In the current form this bill provides a path to citizenship to someone simply because he or she was once married to a United States citizen who is now deceased. This easy path to citizenship, and that might be arguable to the widow or the widower, I acknowledge that, would be available to an alien who may have been married mere days or months and has never set foot in the United States, and without any consideration of whether the United States citizen ever wanted to confer immigration benefits to the spouse; no application, in other words, prior to the death of the spouse.

Family unification goals that underlie current laws granting green cards based on a family relationship have no applicability in cases where the immigrant spouse has never resided in the United States and no longer has a United

States citizen spouse to join and is residing in her native country with her extended family. By amending the bill to require that the immigrant spouse and the deceased citizen have at least resided together in the United States, we will ensure that a new chain of migration is not built on a link who has never been in the United States and has no ties to America.

We should not be granting our most precious gift, a path to United States citizenship, to someone who is not able to demonstrate that he or she has ever lived in the United States with the citizen through whom these benefits would be derived.

It is also eminently reasonable to require that a person who derives an immigration benefit through a marriage of such short duration to establish that they are a person of good moral character. This amendment will prevent us from granting an immigration benefit to an alien who is able to prove admissibility, but who does not possess good moral character. Under the Immigration Nationality Act, good moral character is only demonstrated where, among other things, it is established like that an alien is not a drunk, a gambler or a criminal, and where the alien has not falsely testified to gain an immigration benefit, illegally voted, or falsely claimed to be a United States citizen. There is also a catch-all provision that prohibits a finding of good

moral character for other reasons that are not specified. This would help to protect the United States from permanently admitting someone of undesirable character under the bill.

I would just again reiterate the language in the amendment, and it sets up two conditions. One is that the alien shared a residence in the United States with a citizen with whom they were married, and shared that residence prior to the citizen's death, and that the alien is a person of good moral character. This would address the issue that I laid out in my opening remarks about what can happen when people are -- when American citizens are married in foreign countries, however briefly. And however many heartbeats they might have had before they met their death doesn't necessarily tie a bond to the United States.

And I think that we are talking about all cases here with the sponsors of the bill of people that recognize there is a bond to the United States for the bereaved spouse, whether it is a widow or a widower. And I will support finding that if there is -- supporting that language if we can demonstrate that there is a bond to the United States, a reason for them to want to become an American citizen, at least having set foot in the United States, resided with their spouse, and they are of good moral character. That is not too much to ask.

Mr. Lungren. Will the gentleman yield? Back here behind you.

Mr. King. I will yield to the gentleman behind me.

Mr. Lungren. I mean, the gentleman said an easy path to citizenship. This requires the spouse to die.

Mr. King. Reclaiming my time, I think I did address that caveat. And I said it would be difficult to convince the bereaved spouse, and I agree.

Mr. Lungren. Well, and here is the other thing. You say the alien shared a residence in the United States with a citizen prior to the citizen's death. If, in fact, an accident occurs on a honeymoon, the citizen dies, they have not shared a residence in the United States, you would disallow that unless in old-fashioned terms they had lived together in sin before the marriage. So what you are suggesting is if someone did the old-fashioned thing of not living together before they got married, and unfortunately the spouse died, you would prohibit them from doing -- I don't understand what the connection is sharing a residence in the United States if, in fact, it was a bona fide marriage, and a terrible accident ensued which then disallowed that individual who died from using their status as a citizen to bring their -- to allow their spouse to become an American citizen.

Mr. King. Reclaiming my time. Your hypothesis here

rests upon the presumption that the couple met and were married in a foreign country without the spouse ever having been to the United States after the wedding. And I am having difficulty imagining very many circumstances by which there would be those who were married in foreign countries, met in foreign countries, and decided to come back to the united States, and the spouse for the first time set foot on our sacred soil here, and then having the spouse die before they could apply for citizenship. I think it is stretched out way to the end on that, Mr. Lungren.

Mr. Lungren. If the gentleman would yield, the language of his amendment does not require that they are living outside the United States. It says that the alien shared a residence in the United States with the citizen prior to the citizen's death. What I was suggesting is if you have a terrible accident on a honeymoon, they hadn't shared a residence anywhere, including the United States, under the terms of your bill it would disallow the effect of this bill.

Mr. King. Reclaiming my time, I acknowledge the gentleman's point, and I would restate mine that I think that it is a very strong stretch of a hypothetical to get to that scenario, because at the end of all of that, then the spouse would need to die before they came back to the United States. However improbable it would be that an American

would have a spouse in a foreign country that never set foot here until after they were married, they would still have to die in the process.

