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MARKUP OF H.R. 4279, THE PRIORITIZING RESOURCES AND ORGANIZATION FOR INTELLECTUAL PROPERTY ACT OF 2008; H.R. 5690, TO EXEMPT THE AFRICAN NATIONAL CONGRESS FROM TREATMENT AS A TERRORIST ORGANIZATION FOR CERTAIN ACTS OR EVENTS, PROVIDE RELIEF FOR CERTAIN MEMBERS OF THE AFRICAN NATIONAL CONGRESS REGARDING ADMISSIBILITY, AND FOR OTHER PURPOSES; H.R. 1650, THE RAILROAD ANTITRUST ENFORCEMENT ACT OF 2007; H.R. 5593, THE CONGRESSIONAL REVIEW ACT IMPROVEMENT ACT; AND H.R. 4044, THE NATIONAL GUARD AND RESERVISTS DEBT RELIEF ACT OF 2008

Wednesday, April 30, 2008

House of Representatives,

Committee on the Judiciary,

Washington, D.C.

The committee met, pursuant to call, at 10:15 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, Sanchez, Johnson, Sutton, Gutierrez, Baldwin, Wasserman Schultz, Ellison, Smith, Sensenbrenner, Coble, Goodlatte, Chabot, Lungren, Cannon, Keller, Issa, 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; Anita L. Johnson, Clerk; and Sean McLaughlin, Minority Chief of Staff/General Counsel.

Chairman Conyers. Good morning. The committee will come to order.

Welcome, everybody.

Pursuant to notice, I call up the bill H.R. 4279, "Prioritizing Resources and Organization for Intellectual Property Act," for purposes of markup, and ask the clerk to report the bill.

The Clerk. "H.R. 4279, a bill to enhance remedies for violations of intellectual property laws and for other purposes."

[The information follows:]

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

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

I am pleased to say that we are moving forcefully in the Committee on the Judiciary to step up intellectual property enforcement nationally and globally. We think this is very helpful for our economy.

With so much bad economic news in the headlines, 4279 will help our economy by protecting our high-tech jobs now and long into the future. This bipartisan bill recognizes and puts forth the necessary resources commensurate with substantial and rising importance of intellectual property to the Nation's economic economy.

The General Accounting Office reports that intellectual property accounted for an average of 18 percent of the U.S. gross domestic product and 40 percent of the U.S. exports of goods and services in 2003 and 2004. An estimated 18 million workers, 13 percent of our labor force, are in industries that rely on intellectual property protection.

These 18 million workers' incomes are directly related to effective intellectual property rights enforcement. But due to less than effective enforcement, counterfeiting and piracy costs the United States economy somewhere in the neighborhood of $250 billion every year and results in a loss of 750,000 American jobs. These, we think, are conservative estimates.

And so H.R. 4279 will accomplish the following: It will prioritize intellectual property protection to the highest level of our Government. That is, we will create a White House position that will coordinate the eight other agencies, including the Department of Justice, that are presently concerned with piracy and intellectual property protection.

It will also make changes to the intellectual property law to enhance the ability of IP owners to effectively enforce their rights. It will make it easier to criminally prosecute

repeat offenders, and it will increase penalties for violations of intellectual property that endanger public health and safety.

Now, the problem is that counterfeiting and piracy, both uploading and downloading illegally, is growing at a much faster rate than our enforcement efforts can keep pace. And so what is happening is that we have increasing crime in this area and, because of the Department of Justice resources being drained off in other areas, we have less prosecution.

And so here you have the reasons for this very important and, I think, defining, or redefining, proposal that we have before the committee today.

Now, H.R. 4279 is necessary to stem the tide of piracy and trademark infringements and will provide the institutional IP enforcement structure that the country needs to maintain a strong economic base in the increasingly competitive global marketplace.

Throughout the process of developing this bill, we have heard from many, and I think all, quarters of interest in this area. And we were able to address nearly all the concerns. Shortly, I will offer a manager's amendment reflecting the bipartisan discussions to address a number of these concerns.

A majority of the changes in the manager's amendment clarifies the role of the United States intellectual property enforcement representative. That is the new czar that is being created in the bill. As a matter of fact, that is what about 85 percent of the manager's amendment is about, what his role or her role will be. We clarify this role, as the producer of a national joint strategic plan -- that will be a job -- as well as a representative of an adviser to the President. And we made clear, at the same time, that the role of other agencies, especially the United States Trade Representative, will play in the development of a joint strategic plan.

We also specify and delineate the role of the enforcement representative to alleviate concerns that he or she would be involved in the day-to-day operation at the ground levels of intellectual property enforcement. That is not what we intend to do.

And so we have received support from nearly everyone: the Consumer Electronics Association, the Digital Media Association, the Net Coalition, the Internet Commerce Coalition, the Coalition for Consumers' Picture Rights, the Printing Industries of America, the Teamsters, the Directors Guild of America, SCIU, AFTRA, Unite Here, AFM, the laborers, OPEIU, the Coalition Against Counterfeiting and Piracy, the Motor Equipment Manufacturing Association, even PhRMA, NBC, Universal, and the Motion Picture Association of America.

And so, with that kind of cooperation which we are pleased to enjoy, I am happy to recognize the ranking member of this committee, Lamar Smith of Texas.

Mr. Smith. Thank you, Mr. Chairman.

Mr. Chairman, I do appreciate your scheduling a markup on H.R. 4279, the "Prioritizing Resources and Organization for Intellectual Property Act" of 2008, sometimes called "PRO-IP."

Also, Mr. Chairman, I appreciate the fact that you and I co-authored an op-ed that appeared in The Hill publication today. And, as you said, this is another example of good bipartisan cooperation that is going to yield good results and help the American people and our economy as well.

The United States Government estimates American businesses lose up to $250 billion every year because of counterfeiting and piracy. An estimated 750,000 Americans have already lost a job due to acts of counterfeiting and piracy.

Today, American IP industries account for over half of all U.S. exports, represent 40 percent of our economic growth and employ 18 million of our citizens. By any

measure, it is clear that IP is among the principal engines that drive U.S. economic and export growth.

But the incentive to innovate and the ability to profit from the creation of new IP cannot be sustained in the absence of effective efforts to enforce the rights that protect the ownership of such valuable, intangible property.

As a result of America's success in harnessing creativity and fostering innovation, our rights holders have the dubious distinction of becoming the prime targets for thieves who seek items protected by patent, copyright, trademark or trade secret designation. And yet the U.S. Department of Justice, which is doing more now to enforce IP laws than at any previous time in our history, reports filing a total of only 217 IP cases in fiscal year 2007.

To place this number in perspective, it appears to represent less than one-third of 1 percent of the total criminal cases filed by the Department during that period. The more cases brought, the greater the deterrent effect and the stronger our economy will be. And the importance of IP enforcement is magnified in today's weakening job environment.

To protect U.S. interests and successfully combat the theft, often by international organized crime syndicates, we need an unprecedented national strategy. This strategy demands dedicated leadership and new resources at the White House and key Federal enforcement agencies. This effort must also include, as a key deterrent element, the increased likelihood of apprehension and aggressive criminal prosecution.

For more than 6 months, we have worked to encourage the Department of Justice to engage on these issues. It is no secret that I am disappointed that some officials appear to be ignoring our bipartisan efforts to approve IP enforcement.

Congress has a responsibility to ensure that IP enforcement is made a permanent priority of every administration. By reporting H.R. 4279 and adopting the manager's

amendment to be offered today, this committee will send a clear message that there is a bipartisan commitment to ensure the next President and succeeding administrations have the resources, organizations and strategies that are required to protect our vital national and economic interest.

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

Chairman Conyers. Thank you, Lamar Smith. And thank you for your cooperation -- as a matter of fact, the whole committee's cooperation.

I now ask unanimous consent that all members' statements, including my own, be included in the record at this point.

And I ask that the clerk report the manager's amendment.

The Clerk. "Amendment to the amendment in the nature of a substitute to H.R. 4279, offered by Mr. Conyers of Michigan, Mr. Smith of Texas, Mr. Berman of California and Mr. Coble of North Carolina. Page 9, lines 10 and 11 --"

[The information follows:]

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

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

I would ask that our distinguished head of the Subcommittee on Intellectual Property, now also Chairman of the Foreign Affairs Committee, discuss and explain the manager's amendment, Howard Berman.

Mr. Berman. Well, thank you very much, Mr. Chairman.

And I would like to associate myself with your comments, as well as the comments of Ranking Member Smith, regarding the bill in total. As you have pointed out, it is a much-needed bill for our economy, both in terms of protecting IP but also because it will have a positive impact on public health and safety. It has bipartisan support, and it is championed, as you pointed out, by so many different groups, coming from so many different perspectives.

And I would like to thank, with respect to the amendment now before us in the nature of a substitute, I would like to thank both you, Mr. Chairman, and Ranking Member Smith for an amendment that contains further compromises in an attempt to address concerns raised by the administration while still maintaining the integrity of the main goal of the bill: ensuring coordination and prioritization of IP enforcement.

As was referred to, The Hill article this morning, even though we have not received the kind of detailed proposals that the administration claims would satisfy their concerns, this bill is an effort to make the kinds of compromise to anticipate some legitimate issues that have been raised.

We don't deny that the administration is starting to focus on intellectual property enforcement. Our motivation to codify the U.S. IP enforcement representative comes from the successes of the STOP! initiative. But, as the GAO points out, STOP! is lacking in permanence.

Particular agencies within the administration may have some unease about how title 3 would work, and so we have kept our door open to accommodate any legitimate concerns. So even though we haven't been formally presented with proposals, as the op-ed piece points out, the majority of the changes in this manager's amendment attempt to try to clarify, modify and rectify any unintended consequences.

I will just quickly point out, take 30 seconds here -- I think we share the concern Department of Justice has about independence of agencies in relation to U.S. IP enforcement and the representative. And we don't want it to appear as if there was a White House political direction over prosecutorial decisions. We think the agency should maintain their ability to manage their core missions. The USTR should be responsible for trade negotiations. Customs should be responsible for enforcement of borders; Justice for the investigation and prosecution of IP violations. The manager's amendment takes this into account and ensures the primacy and independence of these agencies.

But at the end of the day, it is clear that there needs to be a much greater coordination between the agencies for an effective IP enforcement strategy, and this bill provides the mechanism for that to happen. I ask my colleagues to support this amendment in the nature of a substitute and the bill.

And I yield back.

Chairman Conyers. Thanks, Chairman Berman.

I now turn to Howard Coble, the ranking member of Intellectual Property.

Mr. Coble. Thank you, Mr. Chairman.

And, in the interest of time, Mr. Chairman, I will not read my entire statement, but I do want to say that the "Prioritizing Resources and Organization for Intellectual Property Act of 2008" reflects a bipartisan recognition and shared commitment to the improvement of our Nation's intellectual property laws.

It is a comprehensive measure that is not confined, as some advocate, to making marginal improvements in the available civil and criminal authorities. Instead, it incorporates bold and urgently needed provisions that, when fully implemented, would permanently elevate the importance of IP enforcement in future administrations. This is accomplished by providing focused and accountable strategic leadership in the Executive Office of the President and at key enforcement agencies.

Mr. Chairman, this is a remarkable degree of bipartisan support for this bill. And I want to commend you and Ranking Member Smith for The Hill op-ed article, which has previously been referred to.

Finally, Mr. Chairman, I want to encourage our colleagues to support the amendment and the underlying bill and commend you, Mr. Chairman, Ranking Member Smith and Mr. Howard Berman, who chairs the committee of jurisdiction, for the diligent and dedicated work that went into this, and other sponsors as well, in advancing this vitally needed legislation to this point.

And, with that in mind, Mr. Chairman, I yield back the balance of my time.

Chairman Conyers. I thank you very much, Howard Coble.

Ms. Lofgren. Mr. Chairman, I move to strike the last word.

Chairman Conyers. Yes. Let me recognize --

Ms. Lofgren. I am sorry.

