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MARKUP OF H.R. 3624; RESOLUTION,

ESTABLISHING THE HOUSE COMMITTEE ON

THE JUDICIARY EXECUTIVE OVERREACHING

TASK FORCE; AND, BUDGET VIEW & ESTIMATES

FOR FY 2017

Wednesday, February 3, 2016

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. Bob Goodlatte, [chairman of the committee] presiding.

Present: Representatives Goodlatte, Sensenbrenner, Chabot, Issa, Forbes, King, Franks, Gohmert, Jordan, Poe, Chaffetz, Marino, Labrador, Farenthold, DeSantis, Walters, Buck, Ratcliffe, Trott, Bishop, Conyers, Nadler, Lofgren, Jackson Lee, Cohen, Johnson, Pierluisi, Chu, DelBene,

Jeffries, Cicilline, Peters

Staff Present: Shelley Husband, Staff Director; Branden Ritchie, Deputy Staff Director/Chief Counsel; Zachary Somers, Parliamentarian & General Counsel; Kelsey Williams, Clerk; Paul Taylor, Chief Counsel, Subcommittee on the Constitution and Civil Justice; Stephanie Gadbois, Senior Counsel; Perry Apelbaum, Minority Chief Counsel, Chief-of-Staff; Susan Jensen, Minority Chief Bankruptcy Counsel; Danielle Brown, Minority Chief Legislative Counsel; David Greengrass, Minority Counsel; James Park, Minority Chief Civil Justice Counsel; Slade Bond, Minority Regulatory Reform Counsel.

Chairman Goodlatte. The Judiciary Committee will come to order, and without objection, the chair is authorized to declare a recess of the committee at any time. Pursuant to notice, I now call up the resolution to establish the House Committee on the Judiciary Executive Overreach Task Force for purposes of markup and move them to committee adopt the resolution. The clerk will report the resolution.

Ms. Williams. Resolution, Establishing the House Committee on the Judiciary Executive Overreach Task Force of 2016.

[The resolution follows:]

********** COMMITTEE INSERT **********

Chairman Goodlatte. Without objection, the resolution is considered as read and open for amendment at any point and I will begin by recognizing myself for an opening statement. The Constitution grants Congress all legislative powers, leaving the President to execute those laws faithfully, according to the will of the people as expressed through their duly-elected legislative representatives in the House and Senate. Yet Presidents from both parties have, for too long, stretched their powers beyond the limits intended by our founding fathers, and too often their abuses have gone uncorrected. As Law Professor David Bernstein has written, "The authors of the Constitution expected that Congress as a whole, would be motivated to preserve its authority against Presidential encroachment." The founders however, did not anticipate the development of our two party system. At any given time, around half the members of Congress belonged to the same party as the President, and may not want to limit their President's authority. This trend has accelerated through administrations of both parties over the past decades to the point at which now, a President boasts of his desire to use his pen and phone to bypass Congress. Indeed, just a couple of weeks ago, White House Chief of Staff Denis McDonough said, "Audacious executive actions are being crafted to make sure that steps we have taken are ones we can lock down, and not be subject

to undoing through Congress or otherwise".

These statements indicate additional unilateral executive actions beyond even those unconstitutional actions the President has already taken. And just last month, the Supreme Court agreed to hear the constitutional challenge brought by a majority of states against the President's unilaterally imposed immigration plan, which the people's legislative representatives never approved. So far, a federal judge in Texas has issued a preliminary injunction in the case, blocking the enforcement of the President's unilateral plan. The Fifth Circuit Court of Appeals upheld that injunction. Importantly, the Supreme Court granted certiorari in the case, and rather than limiting the issue the way President Obama requested, it took up the state's suggestion and requested briefing on the following question, "Whether the President's action violates the Take Care Clause of the Constitution, Article 2 Section 3". That clause of the Constitution requires the President to take care that the laws be faithfully executed. The founders would have expected members of the House of Representatives, known as the people's house, for its most direct connection to the will of the people, to aggressively guard their role in the constitutional legislative process. The resolution before us today will provide another means of doing just that by creating a task force on executive overreach,

chaired by Representative King from Iowa, that will focus on the dangers of ceding power away from congress, and the people's house in particular, and potential solutions.