And so I think what we are doing here is talking about passing legislation that covers every hypothetical. And if we are not willing to say no to anybody, that is really my point, is that I am concerned about an overall cap so that we don't have a runaway immigration policy. I think we ought to put a hard cap on our immigration policy and then work within it. It would be easier for me to work within many of these visa categories if we had a hard cap, but we don't. And so however many, 100, 2,000, 200,000, that adds to the 1.3 million, and that is the reason that I will oppose this bill, and I would urge adoption of this, and I yield back the balance of my time to the Chairman.

Mr. Lungren. Mr. Chairman, I would like to insist on my point of order.

Chairman Conyers. And what is your point of order?

Mr. Lungren. The point of order is that the amendment goes beyond the subject matter and purpose of the underlying bill subject matter and purpose. The bill proposes to create an exception in immigration law for foreign spouses of deceased U.S. citizens so as long as the foreign spouse can show that the marriage was entered into in good faith and was valid. The amendment would require such spouses or



widows or widowers to prove things unrelated to the underlying bill, specifically that the couple lived together in the United States, and that the spouse is a person of good moral character. These requirements are not related to the subject matter and purpose of the underlying bill. The amendment is therefore not germane.

I would also note that it is not at all uncommon, frankly, that especially with military families, that you live on base. In Korea I can give you countless examples of people where the American citizen is stationed in Korea or some other place, and there have actually been cases that we have been made aware of where the deaths have occurred, and they have resided in the American air base. But that is on the merits. I have checked with the Parliamentarian. I believe that the amendment is not germane and should not therefore be considered.

Chairman Conyers. Would you like to respond, Steve?

Mr. King. Mr. Chairman, I would. And I appreciate you recognizing me, and I appreciate the parliamentary ruling on the part of the Ranking Member or the Chair of the Immigration Subcommittee. I would be willing to wait for the Parliamentarian's ruling on this, and I would appreciate it especially if the Parliamentarian would listen to my argument before the decision is made because I think it is going to be so utterly compelling that perhaps the

gentlelady from California will withdraw her objection.

Chairman Conyers. I can hardly wait.

Mr. King. And so, Mr. Chairman, this amendment is germane to H.R. 1593, the Second Chance Act. While rule 16, clause 7 prohibits amendments that are of a subject different from the underlying consideration, my amendment deals with the same subject matter of this bill.

And I would point out that the gentlelady from California said that my amendment creates an exception in U.S. immigration law. Well, lo and behold, this bill creates an exception in U.S. immigration law exactly, and I owe exactly into it.

And I would ask the Parliamentarian and the Chairman to consider the debate that we had on the amendment itself. It went very much exactly to the subject of the bill while we were talking about the amendment. Mr. Lungren couldn't argue this amendment without addressing the very subject matter of the bill itself.

My amendment goes directly into the bill. Yes, it creates an exception. The bill itself creates an exception. So clearly my amendment is within the subject matter contemplated by the underlying text of the bill. And I am absolutely convinced the Parliamentarian will convince the Chairman that I am germane with my amendment. And I yield back the balance of my time.

Chairman Conyers. Well, have you seen what the Parliamentarian prepared for me?

Mr. King. Mr. Chairman, he didn't consult with me to hear my argument, and so I didn't look at his opinion either.

Chairman Conyers. Okay. Well, unfortunately the Parliamentarian did not recommend your proposal very favorably. As a matter of fact, he urged me in his preparation on this point of order that it should be sustained, because under the rule and the clause that you stated, the amendment isn't germane to the bill. I am sorry to say that, really, because you were so optimistic that you would get a favorable ruling. I just don't know how to even begin to go through all the reasons that this is the case.

Mr. King. Would the Chairman yield?

Chairman Conyers. Of course.

Mr. King. I wonder if you might indulge me and perhaps offer the opportunity for the gentlelady from California to see if she might reconsider and be willing to withdraw her objection or point of order.

Chairman Conyers. Absolutely.

Mr. King. The gentlelady from California.

Ms. Lofgren. No, I think we will just follow the rules in this case, Mr. King. I appreciate your generosity in offering me to reconsider.

Mr. King. I appreciate your comity. Thank you,  
Mr. Chairman.

Chairman Conyers. Well, I commend you on your tenacity  
to insist upon this.

Mr. Lungren. Mr. Chairman.

Chairman Conyers. So that takes care of that.

Mr. Lungren. Mr. Chairman.

Chairman Conyers. Yes. Dan Lungren.

Mr. Lungren. Mr. Chairman, may I strike the requisite  
number of words?

Chairman Conyers. Yes. The gentleman is recognized.