Chairman Conyers. Let me recognize Mr. Smith for a unanimous consent request.

Mr. Smith. Mr. Chairman, I ask unanimous consent that two letters that the committee has received be made a part of the record. One is from the United States Chamber of Commerce, and the other is from the Coalition Against Counterfeiting and Piracy.

Chairman Conyers. Without objection, so ordered.

[The information follows:]

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

Chairman Conyers. And I recognize the gentlelady, who has worked on this committee and on the subject for many years.

Ms. Lofgren. Thank you, Mr. Chairman.

I want to thank you and Mr. Berman, Mr. Smith and Mr. Coble for your hard work on this bill. Obviously, we all agree that we can and should do more to deter counterfeiting and piracy, but I continue to have concerns about some provisions of this bill.

Section 202 amends the law with respect to forfeiture of property used to facilitate copyright infringement. And I commend the Chairman for changes made to this section, but I fear we have not yet reached the proper balance between protecting copyright owners from those who unlawfully benefit from infringement and ensuring that we do not inadvertently punish innocent bystanders.

Existing copyright law provides copyright owners with, really, unparalleled remedies. In addition to injunctive relief, very generous monetary penalties, substantial criminal penalties, existing 17 U.S. Code 509 already provides for seizure, forfeiture and destruction of property. The bill's enhanced forfeiture provisions creates a strong possibility that an innocent owner's property could be seized if someone else uses it to commit IP-related offenses.

Under section 202, it is irrelevant whether the owner knew of the illegal conduct. And I don't see that punishing innocent individuals and entities for someone else's wrongdoing is actually a deterrent. I also do not see any evidence that the current law with respect to forfeitures is inadequate.

Now, sophisticated businesses have remedies to reclaim their property under the law. But when you think about -- I mean, an ISP has lots of money. They can go and

pursue those remedies. If you are the parent of a teenager or a sophomore in college whose computer is available to many other students, you don't have the same wherewithal to protect yourself or your child.

So I had prepared an amendment, which I will not offer today because I do not believe it would receive support, but I do want to raise my concern about the bill.

I also hope that the bill's more aggressive enforcement of IP laws does not lead to disproportionate and unfair punishment of entirely innocent individuals and institutions.

I appreciate the work that has been done to refine the scope of title 3. I share the Chairman's frustration with the administration's failure to engage in more constructive dialogue about how to best focus the DOJ's resources on IP without harming equally important law enforcement priorities.

And I thank the Chairman, not only for their work, but for recognizing me for these brief comments. And I yield back.

Mr. Berman. Would the --

Ms. Lofgren. I certainly would yield, Mr. Chairman.

Mr. Berman. I appreciate the gentlelady yielding.

I will simply point out, understanding her concerns, number one, the current law on seizure allows the computers that you are referring to to be seized. And, ironically, the law on forfeiture in this bill, with respect to intellectual property offenses, is significantly narrower than the law as it applies to forfeiture in drug offenses and a number of other criminal areas.

Innocent property owners are clearly exempted from the forfeiture laws, under existing law and also under this bill. And, as I think you at least by implication pointed out, there must be under this bill a substantial connection between the property seized and the offense committed for there to be any seizure and forfeiture.

Ms. Lofgren. Reclaiming my time. And I understand that, and I shared a potential amendment I had thought of offering and will not offer. But unlike drugs, where you have cocaine there -- I mean, if you have a computer that is being used in a dorm, you have four students -- and this has happened. I mean, the RIAA has sued students in this circumstance. And I realize it is a different circumstance, but it is a good example of what happened. Completely innocent people have ended up financially behind the eight ball on this.

And I think this is an opportunity to fix this. We have not done so. I credit the Chairman for his efforts to improve the bill, but I continue to have reservations.

Mr. Berman. Would you --

Ms. Lofgren. I would yield again, of course.

Mr. Berman. In order to seize, there is a requirement that the person, the owner have property be under the predominant control of the offending party. Otherwise, no seizure is allowed.

But I appreciate the concerns. And, look, this process goes on, and we will continue to work to try and find just the perfect balance. I think we did a pretty reasonable job here, but we will be open to any further suggestions.

Ms. Lofgren. Reclaiming my time, I would just note that the problem for the low-income individual is asserting one's rights when -- and what has happened with the RIAA lawsuits is that they have made a business out of extorting money from students, where it actually makes sense to lose a few thousand dollars as compared to hiring counsel to defend yourself.

I think this is the same type of situation. I think we have an opportunity to fix that for low-income individuals. The ISPs can take care of themselves. I mean, they have resources. That is the point I wanted to make.

And I thank the gentleman for his courtesy in engaging me on this, and I yield back.

Chairman Conyers. This is important discussion, because we don't want anyone to get the impression that we have lost the same sensitivity that you bring to the subject. And so we will continue to --

Mr. Berman. Would you yield for one last comment? The decision --

Ms. Lofgren. I yielded back, but if I can reclaim it and yield again, I will certainly do so.

Mr. Berman. One sense is the fact that we don't join on the issue of describing those lawsuits as extortion does not mean, at least for this particular Member, that we accept the notion that they are extortion.

Chairman Conyers. Right. Whatever that means.

[Laughter.]

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

Chairman Conyers. Gentlelady from Texas is recognized.

Ms. Jackson Lee. I thank the Chairman.

I rise to support the legislation.

Mr. Chairman, in discussions with your office, I was intending on offering an amendment, but I just would like to state on the record that I would hope we would have an opportunity at least to make the point on the record that, as we move toward enforcement, although this is not directly related to enforcement, I would like to see our CHIP units -- I think I had a well-thought-out amendment on the recruitment aspect of ensuring that the CHIP unit is diverse and that we work, as I think we've discussed in the Judiciary Committee, as it relates to the Department of Justice, that we have the kind of talent that comes strongly from historically black colleges and Hispanic-serving colleges

and that we have that kind of outreach.

I hope, as we have the continuing oversight on this matter, that we will insist and encourage these CHIP units to be diverse and to work with talent from all over and that we will see increased numbers reflected in the diversity of these particular units in a very important process.

With that, Mr. Chairman, I will yield back my time.

Chairman Conyers. I thank you for your thoughtfulness. And we will be watching the development of this important idea as we move along.

Ms. Jackson Lee. Thank you, Mr. Chairman.

Chairman Conyers. Anyone else have any comments about the manager's amendment?

The question, then, is on the amendment.

All those in favor will say aye.

All those opposed say no.

The ayes have it.

And 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, without objection, the bill will be reported as a single amendment in the nature of a substitute incorporating the amendment adopted.

And staff is authorized to make technical and conforming changes.

Members have 2 days for additional views.

And I thank the committee very much.

Pursuant to notice, I call up H.R. 5690, to exempt the African National Congress from treatment as a terrorist organization.

The clerk will report the bill.

The Clerk. "H.R. 5690, a bill to exempt the African National Congress from treatment as a terrorist organization for certain acts or events, provide relief for certain members of the African National Congress, regarding admissibility, and for other purposes."

[The information follows:]

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

Chairman Conyers. I ask unanimous consent this bill be considered as read.

And I will start off our discussion.

The African National Congress has become a rare example of a successful and peaceful transition to a modern nation. They fought for years, as we all know, underground, in exile, against the bankrupt and apartheid system in South Africa. And once they prevailed, rather than retribution and reprisals, their response to gaining political power was one of reconciliation.

Notwithstanding this remarkably peaceful transition, the United States continues to refuse entry to ANC leaders pursuant to the exclusions in the Immigration and Nationality Act written for those who participated in terrorist acts or have criminal convictions.

As we all know, ANC leaders -- for example, the great Nelson Mandela -- suffered an unjust incarceration at the hands of apartheid regime for 26 years. We know how apartheid regime labeled its opponents as either communists or terrorists to try to deflect criticism of their institutions of repression and racial separation.

And yet, these people who courageously and steadfastly fought for freedom and chose a path of peace once they came to power continue to be blocked from entry to the United States.

So many of us have joined in the fight against the apartheid regime, submitting to arrests and incarceration, in solidarity with those who suffered for years in the Southern African prison camps. Former Member Ron Dellums and I started a congressional campaign for sanctions against the apartheid regime in 1972, in an attempt to get Polaroid to stop providing film for the internal passports that black Africans had to carry inside their own country. It took 14 years to get official sanctions passed. Twenty-two more years have gone by, and the immigration code still classifies the ANC in this unjust manner.

This bill, as modified by a manager's amendment in the nature of a substitute that will be offered, will rectify the problem. It adds the ANC to the list of organizations, passed as part of the Fiscal Year 2008 Omnibus Appropriations Bill, who do not pose a threat to the United States and should not be considered terrorist organizations under the INA. This list already includes the Hmong, the Montagnards, and other freedom fighting groups, and, in fairness, should include the ANC. And now, with our deliberation and support, it will. The bill helps us close the book on the evils of apartheid.

I thank so much Howard Berman and his predecessor in Foreign Relations, the Chairman, the late Tom Lantos, for their work on this bill. And I applaud Lamar Smith for his leadership in the bipartisan discussions that have resulted in the manager's amendment.

I now recognize Lamar Smith, ranking member of the committee.

Mr. Smith. Thank you, Mr. Chairman.

The African National Congress has played a significant role in history. Nelson Mandela and the ANC, for many years, fought against the unjust apartheid system in South Africa. Through a largely peaceful transfer of power, apartheid is a thing of the past, and South Africa now has a representative, democratic Government. Many ANC officials are, in fact, now officials in that Government. South Africa provides hope that genuine reconciliation between historically opposed groups can be achieved.

H.R. 5690 adds the ANC to the list of groups that are not considered terrorist organizations under the Immigration and Nationality Act. The list was created to shield certain organizations from the broad reach of the Immigration Act of 1990. Under the 1990 legislation, any guerrilla group could find itself within the definition of a terrorist organization. But the list exempts some groups from that definition, including the Hmong, who fought alongside U.S. soldiers in the Vietnam War, and groups that are now fighting against the repressive Burmese Government.

It is understandable that the ANC be added to this list. However, real terrorist acts were committed as part of the ANC's struggle against apartheid. There were deadly bombings of civilians and necklacing, in which a car tire was put around a person's neck and set on fire.

No ends can justify these means. As unjust as apartheid was, it did not provide a rationale for carrying out these terrible crimes. So I cannot support the part the bill in which members of the ANC are excused from any crimes or acts of terrorism that were committed simply because they were part of the anti-apartheid struggle.

To quote The New York Times from 1998, "Leaders from the ANC have, for the first time, accepted responsibility for some recent bombing attacks on civilians, which appeared to have been deliberately aimed at civilian targets, including amusement arcades, fast-food outlets, sports stadiums and shopping centers. Criticism reached a climax with a car bomb explosion outside a Johannesburg stadium early last month in which two people died and 67 were hurt," unquote.

The bill, as introduced, might exempt the persons who carried out these acts from the bars to entry of the Immigration and Nationality Act. However, I will offer an amendment in the nature of a substitute, along with Mr. Berman. This amendment provides appropriate relief to the ANC without excusing the perpetrators of terrorist or criminal acts. And I appreciate the willingness of Mr. Berman, our Chairman, Mr. Conyers, and Ms. Lofgren to address these concerns.

I look forward to offering the amendment along with Mr. Berman and, of course, look forward to supporting the bill once it is amended.

Thank you, Mr. Chairman. I yield back.

Chairman Conyers. I thank the gentleman.

All members will have an opportunity, under my unanimous consent request, to

introduce their own statements into the record.

And I now recognize Chairman Howard Berman.

Mr. Berman. Mr. Chairman, I have an amendment, along with Mr. Smith, in the nature of a substitute.

Chairman Conyers. The clerk will report the amendment.

The Clerk. "Amendment in the nature of a substitute to H.R. 5690, offered by Mr. Berman and Mr. Smith. Strike all after the enacting clause and insert the following: Section 1. Exemption of African National Congress from treatment as terrorist organization for certain acts or events. Section 691(b) of the Department of State --"

[The information follows:]

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

Chairman Conyers. Without objection, the amendment will be considered accepted, under unanimous consent.