Such dangers can often seem abstract in the midst of intense policy debates in a historically hyper partisan environment. But this is not a partisan issue. This is about restoring the separation of powers the framers enshrined in the US Constitution, to protect citizens from the tyranny of a runaway executive branch. The story of the harm caused of the erosion of the people's house and Congress can be told vividly and objectively by a task force such as this. I urge my colleagues to support this resolution, and it is now my pleasure to recognize the ranking member of the Judiciary Committee, the gentlemen from Michigan, Mr. Conyers, for his opening statement.

[The prepared statement of Chairman Goodlatte follows:]

********** COMMITTEE INSERT **********

Mr. Conyers. Thank you Chairman Goodlatte, and members of the committee. Debates about the proper scope of executive power and its relationship to legislative authority are as old as the nation itself. As the committee charged with examining issues arising under our Constitution, it is important that we regularly discuss such fundamental matters about how our nation's basic government framework works. Today's resolution, which would establish an Executive Overreach Task Force for the next six months, is ostensibly the latest effort to fulfill this important obligation, and as we move forward, with the creation of this task force, we must keep several matters in mind. To begin with, it is my fervent hope that this task force does not devolve into a partisan political witch hunt. Sadly I have seen too many examples of task forces, select committees, and other bodies that have been set up merely to become venues for roving political attacks.

During the Obama Administration, we have seen the use of a select committee to question the Administration's conduct concerning the attacks on our consulate in Benghazi, Libya, after nearly two years and almost $6 million in taxpayer dollars spent. That committee has yet to find evidence contradicting key findings of the State

Department's accountability review board, or prior congressional investigations finding no wrong doing. There also appears to be a vigorous effort to undermine women's health and equality due to the establishment of a select committee that seeks to de-legitimatize the work of the Planned Parenthood Organization. Now these efforts seem, to many, to be nothing more than political fishing expeditions designed not to get to the truth, but to energize the conservative party's base voters in preparation for the year's elections. Given the importance of the question of whether executive authority has become too concentrated and too open to abuse, I hope that this will not be the case with the so-called Executive Overreach Task Force now under consideration.

Assuming for now that the task force represents a good faith effort to study executive power substantively, I would like to highlight several issues that I would recommend the task force consider, and these include -- expansive and frequent assertions the state's secrets privilege, including efforts to potentially shield evidence of government wrongdoing; secondly, the need to enact press shield legislation that would provide a qualified privilege that prevents a reporter source material from being revealed with limited exceptions; third, the need for enhanced and strengthened legal protection for whistle blowers, including

for federal employees who report high level government misconduct to congress; four, the need for legislation to strengthen Congress' contempt power, including a clear and expeditious mechanism to enforce congressional subpoenas civilly, against current and former executive branch officials; five, the need for legislation to expand the Department of Justice Inspector General's jurisdiction, to allow investigation of misconduct by senior department officials and United States attorneys; finally, the overuse of Presidential signing statements to challenge legal provisions, not merely to explain the President's legal interpretations. These are among my colleagues' several areas that are ripe in my judgment for finding common ground. Indeed, our committee has a long and distinguished history of task forces operating in a productive and nonpartisan manner. Task forces such as the Task Force on Over-Criminalization, the Task Force on Antitrust and Competition Policy, offer promising precedents for working cooperatively to consider important issues. It is my hope that this latest effort will continue that tradition. I thank the chairman and I yield back.

[The prepared statement of Mr. Conyers follows:]

********** COMMITTEE INSERT **********

Chairman Goodlatte. The chair thanks the gentleman. And it is now my pleasure to recognize the proposed chairman of the task force, Mr. King of Iowa, for his opening statement.

Mr. King. Thank you, Mr. Chairman. First, I want to thank you for initiating this task force, and the opportunity to be considered to chair this task force. I have looked at it as a restoration of Article One authority. The definition, however, we have of the task force is the restoration of the authority that Congress has and with regard to executive overreach. And I am an originalist. I believe that the text of the Constitution has to be understood to mean what it was understood to mean at the time of its ratification. And I believe the first task of this task force is to work together, and I would reiterate the words of Chairman Conyers in a bipartisan fashion to identify the executive overreach. And I would first like to approach this by identifying the breadth of the possible executive overreach, and I expect that we will have ideas coming from both sides of the aisle. Then I think we should sort them in categories of what is an unconstitutional overreach versus what is simply an executive overreach.

We also should recognize that Congress has willingly

handed our executive authority over to the President because we did not want to make a decision or we thought that actual governing was too cumbersome. And there are times when Congress has not done the job that I think we should be doing with regard to oversight, and there's times the executive branch has been very reluctant to cooperate with Congress' oversight in legitimate constitutional functions.