Mr. Lungren. Mr. Chairman, this is actually an  
important bill. It would amend the Immigration Nationality  
Act to help hundreds of families a year. I know the  
gentleman from Iowa is concerned about the numbers. I have  
tried to look it up. But it would be hundreds of families a  
year who are unfortunately adversely affected by the 2-year  
rule following the death of a spouse of an American citizen.

One of the reasons it was brought to my attention was a  
police officer in my district in Rio Vista, California,  
Solano County, down in the delta area, he was killed in  
October of 2005 on Highway 12, which is unfortunately a very  
dangerous highway, in a head-on collision. He was returning  
from work, so it was considered in the line of duty. He was  
26 years old. He had been on the force for 4 years,

received a citation for bravery during the time on his force. He had gotten married to a Polish immigrant from the United States whom he had met approximately a year before. Her name is Dereta. And in September of 2005, they were married. Six weeks later he was killed in the way that I suggested. After they were married, his parents paid approximately \$5,000 to an immigration lawyer to try and get the process through, but the death ensued. And so by provisions of current law, she was no longer able to go through the process.

And I think that is what we are trying to deal with here. There is no evidence they were trying to fool anybody. There was no evidence that this was a put-up marriage. It was an unfortunate circumstance, a death that caused the break here. So that is what we are really talking about.

And I appreciate the gentleman's concern, but what we are talking about is hundreds of cases perhaps a year, hundreds of cases in which there was no intention to fool the law, there was an unfortunate death. And I think this is a reasonable way of doing it.

And I know the gentleman's concern continues with the issue of fraud, but still they would have to show by a preponderance of evidence that the marriage was entered into in good faith and not solely for the purpose of obtaining an

immigration benefit.

So for others who might have listened to our debate, I hope they will understand that I think with the law that already exists and putting this provision in there, this is not going to be something that is a foot in the door or some huge opportunity for fraud. In fact, it is specifically dedicated and directed to an unfortunate set of circumstances and is limited at least by the experiences that we could find to probably several hundred per year.

And with that I would yield back the balance of my time.

Ms. Jackson Lee. Mr. Chairman.

Chairman Conyers. Yes. Sheila Jackson Lee.

Ms. Jackson Lee. I want to add my appreciation for this legislation as well. And I think Congresswoman Lofgren has heard my comments in the subcommittee on the need for comprehensive immigration reform. I know that we are not speaking particularly to that issue, but I think Mr. Lungren's recounting of his tragic story should, Mr. King, give you some comfort that there are many, many meritorious cases that this particular legislation responds to.

Let me give you a small anecdote that stretching one's imagination might play into this somewhere down the road. In countries around the world today, there are individuals

that are marrying 8-year-old girls. And I have in my hand a recounting of the marriage of an 8-year-old girl from Yemen to a 28-, 29-year old. And it suggests that she was married through her consent, and that she did not object, and she was in the process of trying to get a divorce. The husband, alleged husband, in the court said that the marriage was consummated. This is with an 8-year old, and this person was 28-years-old, but he did not beat her.

This is horrific. I only cite this example because this person may grow up, and there may be -- I think there would be a better occasion for us to provide refuge for this person as a refugee, but this person could be characterized in some far stretch of the imagination as having an immoral character; an 8-year old who, you know, had sex. Based upon the record, she had sex through consent.

But I think the question is that there are many people living around the world with tragic circumstances, Mr. King. And maybe we can look at this from the perspective of what we need to do in refugees, what we need to do in comprehensive immigration reform. And in this instance, of course, this is a narrow bill, but I believe that it points to the fact that everyone who wants to come to this country is not trying to do it fraudulently, and this gives them the opportunity to do so.

I hope that in this committee we will find a way to

help young women like that in Yemen, because I think that is a crime, international crime. But now we are dealing with a narrow bill, and I hope we will find a way to have comprehensive immigration reform.

With that I will yield back.

Chairman Conyers. Thank you.

Mr. King. Mr. Chairman.

Chairman Conyers. Yes. Mr. King.

Mr. King. Thank you, Mr. Chairman.

I move to strike the last word. I should be so eligible.

Chairman Conyers. Absolutely.

Mr. King. I thank you.

That description that has been delivered to us by the gentlelady from Texas is a disturbing, disturbing description, and it brings to mind an issue. Some of those countries that do arranged marriages of very young girls also arrange multiple marriages for men, and that we have polygamists who travel this world and arrange those kind of weddings. I know that that happens. And sometimes the first wife comes with the husband, and then the second, then the third, then the fourth. That seems to be the limit in some countries; there seems to be no limit in other countries.