And I recognize the gentleman from California, Mr. Berman.

Mr. Berman. Yes, Mr. Chairman, this amendment, which was worked out in collaboration with Mr. Smith and his staff, addresses some of the issues he raised in his opening statement and worked out -- we worked closely with the State Department on this as well.

This amendment essentially strikes the original bill and does three things: It adds, as Mr. Smith pointed out, the African National Congress to a list in existing law of other freedom fighting organizations that do not pose a threat to the United States and will no longer be treated as a terrorist organization for the purposes of the terrorism bar to admissibility. This provision takes care of limitations on admissibility based on material support for ANC or membership alone.

The second section of the amendment deals with individual actions, and it gives the Secretary of State and the Secretary of Homeland Security the discretion to determine that the anti-apartheid activities of an individual should not be considered criminal or terrorist activity and do not trigger the corresponding grounds for inadmissibility in section 212(a) of the INA. This section also includes a Sense of the Congress that the Secretary should exercise this discretion with due speed and may do so sua sponte, on their own initiation, for current or former members of the Government of South Africa.

And finally, section 3 of the amendment requires the State Department, in coordination with all relevant departments and Federal agencies, to take all necessary steps to ensure that databases used to determine admissibility into the United States are updated so they are consistent with the exemptions that I just described in section 2.

So, 1986, we finally reached a point where this Congress, under an effort originally led by our Chairman Conyers that started 14 years before, we played an important and decisive role, a key role in part of the struggle by the override of the sanctions legislation. And now we are trying to do a form of our own restorative judgment by getting rid of this blanket denial of people, the requirement that they, in a humiliating fashion, seek a waiver without regard to their own individual acts because they were members of the ANC. And, at the same time, we retain discretion in the executive branch to provide broad-based exemptions from that activity being treated as either criminal or a terrorist, but allowing that discretion to be applied to deny admissibility where there is an individual situation where that would be appropriate.

And, at this point, I yield back.

Chairman Conyers. Thank you for your remarks.

Lamar Smith?

Mr. Smith. Thank you, Mr. Chairman.

And I am pleased to offer this amendment with Mr. Berman.

Also, Mr. Chairman, I again want to thank you and Ms. Lofgren and, of course, Mr. Berman for working in good faith to address some of the concerns that have been raised about this bill.

As I indicated in my opening statement, this substitute amendment will provide appropriate relief to the African National Congress without excusing the perpetrators of terrorist or criminal acts.

First, under the amendment, the ANC is added to the list of groups not considered terrorist organizations for immigration purposes. Individuals will no longer need immigration waivers to get into the U.S. simply by being members or representatives of the ANC or for having given the ANC material support.

Second, the administration is granted the authority to waive the criminal grounds of inadmissibility with respect to aliens for activities undertaken in opposition to apartheid rule in South Africa. Congress already granted the administration waiver authority on the terrorism-related grounds in last year's omnibus spending bill.

Third, the amendment contains a Sense of Congress that the administration should immediately exercise in appropriate instances the authority granted under the bill to waive grounds of inadmissibility for the anti-apartheid activities of aliens who are currently or former officials of the Government of South Africa. And I am confident that any administration will use this power wisely.

Finally, the amendment asks the administration to ensure that Government databases used to determine admissibility to the U.S. be updated to reflect any waivers granted.

This amendment provides an appropriate remedy for the African National Congress without setting any unsound precedent. Mr. Chairman, I urge my colleagues to support this amendment and the bill.

And I will yield back the balance of my time.

Chairman Conyers. Thank you very much, Lamar Smith.

Ms. Lofgren. Mr. Chairman?

Chairman Conyers. Are there any statements or amendments to the manager's amendment?

Zoe Lofgren?

Ms. Lofgren. I move to strike the last word.

Chairman Conyers. Without objection, the gentlelady is recognized.

Ms. Lofgren. I will be brief.

I first want to commend you, Mr. Chairman, for your advocacy, extending decades,

for freedom in South Africa.

I want to commend Chairman Berman and Mr. Smith for their hard work in getting this amendment put together. I think the amendment should be supported, and I do support it.

A lot of people didn't realize that the definition of terrorism in our immigration laws really catches up people who are not terrorists, people who were on our side: the Hmong; the Montagnards, who fought on the side of the U.S. in Vietnam; the Alzados, who fought for freedom against Castro's regime in Cuba; the Chin and the Karen, who tried to free themselves from the Burmese Government. Until recently, all of these groups were terrorist activities simply because they used weapons to fight for their own freedom.

In 2008, in the consolidated appropriations act, we finally began to address these issues, bringing many of these groups from, really, a senseless application of the law. And this measure today allows the ANC to join the ranks of those who will be judged as freedom fighters and not as terrorists.

And so I would ask unanimous consent to put my full statement in the record, but I would like to congratulate and thank, again, Mr. Berman and Mr. Smith and yourself, Mr. Chairman, for your excellent work.

And also noting, as Chairman Berman did, that this is really also part of the legacy of Tom Lantos, and I appreciate that as well.

And I would yield.

Ms. Jackson Lee. Let me, as well --

Chairman Conyers. Might I recognize the gentlelady first? I recognize the gentlelady.

Ms. Jackson Lee. Thank you very much, Mr. Chairman. I am trying to be efficient.

Let me thank you again for your leadership. And I think we have come to a point that reflects not only on the ANC but, as we called him, Father Mandela, Nelson Mandela, who, for the personal aspect of this story, still goes through a very extensive and, as we all know, sometimes humiliating stop, if you will, as he comes into the United States, because he is -- he, in particular, is on the list as a terrorist.

And so I would ask Mr. Berman, as I yield, does this amendment now respond to the treatment that Nelson Mandela would get as he comes in?

And, also, it seems as if you are now ceding the decision to the State Department as opposed to this legislation, which -- the legislation created an action item. Now you are putting the decision-making to the State Department. What is the enforcement that the State Department will act as quickly as possible?

I yield to the gentleman.

Mr. Berman. It is my belief, based on Secretary Rice's public comments, that, number one, they want this legislation because they cannot, under existing law, exclude leaders of the South African Government, leaders of the ANC, Nelson Mandela, from the provisions of section 212 that now apply and that, very quickly when they are given that authority, they will exercise that authority. That is my real belief, that we will achieve the result we all want to achieve through this mechanism and, at the same time, preserve a level of discretion that, in certain cases, you might want to preserve to insist on a denial or a waiver of that denial.

So I think this is a good compromise, because we are going to get what we want to get in a way that is more likely to get it quicker.

Ms. Jackson Lee. I thank you.

I hope our legislative history, Mr. Chairman, forceful legislative history on the record, that this instruction, legislative instruction, will cause the Secretary of State and the

State Department to act quickly, expeditiously, and that it will impact favorably Nelson Mandela, the former President of South Africa, and the ANC.

I yield back.

Chairman Conyers. Absolutely. Thank you very much.

Mr. King. Mr. Chairman?

Chairman Conyers. The committee will be forced to stand in recess -- and we'll recognize Steve King first up as soon as we come back -- because the Prime Minister of Ireland is about to deliver his address.

Mr. Smith. When will we be coming back?

Chairman Conyers. Immediately following the Prime Minister's address, we will resume.

Thank you very much.

[Recess.]

RPTS KESTERSON

DCMN NORMAN

[12:08 p.m.]

Chairman Conyers. The committee will come to order. The Chair recognizes Steve King.

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

Chairman Conyers. The clerk will report.

The Clerk. The amendment to the amendment in the nature of a substitute to H.R. 5690 offered by Mr. King of Iowa:

In section 2(b) of the matter proposed to be inserted by the amendment, after "the Government of the Republic of South Africa," insert the following: "Except that Secretaries shall not exercise such authority in the case of aliens who are responsible for the forced sale of confiscation of property of South African citizens."

[The amendment follows:]

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

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

Mr. King. Thank you, Mr. Chairman. This is an issue I raise because I think it is important for us in this committee and this Congress to review the breadth of law and humanity. And I want to compliment yourself for the work you have done on your anti-apartheid work over the years, many years in South Africa.

I visited there myself. And I watched many of those events unfold on television. It was a painful thing to watch, but also I remember that here in this country we had divested ourselves of assets that were held by South Africa in an effort to send a strong financial message as well.

And we all have just returned from the Irish address to the full Members of Congress, and there Mr. Bertie Ahern spoke to us. And he said, we have consistently advocated acting in accordance with the principles of democracy, the rule of law, human rights and human dignity. And I believe and I trust that that is the intent of this committee, and I believe it is the intent of this legislation. And I believe it is the intent of Congress, and that will be proven out.

What my amendment does is it addresses the property rights issue in South Africa and it in no way draws from the far more egregious incidents that are taking place in Zimbabwe. I am aware that the rule of law is essentially suspended and there are white farmers that are expelled from their land; their land is confiscated. That is, for the most part, a different scenario than what I have experienced in my visit to South Africa. But what my amendment does is, it addresses the issue. It says that we won't exempt the representatives of government who have been responsible for the forced sale or confiscation of property of South African citizens.

For the purposes of reenforcing this rule of law, reenforcing the human rights and human dignity, which is a component I believe of this legislation, and I am advised that it is already in the Constitution of South Africa. And this peaceful transition that you spoke of and the transition that would preserve the rule of law, I want to reinforce that rule of law so it includes the property rights in South Africa.

So I point out some remarks that are published in the press. This is by the Land Affairs Minister, Lulama Xingwana, who said, from now on we only negotiate for 6 months. And if all else fails, expropriation would take place. This is in the transition I will say, actually the confiscation of land from white farmers to black farmers. And I don't want to see it -- I'm glad to see the trade going to the representatives of the people in South Africa. I don't want to go across that middle where we start to create the beginnings of another apartheid that is on the opposite side of the scale of what we normally would reference.

Here is another statement of the same lady. "Expropriation or compulsory acquisition of land where negotiations over sales have failed is likely to be stepped up, in line with existing and amended provisions in the Constitution and greater financial resources will be made available.

Another statement. "The government now says it is fed up with protracted barter and intends to shake up obstinate sellers by simply booting them off of the land in take-it-or-leave-it settlement." Now, I'm not here alleging that that has taken place. I'm saying that that dialogue has taken place within the discussions in that region of South Africa. And I'm here to reinforce property rights, constitutional rights, human rights, and the preservation and promotion of human dignity and the rule of law.

And so this amendment simply does that, Mr. Chairman. It sends, I think, the right message, the right toned message. And I ask that it be considered and adopted as part of

this broader bill. And, again in a constructive fashion, not an accusatory or critical faction, because as I submitted, I believe these rights are protected in the Constitution. It just simply says that we respect and promote and encourage property rights, human rights, individual rights and human dignity. And this is another component of that, and I would urge its adoption and I would yield back.

Chairman Conyers. Well, I thank the gentleman. The gentleman from California, Mr. Berman.

Mr. Berman. Thank you, Mr. Chairman. And I rise in opposition to this amendment. One might think on the surface that the gentleman was confusing South Africa with Zimbabwe in raising this issue. If the gentleman is seeking to deny admission to people who are involved in the apartheid government of South Africa, where they denied the majority ownership rights, due process rights, equal protection rights, all hallowed principles in American constitutional law, I would say to him that, not withstanding the very understandable desire to punish the people of that government, that in South Africa they went through a different process, the truth and reconciliation process.

And the people who were involved in abusing those property rights of the black majority, the white apartheid government leaders, went before that Commission. And for us here in the United States to try to have our immigration laws reflect the vengeance that would result in the denial of visas to the white apartheid government officials as a result of their conduct in South Africa, I think would be undercutting the spirit of that Truth and Reconciliation Commission.

And as far as I know -- I may be wrong -- but as far as I know, that is the only issue of confiscation and denial of fundamental constitutional rights in South Africa that I am personally aware of.