We have also been unwilling on many occasions to use the constitutional authority we have to restrain an executive branch, and the most specific and useful, and the most nimble is the power of the purse. It was specifically laid out for Congress to restrain an executive branch of government. But all of those things, I think, come before this task force. And I would also remark that listening to Chairman Goodlatte, who stated it this way, that our founding fathers believed that the Congress would be, each branch of government would be, motivated to preserve its authority. I would phrase it a little differently, although it is not at all; it is actually a mirror of this. I have long said that the founding fathers envisioned that each branch of government would jealously protect the constitutional authority that is defined, I think, clearly between the Articles One, Two, and Three in our Constitution. And when any branch of government fails to do that, then that power is going to go somewhere, perhaps to

the more aggressive branch of government, and in the end, it is the erosion of the power of "we the people."

So, what we are really addressing here is how to pull back the Article One authority that has gone to the executive branch and set up a strategy and a plan to do that, an agreement, hopefully, on how to do that. I expect it will be incrementally; however, the net result of a success with this task force will be that we are empowering "we the people" as our founding fathers imagined and envisioned. And I expect also there will be two different viewpoints here, as much as we are going to work in a bipartisan fashion, and that is those that believe that the Constitution is living and breathing, versus those that believe that the text of the Constitution means what it was understood to mean at the time of its ratification.

So I am looking forward to the formation of this committee, and I appreciate the chairman's vision in putting this together. And I think that in the end, the entire government will be better off, and certainly when we empower we the people, we know that we the people are all better off. That is our task. So, I thank the chairman for his vision and foresight, and urge the adoption of this resolution. And I yield back the balance of my time.

[The prepared statement of Mr. King follows:]

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Chairman Goodlatte. The chair thanks the gentleman, and now recognizes the proposed ranking member of the task force, the gentleman from Tennessee, Mr. Cohen, for his opening statement.

Mr. Cohen. Thank you, Mr. Chair. I appreciate the opportunity to serve as ranking member on this committee with my friend from Iowa, Mr. King. We know we have differences of opinion on a lot of issues, but we have always agreed to disagree agreeably and we will do that again. I am not sure exactly what Mr. King means when he says some people see the Constitution as a living, breathing, and some see it in the words in which it was drafted. I am not sure where he comes down on that, because I know the Constitution had slavery provisions in it and did not give women the right to vote, and I guess living and breathing meant we did not have slavery anymore and we did not have -- and women got the right to vote. That was through an amendment. There were a couple amendments necessary to give women the right to vote and give freedom to people that were otherwise enslaved. So, I do see it as kind of living and breathing, and I also see it as in terms of the senators who used to be just political hacks or

political wealth, chosen by railroads to come up here and kind of be kind of like the House of Lords, no longer through constitutional amendment being elected by the people and being more in tune, even though they do have six-year terms and that changed. But that changed a lot of the balance and how things happened.

I look forward to showing the similarities in the President's positions and those of President Bush. President Bush and President Obama both had certain provisions that they had in the Take Care Clause to make sure that on immigration policies, we only bit off what we could chew, and saw how much we could do and how much we could not, and had limits, and they were deemed appropriate under President Bush. And we hope President Obama would be dealt with in the same manner. And there have been quite a few attempts by the Congress to say that the President overreached on the Affordable Care Act, which has provided over 18 million Americans health care and has been a great step forward, started by Republican Teddy Roosevelt and really most implemented by Republican Mitt Romney to have people have health care as a right; and every time it has been challenged, the other branch of government, the third branch of government, the judiciary, has upheld the executive's authority and said that the Affordable Care Act was unconstitutional.

So, there have been lots of opportunities taken that this President in particular is doing executive overreach. I think the task force would better be named the Takings Clause Task Force, because the Take Care Task Force, not overreach, because it does kind of have a leading question. It gives the answer within its question in overreach, and that should not be really how we start off, if we are going to be actually a task force that looks at this from an objective fashion. There is a Jewish holiday where they always ask the youngest child several questions, and one of them is, "Why is this night different from all other nights?" And I have to think "Why is this President different from all other Presidents?" And I think, I know this is, of course, indeed Black History Month. But I am going to show the reasons why this President's actions have been the same as under President Bush and other Presidents from the other party on so many issues, and how the Supreme Court, which is predominantly Republican, has supported his positions in all cases as being within the Take Care Clause and appropriate. I look forward to the committee, and hopefully that it is objective and that it does not become political. I thank the chairman and the ranking member for giving me this opportunity. And I yield back the balance of my time.