And I would just pose this question perhaps to the



gentlelady from Texas whether she supports that case if it happens to be -- would you support then this legislation if it included a polygamist, say, the multiple wives of someone who had died in the United States or had been married to those folks in the other country? And I would be happy to yield to the gentlelady from Texas.

Ms. Jackson Lee. I would be happy to have yield to me because I think the language in the legislation, one, there is a process, and that means that individuals will conform to the laws of this Nation. Polygamy in this Nation is illegal, and therefore, if they are accessing the laws of this country, I would assume and would expect that the legislation provides the firewall that that will be one application, one person, one wife, one spouse. And if you would be kind enough to yield to the gentlelady from California, she will read in particular the firewall that is created in this legislation.

Mr. King. Reclaiming my time, and I will do that in a moment, but I pose the question back to the gentlelady from Texas, and that would be that let us just say, for example, there is a man who is an American citizen who has multiple wives in foreign countries, and he becomes deceased. Does that make the wives all -- are they all polygamists even though there is no longer a marriage to bind them together? Or would they -- I mean, seriously, six wives, no husband;

is there a polygamist marriage that exists? I think it severs all relationships.

So I would yield to the gentlelady from Texas.

Ms. Jackson Lee. Let me again reiterate, though, what I believe. Any law that is passed here in the United States conforms to the mores and also laws of the United States. Polygamy is illegal in the United States. If an application was made, this law would assess the application for that individual applicant to that deceased individual, thereby --

Mr. King. Reclaiming my time.

Ms. Jackson Lee. If I could just finish.

Mr. King. Go ahead.

Ms. Jackson Lee. The law would not adhere to an individual having an application, a deceased individual, as I understand it, having an application for multiple spouses, and I think certainly we would be in compliance with the law.

Chairman Conyers. Would the gentlelady yield to me for a moment?

Ms. Jackson Lee. I would be happy if the gentleman would yield to you.

Mr. King. It is my time, but I would yield to the Chair.

Chairman Conyers. Thank you.

They are about to call a floor vote. We have got to

finish this up. And there is another bill that we were working on when we recessed. So I would like to get this concluded, if we can, without interfering with your trains of thought on this subject.

Mr. King. Mr. Chairman, reclaiming my time, then I think I may be the only one in this committee that is curious about getting an answer on this. So I will just submit that if the husband with the six wives in a foreign country dies, that severs all marriage relationships. It is a principle of this bill that there are no applications for citizenship, but we would confer that citizenship whether there had been any interest or not in the United States.

So I think it severs all marriage relationships, and it opens this up. And whether there are statutory provisions or not, I don't know that we have the ability to go back and actually audit each one of those applications and say, were you part of bigamy or polygamy? I will say not. I think it happens anyway.

I make my point, and I would yield back the balance of my time.

Chairman Conyers. Thank you.

If there is no further discussion, a reporting quorum being present, the question is on reporting the bill favorably to the House. Those in favor, say aye.

Those opposed, say no.

The ayes have it, and the bill is ordered reported favorably, and, without objection, will be reported as a single amendment in the nature of a substitute. And there will be technical and conforming changes permitted, and Members will have the regular time to submit views.

Chairman Conyers. Our final piece of business is to conclude the measure that we were involved in when we had to recess to vote on the floor, and that was with H.R. 6083, which dealt with the authorization to fund the National Advocacy Center. And so we have a reporting quorum in this matter, and the question is on reporting that bill favorably to the House. Those in favor, say --

Mr. Scott. As amended, as amended.

Chairman Conyers. Thank you. Reporting the bill favorably, as amended, to the House. All in favor say aye. All opposed say no. The ayes have it. And so ordered.

Without objection, the bill will be reported as a single amendment.

Mr. Smith. Mr. Chairman, before we adjourn, I would like to ask you a question.

Chairman Conyers. And the staff is authorized to make technical and conforming changes, and Members will have the regular time to submit views.

Thank you. And I yield to Lamar Smith.

Mr. Smith. Thank you, Mr. Chairman.

Mr. Chairman, I did not object today, but I would feel better, and I am sure you would feel better, too, if when we do vote, that a reporting quorum is physically present. Like I say, I didn't want to object today, but I just wanted

to call that to every Member's attention that in the future I would like to insist on a real reporting quorum.

Thank you.

Chairman Conyers. Thank you very much.

And I thank the committee. We have a full committee meeting at 10:00 tomorrow morning, and former Attorney General John Ashcroft is due to testify.

Thank you very much. The committee stands adjourned.

[Whereupon, at 6:33 p.m., the committee was adjourned.]