Secondly, when you apply the standard of the gentleman that he proposes for South

Africa, this amendment worldwide, we could now proceed to deny the leaders of the Chinese Government, Mr. Putin certainly, and the leaders of the Russian Government and all other governments who have treated private property in a fashion differently than we treat private property in this country. Although even there, I would wonder why the gentleman doesn't first seek to overturn the Kelo decision before he seeks to right South Africa's property laws.

Mr. King. Will the gentleman yield?

Mr. Berman. I would be happy to.

Mr. King. I thank the gentleman and I appreciate --

Chairman Conyers. Could I just grant the gentleman 2 additional minutes?

Mr. Berman. I yield.

Mr. King. I thank the gentleman, and I appreciate your comments and your analysis. I am very well aware that there were black South Africans who had their land confiscated, especially in the late fifties and early sixties, and they have now filed claims to get some of that land back. And that is working its way through the system as part of this controversy that is out here.

And I raise this issue -- and I do, by the way, seek to overturn the Kelo decision. I think it is unjustly founded and I think the Supreme Court --

Mr. Berman. Reclaiming my time. Why don't you finish that job before you go on to this job?

Mr. King. And if the gentleman will yield. If you support my appointment to the Supreme Court, I would be very happy to go to work on that forthwith.

Mr. Berman. I myself am not so excited about your effort.

Chairman Conyers. If the gentleman would yield. Why don't we all take a CODEL to South Africa after the election and find out what has been happening? Thank you.

Mr. Berman. Maybe right before the election.

Chairman Conyers. Well, I would rather wait until after the election.

Mr. Berman. My time has expired, but basically I think this amendment has very little to do with -- it has nothing to do with what we are trying to get at it. The gentleman's amendment is selective as to South Africa rather than as to a general principle of immigration law. And even if he offered it as a general principle, I would oppose it because I don't think that is the business of our immigration laws. And I yield back.

Chairman Conyers. The Chair recognizes Lamar Smith.

Mr. Smith. Thank you, Mr. Chairman. Mr. Chairman, I yield to the gentleman from Iowa, Mr. King.

Mr. King. Thank you, Mr. Smith. I appreciate you yielding.

And in listening to the remarks of Mr. Berman, I don't know that I'm more enlightened than I was before when I brought the amendment. But I would like to restate my purpose here; and that is that this country, this Congress, this committee, respects and reveres property rights. And this is an amendment that strongly encourages that those property rights continue to be respected all around the world, whether or not we are able to overturn our own Kelo decision in the Supreme Court and whether or not they happen to be in South Africa or Ireland or in Zimbabwe.

And I draw no comparison between South Africa and Zimbabwe, but I did put into the record the remarks that are made by the Land Minister, that there is a limit to the patience and due process.

And so I raise this amendment for the purposes of making the point that we are observant of those kind of activities. We encourage property rights. We encourage constitutional activity and behavior. And we encourage the support and protection of human dignity, law, their rule of law and human rights. And so with all of that in mind

and having made my point, recognizing the reluctance on the part of this committee to move forward on this particular subject matter, I would ask unanimous consent to withdraw my amendment.

Chairman Conyers. Without objection, so ordered. I thank the gentleman. Are there any other amendments?

Mr. King. Mr. Chairman, I yield back.

Chairman Conyers. Are there any other amendments or statements on the manager's amendment? If there are not, the question is on the manager's amendment.

All in favor say aye.

Those opposed say no.

The ayes have it. And the manager's amendment is agreed to.

Are there any other amendments? A reporting quorum being -- oh. All right. We will hold this and take the next measure.

Without objection, the previous question is ordered and further proceedings on this measure will be postponed. Members of the committee, we move -- pursuant to notice, I now call up H.R. 1650, the Railroad Antitrust Enforcement Act, for purposes of markup and ask the clerk to report the bill.

The Clerk. H.R. 1650, a bill to amend the Federal antitrust laws to provide expanded coverage and to eliminate exemptions from such laws that are contrary to the public interest with respect to railroads.

Chairman Conyers. I ask unanimous consent the bill be considered as read and open for amendment at any point.

[The information follows:]

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

Chairman Conyers. And I would initiate the discussion by pointing out that the gentlelady from Wisconsin, Tammy Baldwin, has authored this measure designed to bring more competition to railroad shipping. Under current law, the antitrust enforcement agencies have limited authorities in the railroad industry: Joint ratemaking and mergers among rail carriers, if approved by the industry's regulatory body, the Surface Transportation Board, are shielded from Federal antitrust review.

The purpose of this bill is to bring the healthy influence of the antitrust laws into the railroad industry. That is the natural way throughout our economy. And as regulated industries have been deregulated in the last few decades, the antitrust laws have helped nurture and protect the competitive environment that the regulation is designed to foster. By removing certain key exemptions from the Federal antitrust law, the bill will enable the Justice Department and the FTC to ensure competition is protected, will enable private properties harmed by anticompetitive conduct to seek appropriate relief. This will not bring new regulation. It will bring the winds of competition. It will be good for shipper, good for consumers, good for the industry and good for the economy. It will also be good for the country, naturally.

When this bill is enacted, the railroad industry will be no differently situated than other regulated industries as natural gas, biplanes, electric power transmitter, telecommunication carriers, all of whom continue to be regulated in some respect, but subject to competition in others.

The Federal antitrust agencies exercise jurisdiction alongside the regulatory body. Just as antitrust oversight has been beneficial in these other regulated industries, it will be beneficial in this one as well.

H.R. 1650 opens the door for a more competitive market in a number of important

respects. For example, there are practices in the industry, sanctioned by the Surface Transportation Board, that prevent shippers from obtaining meaningful quotes on competitive rates. The Justice Department advises that these practices might violate Federal antitrust laws, but current law prevents them from investigating.

In its recent report, the Antitrust Modernization Commission found that statutory exemptions from the antitrust laws undermine rather than upgrade the competitiveness and efficiency of the United States economy, in that they reduce the competitiveness of the industries that have sought antitrust exemptions. So the bill will remove some of these exemptions, thereby promoting competitiveness and all the benefits it brings.

I urge support. I thank the gentlelady from Wisconsin and note the bill is supported, by among others, the California Firemen's Union, hundreds of national trade associations, coalitions and independent businesses, including the American Chemistry Council, The Consumer Federation of America, Consumers United for Rail Equity, The National Association of State Utility Consumer Advocates, the National Association of Regulatory Utility Commissioners, the Steel Manufacturers Association, Dupont, Holcomb USA, Tyson Foods and ExxonMobil.

I point out that the gentlelady from Florida, Corrine Brown, has discussed this matter with me and submitted a memo. And we hope that she will be pleased with the results of the committee. I turn now to the Ranking Member, Lamar Smith.

Mr. Smith. Thank you, Mr. Chairman. Mr. Chairman, let me begin by saying that I appreciate the concerns of the captive shippers, as they are called. Like many others, they are subject to rising fuel costs. These costs mean that when their existing long-term contracts for the shipment of coal expire, some power companies will face higher rates from the railroads. While I'm concerned about the plight of the captive shippers, I am also concerned that the legislation before us will not solve their problem.

The bulk of the shippers' concerns seem to lie with what they view as an ineffectual regulatory body, the Surface Transportation Board, or STB. Unfortunately, this bill may create as many problems for the shippers and the railroads as it solves. While I support the elimination of antitrust exemptions for the railroad industry that make sense, such as subjecting mergers in the industry to review by the Justice Department, others -- like subjecting railroads to suits for injunctive relief throughout the country -- I cannot support. Because railroads are widespread networks, they are not easily diverted into other channels, and an injunction applied to one part of the network could have serious repercussions throughout the network.

In addition, certain conduct by a railroad that runs across multiple districts and circuits, as most do, could be subject to an injunction in one district but deemed not problematic in another. Discrepancies among district and circuit courts may lead to foreign shopping which has created problems in the past and would encourage more foolish lawsuits.

Another issue raised by this bill is the provision that specifies that Federal district courts do not have to defer to the discretion of the STB in these suits. As it is currently worded, this provision may encourage judges to be overly reluctant to refer suits to the STB that would most appropriately be handled by that regulatory body.

Finally, I am concerned that the section of the bill that provides for a grace period for civil suits after the enactment of the bill may actually invite courts to look retroactively into practices that were exempted from the antitrust laws or approved by the STB at the time they occurred. Specifically, in an effort to address the shippers' concerns about so-called bottleneck pricing and paper barriers, courts may be tempted to undue mergers that were consummated years before. Such unscrambling of the eggs is something that is generally discouraged in antitrust law.

Mr. Chairman, I am concerned that the bill as drafted may have unintended consequences for our vital railroad infrastructure. Perhaps if the committee had a little more time to consider the matter, some compromises could be reached that would address these concerns. Absent that, however, I oppose this legislation and encourage others to do so as well.

And, Mr. Chairman, I want to point out something I think most members are aware of, and that is that this legislation has sequential referral to two other committees in the House, I believe Energy and Transportation. So I hope that they will address some of the concerns that I have raised today. And with that I will yield back the balance of my time.

Chairman Conyers. Thank you, Mr. Smith. The Chair recognizes the gentlelady from Wisconsin, Tammy Baldwin.

Ms. Baldwin. Thank you, Mr. Chairman. I am very appreciative of the committee's consideration of this very important bipartisan legislation that will provide relief to thousands of shippers across the Nation dependent upon freight rail. Let me use my time to explain what the bill does and why it is so important.

First, it will increase rail customer access to competitive rail service by ensuring that any future consolidation of the rail industry complies with the provisions of the Nation's antitrust laws. And I want to respond specifically to the Ranking Member's comments. The bill in section 8 is specifically looking at mergers prospectively but not retroactively. And I hope that I can work with the gentleman to satisfy him that this is not intended to undo mergers that have already been considered, but it might examine other anticompetitive practices that continue after the enactment of the bill.

You have named two of them that I'm very concerned about: bottlenecks or the refusal to offer rates for transportation of captive customers' freight to competing rail systems, and also the issue of paper barriers, also called tie-in agreements.

And I wanted to just quickly try to convey what these situations entail and why they are harmful. And I have a poster describing the situation of a bottleneck. These are situations in which customers have only a single rail line connecting them to a point of interconnection with other carriers. And even though they are captive to a single railroad, either origin or destination, often a competing railroad is available for at least part of the distance.

Let's take the situation outlined on the poster board. This was faced by a witness who testified at our Antitrust Task Force hearing from the city of Lafayette, Louisiana, their public utility. It is about 135 miles northwest of New Orleans. And electricity supplied by a city-owned power electrical power utility, as such, all costs are incurred by -- in generating electricity are paid for by citizens, businesses, schools, et cetera.

Looking at the diagram, most of the electricity for Lafayette is provided by a 535-megawatt coal firepower plant called Rodemacher Power Station located in Boyce, a plant designed to use Powder River Basin coal from Wyoming, 1,500 miles away. The Powder River Basin -- in the Powder River Basin, either the Union Pacific or Burlington Northern, which both operate over a common track in the basin, can move the coal cars. In fact, BN can move the coal cars approximately 1,480 miles to a junction point with the UP that is only 20 miles from the power plant, that little tiny spur you see at the bottom right-hand part of the poster. However, at the delivery end of the movement, only UP provides service to the plant.

While the city of Lafayette could have the benefits of competition from point A up in Wyoming to point C in Alexandria, the UP refuses to move the coal cars from point C unless the cars come from UP all the way from Wyoming. By refusing to provide a rate for service for the last 20 miles of this 1,500-mile journey, the city of Lafayette is left with no way to move its coal the last 20 miles, and has no option but to move its coal the entire

1,500 miles from the river -- Powder River Basin to the plant on the UP line. And without access, the city is captive to the UP, meaning it pays captive rather than competitive rates for moving its coal. And the UP can refuse to provide service based on an STB decision, the so-called bottleneck case.