[The prepared statement of Mr. Cohen follows:]

********** COMMITTEE INSERT **********

Chairman Goodlatte. Thank you, Mr. Cohen. Without objection, all other members' opening statements will be made a part of the record.

Mr. Jordan. Mr. Chairman?

Chairman Goodlatte. What purpose does the gentleman from Ohio seek recognition?

Mr. Jordan. I was just going to briefly say -- or is it appropriate now to talk about the task force?

Chairman Goodlatte. The gentleman is recognized for five minutes.

Mr. Jordan. Thank you, Mr. Chairman. I want to thank the Chairman for putting this task force together. And the prospective Chairman of the task force, Mr. King, I think, is right when he said that this is about addressing the erosion of the power of "we the people." It is not solely

about executive overreach. It is not solely about the executive branch bypassing Congress. It is about executive branch attacks on constitutional liberties of American citizens. And obviously, one that has been front and center for a number of years is what the Internal Revenue Service did when they systematically and for a sustained period of time targeted people's most cherished right, their First Amendment ability to speak out in a political fashion. And they went after people. And this should be part of this discussion, part of this task force, looking at what took place at that agency, an agency which has the power that the Internal Revenue Service has where currently, the Commissioner Koskinen, allowed 422 backed-up tapes to be destroyed, potentially 24,000 emails, while there were three preservation orders in place, one by the IRS themselves, and two subpoenas in place.

So, this is about the erosion on the power of "we the people" and our constitutional liberties, not just about an executive branch that may be kind of trampling a little bit on what the Congress is supposed to be doing, but about fundamentally attacking citizens' most cherished rights. And so I think this is real important. I appreciate the chairman proposing this task force, and look forward to voting in favor of it. With that I yield back.

Chairman Goodlatte. The chair thanks the gentleman.

Are there any amendments?

Mr. Cicilline. Mr. Chairman, I have an amendment.

Chairman Goodlatte. The clerk will report the amendment of the gentleman from Rhode Island.

Ms. Williams. Amendment to resolution to establish a task force on executive overreach offered by Mr. Cicilline of Rhode Island. Add after issues in Section…

[The amendment offered by Mr. Cicilline follows:]

********** COMMITTEE INSERT **********

Chairman Goodlatte. Without objection, the amendment is considered as read and the gentleman is recognized on his amendment for five minutes.

Mr. Cicilline. Thank you, Mr. Chairman. To be clear, the amendment that I propose adds in the functions of the task force the words, "The Executive Overreach Task Force shall conduct hearings and investigations relating to separation of powers and executive overreach issues," and adds the following, "As well as Congress's failure to perform its legislative functions." The reason I offered the amendment, members of the committee, is that the executive branch's robust use of the executive authority is very often as a result of Congress's failure to fulfill its obligations to do our legislative work on any number of

issues, in the areas of immigration, of equality for LGBT Americans, of fixing our broken background check system, and so many other areas. It is Congress's failure to legislate that has caused the executive branch to use this executive authority, I think properly, but use it robustly.

And so what I am suggesting is the task force, when it talks about examining the separation of powers, those separations of powers are the judicial branch, the executive branch, and the legislative branch. And in addition to looking at executive overreach, I think this is an opportunity for the task force to look at, sort of look ourselves, you know, look in the mirror. Look at the way we function. Are we, in fact, responsibly legislating, addressing these important issues? And are there things we could to improve the legislative process so that we will perform our legislative function, which is also one of the important powers that we talk about when we speak about the separation of powers. So I think it is an opportunity to give this task force a really balanced portfolio and a balanced set of responsibilities, and to do a little self-examination, and to look at what are the reasons that we are not making more progress in terms of our legislative work? And so, I think this amendment will do that. And I urge my colleagues to be as willing to examine executive authority as our own legislative responsibilities.