Now, according to our witnesses at the hearing, the annual cost of captivity to ratepayers in Lafayette is $15 million, or $300 per year for a medium-usage residential customer; 1.5 million annually for Lafayette schools; $110,000 per year for a typical 1,700 employee business. So the Railroad Antitrust Enforcement Act would address this. There are other anticompetitive practices addressed by this bill called "paper barriers."

I think I'm out of to,e, so I'm not going to run through them. But I do hope that members understand that it is vital to provide tools to resolve these anticompetitive practices. And while I will concede that this won't fix all of the problems with the rail industry, it will restore some of the public interest responsibilities to our Nation's freight rail system.

Thank you, Mr. Chairman. I urge my colleagues to support this important legislation.

Chairman Conyers. Thank you very much. Does anyone seek recognition? Anyone seek recognition? The gentleman from New York, Chairman of the Constitution Committee, Jerry Nadler.

Mr. Nadler. Thank you. I want to urge support of the bill. There are problems in the rail industry we have been facing. I'm a member of the Transportation Committee. We have been facing for years the arguments over the question of the paper barriers, the tie-in agreements, the captive shippers. And there are arguments, frankly, on both sides in these cases which are difficult.

Passage of the bill would subject these practices to Federal antitrust laws. And it

would mean that the Justice Department -- in a 2004 letter to former Chairman Sensenbrenner, the Department of Justice said if paper barriers -- this goes also for the issue of captive shippers and some of the other issues -- were subject to the antitrust laws, they would be evaluated under section 1 of the Sherman Act. The Department would examine whether the restraint is ancillary to the sale of the trackage; i.e., whether the restraint is reasonably necessary to achieve the procompetitive benefits of the sale.

Allowing these questions to be decided on a case-by-case basis on an anticompetitive -- an antitrust analysis by the Department of Justice, I think makes sense and takes some of these questions away from Congress where we, frankly, have been stymied for many years. So I think this is a good bill and will help to achieve a resolution on a case-by-case basis on many of these questions. I yield back.

Chairman Conyers. Thank you very much.

Mr. Lungren. Mr. Chairman.

Chairman Conyers. Yes, yes, the gentleman from California, Dan Lungren.

Mr. Lungren. I'd like to strike the record a number of words, and ask the chief author of the bill a couple of questions. I'm trying to figure out exactly where we go on this. I think there are legitimate issues about captive shippers and the whole question of whether there is a competitive environment.

The concern I have is -- as I understand, these questions are now under the Surface Transportation Board's jurisdiction, and what this bill would do would be allow two other government agencies or Departments, the Federal Department of Justice -- U.S. Department of Justice and the Federal Trade Commission -- to review these matters. So you will have three different bodies reviewing them.

So let me just ask this, specifically referring to section 4 of your bill. As I understand it, the courts currently have the discretion to refer matters to an administrative

agency that are within the agency's area of expertise. Is section 4 intended to change current law and limit the court's discretion to seek assistance from the Surface Transportation Board? Or would they still be allowed to, in their discretion, the court's discretion, to refer certain questions to the Surface Transportation Board? And I would be happy to yield to the gentlelady for that.

Ms. Baldwin. First, on the preface comments that you made leading up to your question, in most other similar sectors we do have the antitrust oversight by the Department of Justice and the Federal Trade Commission, in addition to additional sort of successor of the regulatory era. Obviously you're familiar with the fact that in 1980 with the Staggers Act, the freight rail industry was largely deregulated. At that point, ICC was the oversight. Now, the successor agency, Surface Transportation Board, is the oversight. And so section 4 of the bill essentially removes any requirement that a Federal district court defer to the primary jurisdiction of STB in any civil antitrust action against a common carrier. So this would be the sort of private enforcement part of antitrust law, not the public enforcement part that you would see exercised by Department of Justice and FTC in merger and acquisition issues.

Mr. Lungren. I appreciate that. But I guess I'm still wondering. Would the court have the discretion to refer the matter to the Surface Transportation Board if they thought that was appropriate? Or, conversely, would the Surface Transportation Board be treated differently than other administrative agencies?

Ms. Baldwin. The Federal court could still defer under this provision.

Mr. Lungren. And could --

Ms. Baldwin. And prohibition.

Mr. Lungren. And could defer to the Surface Transportation Board if they wished. Okay.

Let me just ask you about section 8. Again, this goes to the question of what the courts would be allowed to do. Under section 8, would this permit courts after 180 days to undo entirely a merger, or the effects of a merger, that had been previously approved by the STB?

Ms. Baldwin. Will the gentleman yield?

Mr. Lungren. Yes.

Ms. Baldwin. The language in section 8 is designed precisely to leave in place mergers that have already been approved. It would apply prospectively to proposed mergers after the date -- effective date. What it does -- the 180-day language that you're referring to allows the courts to look into continuing activities or actions that may have been entered into prior to the enactment date but that continue at least 180 days after. And that's what the -- I don't know if you were in here when I was describing the bottleneck issue and the paper barrier issues, but if those --

Mr. Lungren. I watched you on television from my office, So I did --

Ms. Baldwin. Hopefully I didn't get to the paper barriers issue, but those are the two -- if those practices were to continue after the enactment date, 180 days after the enactment date, those could be the subject of a review.

Mr. Lungren. Okay. Let me ask it in a slightly different way. You answered my question in part. After 180 days, would a railroad be subject to antitrust claims or suits for any previously determined lawful action they have taken? In other words, if they acted in concert with the law as was then administered, could, after 180 days, they be subject to antitrust review of those previous actions?

Ms. Baldwin. I believe the answer is yes. I mean, the problem right now is that because there is an exemption to the antitrust laws, we haven't brought some of the practices that STB has approved. We haven't applied, you know, the Sherman Antitrust

Act, the Clayton Antitrust Act.

And as we got the letter to then-Chairman Sensenbrenner in the year 2004 from the Department of Justice, they raise an issue that paper barriers and bottleneck issues, on a case-by-case basis, may be anticompetitive and violative of either Clayton or Sherman, and that we ought to give them a chance to look at that.

Mr. Lungren. So reclaiming my time, if I might have a little more time, Mr. Chairman.

Chairman Conyers. The gentleman is granted 2 additional minutes.

Mr. Lungren. When the gentlelady says that this is prospective, I understand you're talking about new actions. But in reality, previous actions or prior actions, if the impact of those actions extend beyond 180 days, could be considered by the courts or by the FTC. And I presume they could then make a judgment as to whether or not they are legal under antitrust law and therefore determine that they violate that, so that the impact of this law could be retroactive in that sense in an activity that the railroad continues in after 180 days; is that correct?

Ms. Baldwin. Yes.

Mr. Lungren. Okay. I thank the gentlelady.

Chairman Conyers. Time has expired. Does the gentlelady from Texas seek recognition?

Ms. Jackson Lee. Mr. Chairman, when you open it up for amendments, I have two amendments at the desk.

Chairman Conyers. I'd like to ask the distinguished gentleman from Virginia, Rick Boucher, a senior member on Energy and Commerce and the Judiciary Committee as well, if he had any comments for us.

Mr. Boucher. Well, Mr. Chairman, I had not planned to make any. But given the

opportunity and being a member of Congress, I suppose I can't resist. I want to commend the gentlelady from Wisconsin for this legislation. I support it. It is necessary, I think, to address problems that captive shippers had.

A number of years ago, I actually introduced legislation on behalf of captive shippers that took a regulatory approach to addressing the problem and required greater oversight by the Surface Transportation Board of their unique concerns. That was in the 1980s and the legislation did not pass. But the problems remain, and I think in fact have become amplified over the years. And so the gentlelady's approach is constructive. I think it will help. I don't see any harm coming from it. And I'm prepared to support it and encourage others to do the same.

Thank you, Mr. Chairman. I yield back.

Chairman Conyers. I thank the gentleman for his comments.

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

Chairman Conyers. Could you hold that for just a moment? I have a manager's amendment at the desk and I'll recognize you immediately afterward, Mr. Johnson. Would the clerk report the manager's amendment.

The Clerk. Amendment to H.R. 1650 offered by Mr. Conyers of Michigan: Page 2, beginning on line 8, strike "that is not a railroad" and insert "(other than a railroad)".

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

[The information follows:]

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

Chairman Conyers. And the reason I move as rapidly -- this is 2 pages' worth of technical changes, clarifications. There are no substantive changes. We make technical and clarifying changes and focus on two sections of the FTC-related provisions: on its antitrust enforcement authority and more precisely matches up the antitrust provisions that come into play with their Surface Transportation Board counterparts.

I yield back my time and recognize Lamar Smith.

Mr. Smith. Thank you, Mr. Chairman. Mr. Chairman, as you mentioned, I think this is primarily a technical amendment to H.R. 1650 and I don't have any substantive objections to it. I do wish some amendments might address some of my concerns but that is probably wishful thinking at this point. But I support your amendment.

Chairman Conyers. Well, stay tuned, because there are people that want to offer amendments and I hope they will accommodate your desire.

Any other discussion?

If not, all in favor of the technical manager's amendment say aye.

All opposed say no.

The amendment is passed. And the Chair recognizes the gentlelady from Texas, Sheila Jackson Lee for her amendment.

Ms. Jackson Lee. I thank you very much, Mr. Chairman. I ask unanimous consent that my amendments be taken en bloc. I have two amendments and I can briefly offer them.

Chairman Conyers. You know, I remember I just promised Hank Johnson. Who wanted to strike the last word. Could I do that first and then come back to you?

Ms. Jackson Lee. I'd be happy for him to do so.

Chairman Conyers. I recognize the gentleman from Georgia.

Mr. Johnson. Thank you, Mr. Chairman.

After listening to Ranking Member Smith's remarks, I am concerned about section 2 of this act which would change section 16 of the Clayton Act, which provides that only the Federal Government may file suit for injunctive relief against any common carrier subject to the STB's jurisdiction, and it would give private individuals or private plaintiffs filing civil antitrust suits the right to obtain injunctive relief.

And what I want to ask is whether or not there are any limitations on the injunctive relief. How broad a scope would be the injunctive relief that would be granted? In other words, if you go into one district court and obtain injunctive relief, are there any limitations on the scope of that relief in this bill?

Ms. Baldwin. Will the gentleman yield?

Mr. Johnson. Yes.

Ms. Baldwin. I'll take my best crack at a response on that. Currently, freight rail has enjoyed an exemption from a wide array of antitrust laws. Antitrust laws generally have public enforcement and private enforcement. This would give actors aggrieved by anticompetitive practices a private right to assert that grievance and have enforcement with injunctions. It would make the freight rail subject to the same antitrust laws that almost every other industry is. So it is not broader or narrower than the type of injunctive relief that any other entity, industry, sector, that is under the antitrust laws would currently be exposed to. So it is not bigger, it is not smaller.

Mr. Johnson. Okay. Reclaiming my time. Could it result in a district court judge granting injunctive relief to a private plaintiff that would interfere with the commerce clause? So in other words, would it affect -- an injunction granted by a district court judge in one particular district could impact interstate commerce in a way that would be perhaps more significant than commercially reasonable. I'm not really framing this issue the way

that I want to frame it, but I'm concerned about the impact of injunctive relief and its effect on a particular common carrier to do business throughout the country or throughout its area that it does business in, that may be outside of that particular district.

Ms. Baldwin. Would the gentleman yield again?

Mr. Johnson. Yes. Are my fears unfounded?

Ms. Baldwin. I think they are unfounded. I think that what they are doing is, courts are already quite accustomed to dealing with this section of the Clayton Act vis-a-vis other industries. We are now saying this section of the Clayton Act would apply also to freight rail. Judges regularly balance competing laws, et cetera. So I think your fears are unfounded.

Mr. Johnson. I will yield back.

Chairman Conyers. Thank you very much. The Chair asks unanimous consent for the gentlelady from Texas to combine both of her amendments in one amendment and recognize her at this time.

Ms. Jackson Lee. Mr. Chairman, thank you so very much. I rise to support this legislation. I commend the Congresswoman from Wisconsin and also indicate that there are a number of us that have overlapping jurisdiction on these issues, the Transportation --

Chairman Conyers. Does the gentlelady have a couple of amendments?

Ms. Jackson Lee. I have two amendments at the desk. Thank you, Mr. Chairman. I had said that the earlier, but I can say it again.

Chairman Conyers. The gentlelady is recognized.

Ms. Jackson Lee. I have two amendments at the desk.

The Clerk. Amendment to --

Ms. Jackson Lee. And I ask unanimous consent that the amendments be considered as read.

Chairman Conyers. Well, they haven't been read yet. The clerk will report the amendments.

The Clerk. Amendment to H.R. 1650 offered by Ms. Jackson Lee of Texas: Page 6 --

Ms. Jackson Lee. I ask unanimous consent that the amendment be considered as read. You haven't read the second one?

[The information follows:]

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

The Clerk. Page 5, Line 18, strike "on" the 2d and 3d places --

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

Chairman Conyers. Without objection, so ordered. The gentlelady is recognized.

[The information follows:]

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

Ms. Jackson Lee. So that my comments are continued again, my appreciation to Ms. Baldwin, the number of us that have overlapping jurisdictions on some of the issues that she has spoken to. I as the Chair of the Transportation Security Committee, albeit issues of antitrust may not be directly related, but certainly the question, Congresswoman Baldwin, of the lack of congestion and issues that you have discussed certainly bear as some might not think on security.

I also want to associate myself with the query that was made by Congressman Lungren dealing with section 4 and section 8. And I believe that the amendments that I offer -- not only the explanation that Ms. Baldwin gave -- also adds to the clarification and the balance of this legislation.

The first amendment that I have specifically provides that the STB, Surface Transportation Board, would still play a critical role in any antitrust violation determination. H.R. 1650 requires that the STB conduct an analysis in reviewing any proposed merger. And it requires the Board and any other reviewing agency to take into account, among other considerations, the impact of the proposed agreement on shippers, on consumers, and on affected communities.

My amendment would require that the STB would issue a report of its findings, and such report should be included as part of the administrative record. The amendment would also require that the report should be provided to any other reviewing agency for use in the reviewing agency's determination.

The amendment would also require the STB report to be included as part of the administrative review, and it requires that the report be subjected to judicial review. I believe this is important because the STB has the most experience in dealing with and regulating the railroads. And it also helps because H.R. 1650 provides the courts with

discretion to defer to STB determination. It is important for there to be a full record, and that the STB's determination be relied upon in any determination to be made. The STB knows railroads and I think this is a good balance.

My second amendment allows for transactions related to the pooling of railroad cars approved by the STB or its predecessor, the ICC, to be exempt from antitrust provisions. This amendment has support going forward. It is an amendment that I think allows there to be a balance in this legislation. And I would ask for my colleagues to support the amendments.

Chairman Conyers. Thank you very much. The Chair recognizes the gentleman from Texas, Lamar Smith.

Mr. Smith. Thank you, Mr. Chairman.

Mr. Chairman, the gentlewoman from Texas has offered two amendments. One is very similar to an amendment adopted by the Senate Judiciary Committee during its consideration of a similar measure. And the other adds a reporting requirement for the Surface Transportation Board that I do not think is under the Judiciary Committee's jurisdiction; nevertheless, I don't have any substantive objections to the amendments and will support them. I yield back.

Chairman Conyers. I thank the gentleman. Is there any other discussion?

If not, all in favor of the gentlelady's amendments combined will indicate by saying aye.

Those opposed say no.

Ayes have it. The amendment is agreed to.

Ms. Jackson Lee. I thank the committee.

Chairman Conyers. The Chair recognizes Mr. Berman.

Mr. Berman. Mr. Chairman, since now there is a reporting requirement only -- my

only problem is that I have a markup to chair at 1:30. I was wondering if we could go for one moment, just to go to the vote on passage. We've adopted the amendment in the nature of a substantive. If we could go back to H.R. 5690 and just vote on final passage of that.

Chairman Conyers. Without objection, so ordered.

Mr. Berman. I move passage. I move that the committee do pass H.R. 5690.

Chairman Conyers. All those -- a reporting quorum being present, the question is on the reporting of the bill favorably to the House, as amended.

Those in favor say aye.

Those opposed say no.

Ayes have it.

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

Chairman Conyers. The measure is reported favorably to the House. Without objection, the bill will be reported as a single amendment and the bill will be reported, and the staff is authorized to make technical and conforming changes. Members will have 2 days to submit additional views.

We now return to the measure that is at hand. Let's see, H.R. 1650, the railroad antitrust enforcement measure. And are there any further amendments? Did someone say yes?

Mr. Issa. Yes.

Chairman Conyers. Oh, Mr. Issa. Darrell Issa is recognized for his amendment.

Mr. Issa. Thank you, Mr. Chairman. I have an amendment at the desk, No. 004XML.

Chairman Conyers. The clerk will report the amendment.

The Clerk. Amendment to H.R. 1650 offered by Mr. Issa: Page 3, Line 1, strike "LIMITATION OF".

Page 3, Line 6, strike "shall not be required" --

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

[The information follows:]

******** INSERT 2-6 ********

Mr. Issa. Mr. Chairman, I believe this is a minor perfecting amendment designed to not shift anything except to make it explicit that there are options. And by doing so, the very last line of this amendment -- it was nearly done -- it inserts "may at its discretion, but shall not be required." Essentially, the "but shall not be required" means that there is no tangible change except we want to make sure the court fully understands that it is its discretion. So we are neither ordering it to, nor preventing it from.

This was the most articulate way that somebody much smarter than me could write that rebalancing. And I would ask that this very minor, if not -- I hope the gentlelady from Wisconsin would agree it makes no substantive change, but it certainly lets the court know that it has full jurisdiction to do or not do as it sees fit, and that hopefully is what we always want the courts to do. So it is intended to clean up what I thought was a little ambiguous when "shall not be required" to me says "shall not be required," but are we encouraging, are we discouraging? What were we doing? And I think "may at its discretion" says we are neither encouraging nor discouraging.

And I would yield to the Ranking Member.

Mr. Smith. I thank the gentleman from California for yielding.

Mr. Chairman, as it is currently worded, section 4 of the bill may encourage judges to be overtly reluctant to refer suits to the STB that would most appropriately be handled by that body. This amendment, as the gentleman from California said, simply clarifies that a judge's decision to defer a case or not to the STB is purely discretionary and the judges are in no way obligated to retain an antitrust case against a railroad if the STB has greater experience in that area.

So I too agree that this is a commonsense amendment that is more technical than substantive in nature. And I hope the author of the bill will consider supporting it as well.

I'll yield back.

Mr. Issa. Reclaiming my time. Mr. Chairman, I would also point out that the original first draft -- first case is what people often focus on. And we always talk about in terms of, well, they may want to refer it because they lack the expertise. And the Ranking Member certainly brought that out. But let's remember that in litigation history, what can often happen is that somebody can file in multiple jurisdictions, repeatedly, substantially the same cases.

And although I have another amendment, which I may offer, which would centralize jurisdiction to the District of Columbia, if in fact you have multiple jurisdictions, if judges see that, in fact they are the ninth judge to deal with something that has previously been decided or previously referred, this would make clear that that judge has that discretion.

So it may be far down the road that this provision, if you will, is used. But I want to make sure that it is clearly there so that a judge does not use up very valuable time, and time which is by definition much slower than one in which Surface Transportation Board may have seen this 20 times identically, even from the same plaintiff or similar plaintiffs.

And with that I would yield back.

Chairman Conyers. I thank the gentleman. The gentlelady from Wisconsin.

Ms. Baldwin. Thank you, Mr. Chairman.

I do oppose this amendment. Although if the gentleman chooses to offer his other amendment, I will even more vociferously oppose that amendment.

Mr. Issa. Give me a --

Ms. Baldwin. I was going to say -- let me explain. There are a number of reasons why I oppose this. First of all, it relates to consistent treatment from industry to industry, and why we should craft specific -- as we restore antitrust protections in this arena, why we

should specifically tailor language for this instance, rather than treating them like all other industries -- which is what I'm attempting to do with the underlying bill -- is a big question. And that is part of my reason for opposition. Also, you know there is a large coalition of shippers.

RPTS BINGHAM

DCMN ROSEN

[1:08 p.m.]

Ms. Baldwin. Also there is a large coalition of shippers, of energy producers, of customer -- consumer advocates who are allied to support this bill who have put a lot of effort into assisting me with crafting it. And I will frankly tell you that rail customers view this as a killer amendment, a poison pill amendment because -- because it allows, it sort of sends a signal to the courts to refer antitrust complaints back to the STB for determination of key elements of the case. The amendment really appears to many to be an attempt to ensure that the STB can continue to protect the railroads as we have been seeing, you know, their practice over many, many years now.

This amendment would allow the railroads to continue to pursue their bottlenecks and to enjoy the exclusive tie in or paper barrier agreements with the short line railroads, both of which practices deny rail customers access to the competition and both of which practices the Department of Justice said in their 2004 letter to then-Chairman Sensenbrenner might violate the antitrust laws if applied to railroads. And so for those reasons, I would oppose this amendment.

Mr. Issa. Would the gentlelady yield? Just inquiring because you have studied this probably more extensively than anyone else, at the end of the day when this bill is passed in its present form, if I understand, the railroad will be treated differently. It will not be totally uniform with other forms of transportation in spite of your changes, isn't that correct?

Ms. Baldwin. That is not the intent. There may be, I don't know if there is a specific provision that you are talking about, for example, the other amendment that you

may be offering would be a very specialized treatment for freight railroads in the antitrust arena. I think here we are trying to get rid of antitrust exemptions that the freight rails have enjoyed for over a century and apply the antitrust laws of this country to this industry like almost all others.

Mr. Issa. But if the gentlelady is correct, and you are trying to keep things from going to the Surface Transportation Board, which is what I think I heard you just say, then why not just honesty abolish the board because you think it favors railroad over shippers? I don't mind your having that bias. But my question to you is, if that is really what we think is that they can't do their job and they are not doing it and they favor only railroads, then perhaps this isn't the right attack, and rather to abolish an organization you think only favors one side over the other.

Ms. Baldwin. Reclaiming my time, I think that this is a debate that Congress is having right now. There is separate legislation that would re-examine the regulatory authorities of the Surface Transportation Board that is pending in the Transportation and Infrastructure Committee. But we have two separate issues, regulation and application of our antitrust laws. And there are a number of practices that we have seen with the freight rail shippers that, quite frankly, in my opinion, bring up strong questions about anti competitive behavior, and I want to empower the Department of Justice and the FTC to be involved in taking a look at those and as well as empowering shippers to be able to look for private enforcement where they and their customers are being aggrieved.

And so that is the approach that this bill does take. It doesn't mean that we can't re-examine the regulatory framework under which rail is operating right now.

In 1980, the Congress, neither of us served at that time, but in 1980, the Congress decided to deregulate largely the freight rail industry through the Staggers Act, and I think we are seeing right now that there has been imperfections in that approach. And perhaps in

1980, they should have repealed the exemptions the antitrust exemptions. Congress didn't. It is our turn to do that today, and I hope that we will.

Chairman Conyers. Time is expired. If there is no further discussion, we will vote on the Issa amendment. All in favor of the Issa amendment signify by saying Aye.

All those in favor, signify by saying aye.

Opposed, no.

The noes appear to have it.

Chairman Conyers. The noes have it. The amendment is defeated.

Mr. Issa. Are you sure, Mr. Chairman? It sounded close to me.

Chairman Conyers. Well, it sounded close to you, but I was listening more carefully.

Mr. Issa. I will go with the wisdom of the chairman. Thank you.

Chairman Conyers. You are very welcome. Are there any further amendments? If there are none, a reporting quorum being present, the question is on reporting the bill as amended favorably to the House.

All those in favor, signify by saying aye.

Opposed, no.