Chairman Goodlatte. The chair recognizes himself in opposition to the amendment. The base resolution for this establishment of this task force focuses on the separation of powers. That is, our constitutional procedures and how they must be preserved. This amendment does not relate to procedure. Instead, it implicates alleged failures of the Congress to legislate on one thing or another. And I am sure members on both sides of the aisle would have a long laundry list of things they would like to have the Congress legislate. Probably all of us would like to see some of the things that have passed through the House taken up in the United States Senate and would love to see them signed into law by the President. But what we are doing here is translating a procedural debate about protecting the constitutional powers of the Congress into simply another policy debate. And I would say to the gentleman that there is nothing in Article II of the United States Constitution that says, "When the Congress fails to act, for whatever reason, for political decisions that are made, for policy decisions that are made in the Congress," that says that if the Congress fails to act, then the President is authorized to act. The issue is whether or not the President and others in the executive branch have exceeded their constitutional authority under Article II of the Constitution. And so, for that reason, since we already

every day have policy debates here in the Congress regarding a whole host of legislative initiatives, when we have an opportunity to pursue in a whole host of other ways, that is not the purpose of this task force and not something that the task force is needed for, and therefore, not something that should be added to the authority of the task force. And I urge my colleagues to oppose the amendment.

Ms. Jackson Lee. Mr. Chairman?

Chairman Goodlatte. What purposes does the gentlewoman from Texas seek recognition?

Ms. Jackson Lee. To strike the last word.

Chairman Goodlatte. The gentlewoman is recognized for five minutes.

Ms. Jackson Lee. Let me rise to support the gentleman's amendment. And I make the argument of fairness and balance. And there are three branches of government. And there are responsibilities that each of the branches of government have. We are the Judiciary Committee. And appropriately, we have authorities as it relates to the legislating aspect. But many times, we are reviewing legislation that deals with the question of justice. This is a resolution that wants to discern whether the Constitution has been properly adhered to by one branch of government, why not appropriately add another branch of government? But I also add, if I might, to the gentleman's

comments from Ohio, previous speaker, on issues dealing with the IRS. And I was just thinking to myself, as to whether or not, as we proceed with this particular committee, that we will be adhering to facts, as the ranking member mentioned, Mr. Cohen, that we will be focused on facts, and not on speculation and newspaper articles as related to what the IRS did and who they were attacking or not attacking. That was not interpreted as the gentleman interpreted.

So any of us on this committee, one, would see Mr. Cicilline's amendment as appropriate. Two, I hope that we will stick to the facts of any assessment of overreach. And number three, I think that we should know that the Constitution is a living document. It is a living document because it added amendments that included due process that expanded a person's right to hear either the charges or to be treated fairly under the law. It of course added amendments that would eliminate slavery. And it certainly captured a holistic amendment that we use quite frequently that makes it living and breathing, and that is the First Amendment. But it gives us right to access, right to freedom of movement, right to speech, right to religion. And that is a living and breathing amendment that requires the infusion of the life that it brings in the 21st century, and maybe the 22nd century. So again, this committee opens up a lot of doors. And I think one of them may be an

assessment of the Congress and its role in the governance of this government under the Constitution. With that, I support the gentleman's amendment and yield back.

Chairman Goodlatte. The Chair thanks the gentlewoman. For what purpose does the gentleman from Iowa seek recognition?

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

Chairman Goodlatte. The gentleman is recognized for five minutes.

Mr. King. Thank you, Mr. Chairman. I just urge the committee here today to follow the directive of the ranking member from Michigan, who asked that we address this in a non-partisan fashion. And it must not be partisan. It must not be political. And if we could just take the tone down a little bit, maybe save it until at least the task force is working, I would appreciate that. I know that I spoke to the subject matter of the gentleman's amendment in my opening remarks. And I am hopeful that we will be able to take the issue up in the task force when we are all together focused on that. But also, I rise in opposition to the amendment because I do not want to start building a list of the things that Congress should be doing within this. We have a broad definition to work with. And I would want to maintain the broadest scope that we can. And I think it is important for us, in a non-partisan fashion, to build a long

list of the issues that we think should be addressed with this executive overreach task force, and then begin to discuss them, and narrow that list down to what is logical, what is practical.

And then, I would also point out that the gentleman's amendment, in the language is "failure to perform its legislative functions." That echoes in my ear. It comes back from a State of the Union address that President Obama has made, when he said, "If Congress fails to act, I will." I do not want to imply that the President has constitutional authority if he accuses Congress of failing to act. And I think that implication is in this amendment. And so, I would urge that we defeat this amendment and move on with the broader definition and, let's say, endeavor to following Ranking Member Conyers' counsel in his opening remarks, that we be as non-partisan as we can restrain ourselves to be. And with that, I would yield back the balance of my time.

Mr. Labrador. Mr. Chairman.

Chairman Goodlatte. For what purpose does the gentleman from Idaho seek recognition?

Mr. Labrador. To strike the last word.

Chairman Goodlatte. The gentleman is recognized for five minutes.