The ayes have it and the bill as amended is ordered reported favorably to the House without objection. The bill will be recorded as a single amendment in the nature of a substitute incorporating the amendments adopted. Staff is authorized to make technical and conforming changes and Members will have 2 days to submit views.

Pursuant to notice I call up bill H.R. 5593 congressional review Act improvement of 2007 for purposes of markup. The Clerk will report the bill.

[The information follows:]

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

The Clerk. H.R. 5593, a bill to amend title 5 United States Code, to make technical amendments to certain provisions of title 5, United States Code.

Chairman Conyers. Without objection the bill will be considered as read and open for amendment at any point. And the Chair invites the subcommittee chairperson, Linda Sanchez to make our opening statement.

Ms. Sanchez. Thank you, Mr. Chairman, and I will be very brief. H.R. 5593, the Congressional Review Act Improvement Act, would cut government waste by reducing duplicative paperwork and relieving some of the administrative burdens currently mandated by the Congressional Review Act, the mechanism used by Congress to review agency rules. The Congressional Review Act requires all agencies promulgating a rule to submit to both houses of Congress and to the Comptroller General at the Government Accountability Office, a report that contains a copy of the rule, a concise general statement describing the rule and the proposed effective day of the rule. Thus including the copy kept at the originating agency, current law declares that same material be submitted, housed and printed at four different governmental agencies.

Specifically, this legislation would eliminate the requirement that agencies submit rules that are printed in the Federal Register to each House of Congress. Instead of receiving the full submission of each individual rule, the House and Senate would receive a weekly list of all rules from the Comptroller General. The House and Senate would then enter that list into the Congressional Record with a statement of referral for each rule.

Under these revisions, agencies would still be required to submit rules and reports to each House of Congress that were not printed in the Federal Register, and Congress could still employ the procedures in the Congressional Review Act to disapprove agency rules. On April 24, 2008 the commercial and administrative law subcommittee favorably

reported H.R. 5593 without amendment and by voice vote.

I urge my colleagues to once again support these common sense modifications of the Congressional Review Act. And I want to specifically thank Chairman Conyers, Ranking Member Smith and the subcommittee ranking member, Mr. Cannon, for their work on this legislation.

And I urge my colleagues to help green the government and support this paper reduction measure. And with that I yield back. I would yield to the gentleman from Utah.

Mr. Cannon. The consideration of this bill is a positive step forward in the improvement of the Congressional Review Act. Many believe that Congress should be more active in its oversight of the executive branch's rulemaking activity.

The Congressional Review Act could be a spring board to renewed efforts in that area. I look forward to further efforts to make it as effective as it can be. I thank you. And I yield back to the gentlelady.

Ms. Sanchez. And I would yield back to the chairman.

Chairman Conyers. Thank you very much, Linda Sanchez. The Chair recognizes Ranking Member Lamar Smith.

Mr. Smith. Mr. Chairman, I support this bipartisan reform of the Congressional Review Act and urge my colleagues to support it as well. I yield back.

Chairman Conyers. Thank you. Are there any further discussion or are there any amendments? If there are none, a reporting quorum not being present, the Chair will hold -- all right, a reporting quorum being present the question is on reporting the bill favorably to the house.

All those in favor, signify by saying aye.

Opposed, no.

The ayes have it. The bill is ordered reported favorably. Members will have

2 days to submit additional views.

Pursuant to notice, I call up bill H.R. 4044 the National Guard and reservist debt relief act of 2007 for purposes of markup. The Clerk will report the bill.

[The information follows:]

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

The Clerk. H.R. 4044 a bill to amend the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 to exempt from the means test and bankruptcy cases, for a limited period, qualifying reserve-component members who, after September 11, 2001 --

Chairman Conyers. Without objection the bill will be considered as read and open for amendment at any point. The Chair recognizes Linda Sanchez once more for an opening statement.

Ms. Sanchez. Thank you, Mr. Chairman. I strongly support H.R. 4044, the National Guard and Reservist Debt Relief Act of 2008. This is a targeted no-nonsense bill that will serve to temporarily exempt our service brave men and women from some of the more onerous aspects of the bankruptcy means test requirements.

Since September 11, 2001 nearly half a million members of the National Guard and Reserve have been called to serve in Iraq and Afghanistan. These lengthy and often unanticipated deployments not only disrupt the lives of these service members and their families but also can lead to financial hardship. It is estimated, for example, that up to 26 percent of National Guard members who are deployed experience financial problems as a direct result of their deployment.

At an oversight hearing on the Bankruptcy Abuse and Prevention and Consumer Protection Act held last May, we heard from a Chapter 13 debtor about her financial circumstances. She explained how after her husband, a member of the Army Reserve, was called to active duty and deployed to Iraq, the family income decreased by more than $1,000 per month which among other reasons caused her and her husband to seek bankruptcy relief. One would think that our bankruptcy law would honor the special contributions of these brave men and women who make so many sacrifices to protect our Nation. But sadly it does not. BAPCPA was signed into law 3 years ago this month,

includes a means test which requires debtors to prove their inability to repay their debts through a complex bureaucratic maze. Those unable to navigate this maze correctly risk having their case dismissed for abuse.

The means test is particularly unfair to National Guard and Reserve members as a matter of both principle and practice. Service members while serving in Iraq or Afghanistan, typically receive higher than usual service-related compensation in the form of combat pay and also incur fewer living expenses. When they return to the United States, however, they receive less service-related pay and greater living expenses.

Despite laws designed to protect the civilian jobs of Guard and Reserve members while they are on active duty, some returning soldiers find that they have lost not only their combat pay but also their regular job. The means test, nevertheless, requires a debtor to calculate his or her income based on the average monthly income that he or she received during the 6-month period preceding the filing date of the bankruptcy case rather than the debtor's actual income.

As a result of the means test, a service member could appear to have higher net income and therefore could be at risk of having his or her case dismissed for abuse. To overcome this presumption, the service member must then demonstrate "special circumstances" which can be a burdensome undertaking, to say the least.

This is not the way our consumer bankruptcy laws should work. Our service members deserve better. This legislation gives us the opportunity to provide some modest relief to these men and women from at least some aspects of the onerous means test requirement.

Specifically, H.R. 4044 will exempt a member of the National Guard or Reserve from the means test if he or she is on active duty or performs a homeland defense activity for at least 60 days after September 11, 2001. The exception continues for 18 months after

completion of such service.

As you may recall, we had a very enlightening hearing on this bipartisan legislation earlier this month. It was a rare example of unanimity among witnesses, all of whom expressed strong support for this proposed consumer bankruptcy reform, particularly as it pertains to the means test, which is one of the more controversial issues we have had to deal with over the years.

I recognize that staff has and will continue to make efforts to clarify any remaining concerns that some may have about this legislation. Nevertheless, I maintain that this bill is a very limited bill and not intended to brush aside the means test for all but to provide some modest targeted relief to our citizen soldiers who risk their lives and then encounter financial distress due to their service. I would like to thank Representatives Schakowsky and Rohrabacher, the sponsors of this bipartisan legislation, for their work and leadership on this issue.

I urge our colleagues to honor our service men and women and support them in their quest for financial stability. And with that, I yield back.

Mr. Cannon. Would the gentlelady yield?

Ms. Sanchez. I would yield to the gentleman from Utah.

Mr. Cannon. I thank the gentlelady. I appreciate her comments about continuing to work on a couple of issues here. I don't want those issues that remain to cloud the fact that this is a very important bill. I think we owe this to our service members who have sacrificed. I made a personal promise to sponsors that we would work on this bill. And so I appreciate the gentlelady bringing it up and look forward to working with her to the make a couple of clarifications between now and the floor. And with that, and with my gratitude to the Chair, I yield back.

Ms. Sanchez. I thank the gentleman and I yield back to the gentleman.

Chairman Conyers. I thank both the chairwoman and the ranking member of the subcommittee. And I now yield to the ranking member of the full committee, Lamar Smith.

Mr. Smith. Thank you, Mr. Chairman. I am happy to help our patriotic reservists and guardsmen in need. While I am disappointed that we have not reached agreement on all issues raised on this bill, we have made progress, and I am glad for that.

Our highest priority has been to ensure that we meet the needs of our reservists and guardsmen when their service to our country triggers their bankruptcy. At committee markup, we were encouraged by the statements of Chairwoman Linda Sanchez. She highlighted the need for a bill that was "very targeted," a bill that responded to the financial distress of reservists and guardsmen that was "directly related to their service." That is precisely the compromise we had been proposing. So we took the chairwoman at her word and sought to achieve a bipartisan bill. We have not yet been able to agree on how to write a final compromise, but we are making progress. Both sides, I believe, are committed to considering in good faith further amendments that could resolve the remaining issues.

I intend to support the bill today, Mr. Chairman, but look forward to a further compromise before the bill is considered by the full House.

And Mr. Chairman, I might also add that if we do not have a reporting quorum, that might afford us the opportunity to continue discussing the compromise that, I think, is within reach and might enable us to have a better result if we do have to continue markup at another time. And with that, I yield back.

Chairman Conyers. I thank the gentleman.

Ms. Sanchez. Mr. Chairman.

Chairman Conyers. Gentlelady from California.

Ms. <u>Sanchez.</u> I have an amendment at the desk.

Chairman <u>Conyers.</u> The clerk will report the amendment.

The <u>Clerk.</u> I have two.

Ms. <u>Sanchez.</u> This is the manager's amendment.

The <u>Clerk.</u> Amendment in the nature of a substitute to H.R. 4044 offered by Ms. Linda Sanchez. Strike all after the enacting --

[The information follows:]

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

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

Chairman Conyers. Without objection and the gentlelady is recognized in support of her amendment.

Ms. Sanchez. Thank you, Mr. Chairman. This amendment in the nature of a substitute makes two revisions to H.R. 4044 for clarity and implementation purposes. And we have worked closely with the minority in terms of trying to craft an amendment that would be acceptable to them, that would take off of the table some of the concerns that they had about the underlying bill.

At the suggestions of the ranking member of the Commercial and Administrative Law Subcommittee, Mr. Cannon, the amendment folds the exception created by this legislation for the National Guard and Reservists into the existing exception for disabled veterans in bankruptcy code section 707 subsection (b)(2)(d).

Second, my amendment revises the bill's effective date provision to provide that the Act would become effective 60 days after enactment. This is a common sense revision requested by the Administrative Office of the U.S. courts so that the court system would have adequate time to amend any applicable bankruptcy forms. It is a very simple straightforward manager's amendment. And I urge my colleagues to support it. With that I yield back.

Chairman Conyers. I thank the gentlelady. Mr. Lamar Smith.

Mr. Smith. I support this as far as it goes. I hope we have time --

Chairman Conyers. Hit the mike.

Mr. Smith. Mr. Chairman, I do not object to this amendment in the nature of a compromise, but as I mentioned a minute ago, I do hope that we will have time to work on

a compromise either before it comes back to the full committee or before we go to the House floor. Thank you I yield back.

Chairman Conyers. Any other comments?

Mr. King. Mr. Chairman.

Chairman Conyers. Yes, Mr. King. The gentleman is recognized.

Mr. King. I move to strike the last word. Mr. Chairman, I be will very brief, but I just add a viewpoint to this that I maintain the same reservations as Ranking Member Smith does. I also reflect that this sends a message of supporting our troops. And certainly I have been many times in the front-lines here in Congress doing so. But I can't help but reflect that "support the troops" we need to also support their mission and they would prefer we do that as to anything else we can possibly do. We can't ask them to put their lives on the line for us and tell them that we do not support their mission. If we are going to support the troops, we must also support their mission. I thank you and I yield back.

Chairman Conyers. Thank you very much, Steve King. If we support the troops, why don't we pass this bill?

Mr. Nadler. Mr. Chairman.

Chairman Conyers. Yes. The Chair recognizes the gentleman from New York.

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

The Chairwoman. Gentleman is recognized.

Mr. Nadler. Mr. Chairman, I support this bill as far as it goes. But I just have to observe that this bill carves out, as the gentlelady says, a narrow exception to what is a very egregious provision of a very unjust law.