Mr. Labrador. Mr. Chairman, I ran for Congress six years ago, because the Republican majority in Congress had

abdicated their responsibility and had failed to look out for their Article I responsibilities. And that was when they had a Republican President. I find it kind of sad to see the other side abdicating their responsibilities sometimes when they do not look internally at not what the end result is, which I know they agree with on many, many things with the President, but they are okay with the President taking that responsibility away from them. So I would be willing to join something like Mr. Cicilline's amendment if it was something that actually looked at our responsibility as members of Congress, to actually stand up and protect the Constitution and protect our Article I role. And if there is a way that we could do that in a bipartisan way, where I can talk about my frustration with the Bush Administration, and with members of Congress during the Bush Administration, and they could talk about their frustration during the Obama Administration, and their inability to get Obama, President Obama, to stop taking away our roles. I would be really willing to do that. But it does not sound like that is what they want to do. It sounds, and maybe I am misreading Mr. Cicilline's amendment, but it sounds like there is argument that was well-expressed by the future chairman of this task force, that if Congress does not act, then the President can act. There is nothing in the Constitution that allows that.

I want to know, and I hope that we get into this in the task force, why Republicans and Democrats have failed to stand up to Presidents, to the executive branch, over the last 16 years. Not just the last eight years, but the last 16 years. And maybe we can together, as Democrats and Republicans, get back that Article I responsibility and power that the Constitution originally granted us. Thank you and I yield back.

Ms. Lofgren. Mr. Chairman?

Chairman Goodlatte. The chair thanks the gentleman. For what purpose does the gentlewoman from California seek recognition?

Ms. Lofgren. I would like to strike the last word.

Chairman Goodlatte. The gentlewoman is recognized for five minutes.

Ms. Lofgren. I would support the gentleman's amendment. I think it is a good addition. But whether or not the amendment passes, I am sure it will be a topic of discussion. And I think, you know, one of the things that is often missed as we discuss this is the delegation authority that the Congress has repeatedly granted to the executive branch in the last hundred years or so. And I think that, although it is very easy and we certainly should be mindful of the Constitution that guides us, when the Congress acts and delegates broad authority to the Congress,

as we have done repeatedly as recently as a few weeks ago where we included a national interest waiver on the visa waiver reform program to complain when the executive uses the authority that it has been delegated is not becoming for the Congress. So I do think -- I will get into this when the task force is adopted. Certainly, the executive actions that were taken by the Secretary of Homeland Security two years ago in November were based on authority that has been delegated repeatedly by the Congress to the executive in the creation of the Department of Homeland Security and in immigration law prior to that. So, I just thought it was important to note that. And I think having an examination of the roles of Congress and the executive branch is always appropriate. But I do hope that we will take a look at our drafting and make sure that we know the role that we have played, and not unnecessarily agitate the public to think that somehow, when the executive uses the authority that we gave the executive, that they are somehow doing something improper. If we do not want them to use that delegated authority, it is very simple. We should not delegate the authority. With that, I yield back.

Chairman Goodlatte. For what purpose does the gentleman from Georgia seek recognition?

Mr. Johnson. Move to strike the last word.

Chairman Goodlatte. The gentleman is recognized for

five minutes.

Mr. Johnson. Thank you, Mr. Chairman. My colleague from Iowa has asked that we kind of keep this away from politics, and this is a very sober and serious process that is removed from politics. I would respectfully argue with my friend on that point. I would say that this is all about politics. This is all about Presidential politics, as a matter of fact. And this is all about politics, the politics of Paul Ryan, our new Speaker, who has made a commitment to use the majority in the House as an incubator for Republican ideas that can be used on the campaign trail after the Republicans choose a nominee for President. And it is no surprise why the ending date of the Task Force on Executive Overreach ends sometime in August, if I recall correctly. That will be right after the Republican Convention. Well, it will be at some point after the Republican Convention. It will be an opportunity --

Mr. Sensenbrenner. Mr. Chairman, will the gentleman yield?

Mr. Johnson. Yeah. I will yield.

Mr. Sensenbrenner. Is the gentleman from Georgia aware that the rules say that the time limit on task forces is six months? So, this is a six-month authorization?

Mr. Johnson. I am just looking at what I read. And I believe that this task force, by its terms, is scheduled to

end its work in August, though that may not be, though it may, of course, be extended from that point. But I think the objective that has been stated is to end it in August. But my point is…

Mr. Sensenbrenner. Will the gentleman further yield?

Mr. Johnson. I will.

Mr. Sensenbrenner. Yeah. Is August six months from now?

Mr. Johnson. Gosh. Time does fly, I tell you. As I get older, I am starting to be worse with my addition. What is your point, though, if I might inquire of the gentleman? What is your point?

Mr. Sensenbrenner. Well, if the gentleman will further yield.

Mr. Johnson. Mine is that this is a political exercise. What is your point?

Mr. Sensenbrenner. Well, if the gentleman will further yield, my point is, you know, very simple. And that is that the six months that the rules allow us to authorize is implemented here.

Mr. Johnson. Well, I am reclaiming my time.

Mr. Sensenbrenner. If the gentleman wants to offer to make it earlier than that, he is free to do so.

Mr. Johnson. I am reclaiming my time. My point is that this is a political exercise. And it is well-timed to

end at a time when the Presidential campaign will be unfolding. And so, what this exercise is, is an opportunity for the Republicans on this committee to create a list of all of the actions that they contend are overreach, or executive overreach, and then campaign against it. And so, I do not want the public to be confused at all about what we are doing here. It is not a serious effort. It is just simply politics. And it is a shame that while we are here playing politics during this year, we could be doing things like criminal justice reform and other serious legislative matters. Why not have a task --

Chairman Goodlatte. Will the gentleman yield?

Mr. Johnson. All right. Let me make this point. Why not have a task force that looks into executive overreach on the state level, where we have seen takeovers in Michigan that have resulted in removal of standards for clean drinking water and have resulted in children being poisoned with lead, all to save money? Why not talk about, why not look into all of the takeovers on the state level throughout the country, where Republicans are in control of state legislatures and the executive branch? How they are taking over school systems? So-called failing schools, which they have defunded over the years, and then use that non-performance as an opportunity to take over and wrestle local control, schools from local control? Those are legitimate

things that we can look at. But instead, we are embarking upon another political exercise with this Executive Overreach Task Force which, I mean, it presumes that there has been executive overreach. It is not even fair in the way that it is named. So I would hope that we can get down to some serious business here, and do some criminal justice reform.

Chairman Goodlatte. Would the gentleman yield?

Mr. Johnson. Yes, I will.

Chairman Goodlatte. I thank the gentleman for yielding. I just want to point out that this committee has done substantial work in a very bipartisan fashion on criminal justice reform. And in fact, we are intending to mark up another important key piece of that -- dealing with prison reform and prison reentry reform next week. So, we are listening to the gentleman. We are doing criminal justice reform.

As to some of the things that the gentleman talks about that are going on in the states, I would argue that we should have some respect for the Constitution and say that that is the business of the state, not this committee. But it is the business of this committee what our relationship is with the executive branch. And that is why we have this task force.

Mr. Issa. Mr. Chairman?

Mr. Johnson. Well that having been said, I cannot disagree with that. But I will say that the remedy for any executive overreach is legislative action, and that is something that we have not seen enough of in the 114th Congress, and with that, I will yield back.

Chairman Goodlatte. The chair recognizes the gentleman from California for five minutes.

Mr. Issa. Thank you, Mr. Chairman. And as to the amendment before us, first of all I regret that this committee has a great jurisdiction but perhaps does not have jurisdiction over our colleagues throughout the entire Congress and that, just maybe, you know, investigating Congress for its failure to perform both the House and the Senate might be clearly beyond our means as a powerful committee, even if we chose to. But having said that, I would like to refocus on what Ranking Member Conyers said. I think that his opening statement, if we focus on it on a nonpartisan basis or on a bipartisan basis, I think we will find some very good points he made on what this committee, subject to whatever its final name is, could and should do. I think Ranking Member Conyers, when he talked about empowering the I.G.s, you know, the Inspector Generals, people that are appointed by the President or a Cabinet officer and confirmed by the Senate, who have testified that they have concerns about their authority, independence, and

freedom.

Specifically I note that the gentleman from Michigan specifically talked about U.S. attorneys and other lawyers and the injustice and where, under this Administration, the next, and the next, and the next, if we do nothing, we might find the actions of those lawyers in justice being investigated essentially by -- internally, but not through the I.G. because the Inspector General for Justice has specifically said that he is locked out of that process. It probably does not fit the term "overreach", but I think Mr. Conyers said it very well, that it was important. Whistleblower is again something that does not necessarily fit the title, but I think Mr. Conyers was right to say that the committee shall be looking at these kinds of things which help create the balance between the branches that propose Chairman King talked about subpoena authority and enforcing. No one in my history, my fifteen-plus years in Congress, has done more to secure the power of this committee and of our branch than Chairman Conyers when a previous Administration was unwilling to simply bring us witnesses when we were doing the people's work in reviewing the firing of U.S. attorneys. I think that, to the extent that the chairman and ranking member in this committee envision these areas being part of what this task force takes on, these are not partisan issues. These are issues

that Congress after Congress we wrestle with.