What this says is that someone returning from service whose income has gone way down, who is in bankruptcy because his income has gone way down, should not be subject

to a means test which looks inflexibly at what his income was never mind what it will be in determining what he can afford take pay. That is obviously correct. But it is equally correct whether the reason his income has gone down is because he has lost his job because he was in the National Guard, which this bill would take care of, or because he has lost his job because the factory moved to Taiwan, or for any other reason. A means test that says we will not allow a person to have recourse to Chapter 7 bankruptcy without passing a means test, and the means test says we will assume irrebutably that his income is going to be what it was; never mind that he lost his job, never mind he has a medical problem and can't do the job anymore; never mind that the factory moved to Taiwan; never mind whatever, it is irrelevant. We are going to assume that his income for the last 6 months is what it will be going forward, is wrong because, obviously, life is not like that.

Now, what this bill does is to say that in the case of returning veterans, we won't apply this obviously wrong and unjust standard. And I support that. But I would hope that thinking about this we will see that it is just as wrong and just as unjust to apply to anybody whose income in the next 6 months or year or whatever is going to be less than the last 6 months because he has lost his job or whatever.

So I support this bill. But I do think it ought to cause us to think about revisiting some of the terrible things we did 3 years ago as we move forward. And I yield back.

Ms. Sanchez. Will the gentleman yield?

Mr. Nadler. Yes, I will.

Ms. Sanchez. I understand the gentleman's concern, and I share it. However this bill was specifically tailored for people who voluntarily are serving in the Armed Services and get called up --

Mr. Nadler. Reclaiming my time I understand exactly what the gentlelady is doing with this bill. I appreciate it. I support it. I am simply saying that the principle behind this

bill, while we support our troops and we emotionally support our troops, that is why we are doing this for our troops. The fact is that people who aren't our troops may have the same problem and the same injustice and we ought to look at their problem too at some future time not too far in the future I hope. I yield back.

Chairman Conyers. I appreciate the gentleman's observations from New York. Are there any other comments?

Mr. Issa. Mr. Chairman.

Chairman Conyers. Yes, the gentleman from California.

Mr. Issa. Thank you, I figure one from this side to strike the last word. I am going to be offering an additional amendment because I agree with the gentlelady and not with the gentleman from New York, and in that sense I believe we should do something narrow and focused for reservists. I think the hearings that have been held in Congress have made it very clear that those who have deployed for long times, those who have deployed repeatedly, those who have deployed unexpectedly have, in fact, often suffered losses which lead them into not just economic distress but forced bankruptcy.

And no provision of bankruptcy was intended to somehow say that you lump those events the same. I do understand the gentleman from New York's comments because I think there are those who felt that we did it wrong 3 years ago as to everybody. And although I would be perfectly willing to begin the 5-, 6-, 7-year process of bankruptcy reform with the gentleman because we are young and in good health and we will be here, I don't think we should do it by having a bill that puts the camel's nose under the tent flap and causes us to have a series of small fixes.

So I am going to support final passage. My amendment is intended to clarify some areas where we all agree but the language doesn't say what we agree. The current language, and I will use this time rather than using a lot more time later, the current

language does not differentiate between active duty for training and active duty. Clearly a difference. When you enlist in the Reserves, you know you are going to go to basic training for 60 days and so on. The current legislation does not cause the Reservists to make a statement or any kind of an attempt to say this was the cause but at the same time, if they were called involuntarily to active duty, they were, in fact, economically disadvantaged because of this and that is a partial or total cause of their bankruptcy then I believe the court should consider it, and that is why I am going to support the final passage.

I might also note that there is very difficult to define in law so I don't try to do it, but there is sort of a difference between called to active duty, and I chose to go to active duty and now I want to use it as an excuse for bankruptcy. That is not in my amendment because I couldn't figure out a way to craft it.

Mr. Nadler. Would the gentleman yield for a question?

Mr. Issa. Of course, I yield to the gentleman.

Mr. Nadler. I understand it is not in your amendment, but are you trying to suggest that if someone went bankrupt because he voluntarily went to active duty that somehow that is, he should be held to less than if he went bankrupt because he was involuntarily called to active duty?

Mr. Issa. No. Reclaiming my time. What I was saying was that the hearings had dealt specifically with people who were involuntarily unexpectedly called to service and not was just all reservists. And one of the reasons that that differentiation, although I cannot easily make it is important is that all of our members of the Armed Forces, our full-time active duty personnel, are not automatically somehow dealt with differently in bankruptcy.

So that was the reason for differentiating, wanting to differentiate. To be honest, I

thought that this amendment was already enough improvement that I was going to settle for it and with that I yield back.

Mr. Watt. Would the gentleman yield before he yields back? I didn't want to prolong this, but the gentleman made a reference to people being young and being here a long time.

Mr. Issa. Well, you are young and you will be with us a long time.

Mr. Watt. My good friend, Bobby Scott, is having a birthday today, and I just wanted to make an exception for him, he is not nearly as young as he was yesterday.

Chairman Conyers. And we will not inquire as to his exact number of years.

Mr. Issa. Bobby, we will save you the song too, but happy birthday.

Chairman Conyers. The time of the gentleman is expired. Does he have an amendment at the desk?

Mr. Issa. I do, but the gentlelady's amendment is still here. I have an amendment in the nature of a substitute to the amendment in the nature of a substitute at the desk.

Chairman Conyers. Yes, the gentleman should go before hers.

Mr. Issa. Okay. Then I have the amendment at the desk.

The Chairwoman. Clerk will report the amendment.

The Clerk. Amendment in the nature of a substitute to the amendment in the nature of a substitute to H.R. 4044 offered by Mr. Issa. Strike all after the enacting clause and insert the following. Section 1 short title, this Act may be cited as the National Guard and Reservists Fair Deal Bankruptcy Act of 2008.

Chairman Conyers. Without objection, the amendment will be considered as read. The gentleman from California, Mr. Issa, is recognized in support of his amendment.

Mr. Issa. And I am going to wrap up quicker because I explained most of it in the earlier time.

Again, this is limited simply to dealing with two areas. As a former both active duty and reservist, I believe we all intended to differentiate between somebody who enlisted in the Reserves and knows they are going to go away to basic training for 6 weeks or 8 weeks, and that is part of it, and then they are going to go to AIT; that is part of the anticipation. So we are talking about call to active duty for other than training and that would cover all deployments.

Additionally, we are asking for the simple assertion as part of it that, in fact, there was an economic harm related to the active duty, the court will find that we are putting the burden on the creditors if they wanted to convince the judge it is not true that this simple assertion will be sufficient. But I think we all understand that just showing a discharge from 60 days of active duty isn't really what we intend. We intend for there to be a claim that there was economic harm as a result of their deployment and if there was, we certainly expect, under this Act, the bankruptcy court to take that as sufficient.

Ms. Sanchez. Will the gentleman yield?

Mr. Issa. Of course I will yield to the gentlelady.

Ms. Sanchez. I just want to call your attention to your amendment on the second page. The language of your amendment is that such active duty or such homeland defense activity is substantially related to the debtors claimed insolvency. In your previous comments that you had made on my amendment, you said partially related to the debtors' claim to insolvency and you said in the other instance when you were speaking on your own amendment related to the debtor's claimed insolvency. I just want to raise the point that causation is a very tricky issue here because what we are trying to do here is --

Mr. Issa. Reclaiming my time to explain it, "substantially related" does not mean it is the substantial cause. We are not, we carefully did not put it in as the needing to be 51 percent or substantially the cause of, but substantially related, and I would be glad to

work with the gentlelady between now and the floor, because ultimately the important point here is that we want to make sure there is an assertion that it had something to do with it.

And I will give you a simple example. When I left active duty and I went in the reserves, I started a small business and I went back to active duty several times as an Army captain, and my pay on active duty was greater than on my income on that small business. Now that was 1980 and times were bad. If I had gone into bankruptcy, it would have been the failure of my small business, and, by the way, my going to active duty was voluntary, I would not have reasonably been able to pass the sniff test for why one was related to the other.

Having said that, remember that under the bankruptcy law, this is only a point of contention if the veteran has income at the time of the bankruptcy, but, in fact, had this harm done earlier. So we are only asking for there to be a relationship. We are clearly not asking for it to be the cause. I would yield to the ranking member.

Mr. Smith. I thank the gentleman from California. Mr. Chairman, I just want to point out to the attention of the members that are here the next sentence the one following the one that was just read whereby we say that the petitioner simply has to certify that active duty or homeland defense activity is substantially related. And that is a prima facie showing. We are not asking for any hardship or any, we are not asking for any long and arduous petition. We are not asking the petitioner, the reservist to prove something that might take some time or might be complicated or might be complex.

We are simply saying that if he certifies, that alone satisfies this particular requirement. And that is not too much of a burden to ask to simply say that there has to be some connection. The reservist has to mention that, and then they will able to take advantage of the bill.

So I will yield back. I just think I want to make the point that this is about as minimum a requirement as we could ask for, and I do hope that the chairwoman of the subcommittee will consider this as we go forward. Thank you.

Mr. Issa. And I would just urge passage of this and urge that everyone understands sometimes when we have amendments, we are trying to be the minority to the opposition.

I support Ms. Schakowsky, and certainly Mr. Rohrabacher, in their intent in the bill and want to be productive and positive in that intent. And that is why I have offered the amendment, and with that, I yield back.

Ms. Sanchez. Mr. Chairman.

Chairman Conyers. I thank the gentleman. Does the gentlelady yield back?

Ms. Sanchez. I move to strike the last word.

Chairman Conyers. The gentlelady is recognized.

Ms. Sanchez. Thank you, Mr. Chairman and I appreciate the efforts of the minority in terms of this amendment.

We have, my staff has extended a lot of patience in terms of trying to resolve some outstanding issues that still exist. But I have to say that I oppose this amendment. We were given the language maybe 30 minutes ago and asked to approve it. And I think there are still some issues that they are trying to raise that could prove very burdensome to debtors. And while there may be a prima facie calling for certification, that is always subject to a dispute by a creditor, that it is, in fact, not the case, and therefore could lead to costly litigation on the part the debtor. And in fact, what this bill seeks to do is try to streamline that process so that there isn't this burdensome issue of proof on the part of the debtor.

And I want to remind members on this committee that the minority's own witness, Professor Jack William, spoke effusively in support of H.R. 4044 and offered no

suggestions about limiting it. He testified that the bill was targeted, specific and quite modest, and that it would help, at most, between 2,000 to 2,500 members.

So we are talking about a very small universe here.

With respect to the issue of substantially related, it is very hard when you could have multiple factors that lead to somebody's economic distress while they are on active duty. And I want to give, just throw out one hypothetical here. Before being deployed, a service member is experiencing marital difficulties and after being discharged and perhaps as a result of post traumatic stress disorder, the member's spouse files for divorce.

As a result of the divorce, the member's household income drops precipitously and expenses increase. What was a substantially, the substantial factor in that member having to, having this financial distress and having to file for bankruptcy. Again, I am willing to work with the minority to try to clean up the language and perhaps address their concerns. But at this time, I do not support this amendment, and I would urge my colleagues to not support it as well, and with that, I yield back to the chairman.

Chairman Conyers. Does anyone seek time? Since we don't have a quorum, we could either vote on this now or wait until we have a quorum to take this up again.

Mr. Issa. I think we should wait until we have a quorum, and perhaps the staff could use that time to reach the common ground that would negate any further action.

Chairman Conyers. Well, that is a great idea except that we could also vote on it right now.

Mr. Issa. It will be a record vote if it is present, so be it.

Chairman Conyers. Okay, we will suspend any further action. But I want to commend the members of subcommittee Number 5, their industry is only comparable to the importance of us getting some aid to the servicemen. And so I urge the committee to really do all they can to resolve this as quickly as possible so that we can move it forward.

So I thank the committee. That ends all of the items on our agenda and I declare the committee adjourned.

[Whereupon, at 1:40 p.m., the committee was adjourned.]