Lastly, and perhaps this is more the bipartisan nature, timing does matter. None of us know between now and August or between now and November who will be the next President of the United States, and I suspect that we will not know until probably the morning after the election who is likely to be the next President. As a result, I think we have an opportunity to deal in good faith, one in which those of us who might think this Administration overreached, and those of us who, if we listen to the other side, would realize that the last Administration overreached, that the ills we seek to, on a nonpartisan basis, come together and agree on and set a path toward reform, these are issues that are best decided when we do not know who the next President would be. We have nothing to defend. None of what we do on this task force will affect this President, and I do not believe it will affect this election. But I do believe that we can agree to things that are before us by November, so that we agree what should be done to balance the three branches.

And I will close, Mr. Chairman, by saying that Mr. Conyers hit one of the most important points. Not everything is a matter of ceding authority or seeking authority between Article 1 and Article 2. Some of it is what former Chairman Conyers said so well. We need to consider expeditious redress to Article 3, because unless we

pass legislation that very specifically tells the Article 3 judges that yes, we do want them to arbitrate at an expeditious rate when there are certain types of disagreements as to the meaning of a law and the like; unless we do that, the justices will assume that they do not have that authority, and they certainly would assume that they do not have the authority to do it in an expeditious fashion. So since I have done only the work of saying Mr. Conyers is right, I would yield the remainder of my time to Mr. Conyers.

Mr. Conyers. I thank the gentleman, and I think this has been a very helpful discussion. I am flattered that I have been referred to more favorably on the other side of the aisle than on my own, but I think that we should proceed to a vote on this matter. It has been appropriately examined, quite thoroughly by everybody, and I begin to hold more and more belief that we will in the end be able to do an important service with this overreach task force than I first originally imagined. And I thank the gentleman and yield back to him.

Chairman Goodlatte. The chair thanks the gentleman, the question occurs on the amendment offered by the gentleman from Rhode Island.

All those in favor will respond by saying aye.

Those opposed, no.

In the opinion of the chair, the noes have it.

Amendment is not agreed to. The question occurs, are there further amendments? A reporting quorum being present, the question is on the motion to adopt the resolution.

Those in favor will respond by saying aye.

Those opposed, no.

The ayes have it, and the resolution is adopted.

Voice. Could you recognize Mr. Conyers out of order to congratulate a staffer that is leaving before you pull the next bill up?

Chairman Goodlatte. The chair is pleased to recognize the ranking member for purposes of a recognition.

Mr. Conyers. I thank the gentleman, Mr. Chairman, for yielding to me. And, members of the committee, this is very personal to me because I am really thanking one of our excellent lawyers, Norberto Salinas, for his service on the committee. He will be leaving, and I would like to observe that, for nearly nine years of service on the Committee of Judiciary, he has done very good work, and today is his last mark-up. Over the course of his tenure with the committee, he is been one of the principal attorneys responsible for a broad array of matters, including the highly complex subject of intellectual property rights and patent law, arbitration, and state taxation. He was also the lead counsel and liaison with regard to the Legal Services Corporation, a

critically federally-funded program that, of course, provides legal representation to the indigent. He also worked with his colleagues across the aisle, fellow staff members, on a variety of important matters, including amendments to the Equal Access to Justice Act and the Remote Sales Tax Law. He served the committee well. We will surely miss him, and I thank the chairman for allowing me to make this statement.

Chairman Goodlatte. Will the gentleman yield?

Mr. Conyers. Yes, I would be pleased to.

Chairman Goodlatte. I thank the gentleman for yielding, and I thank him for recognizing Norberto. He has been a valued member of this committee staff, and his work is appreciated not only on the minority side, but also on majority side. I know that I speak for my staff that, in working on intellectual property issues and other issues, they have enjoyed working with you, and we thank you for that. And we wish you Godspeed.

Mr. Conyers. Take a bow, Salinas. I thank the chairman.

Chairman Goodlatte. Pursuant to notice, I now call up H.R. 3624 for purposes of markup, and move that the committee report the bill favorably to the House. The clerk will report the bill.

Ms. Williams. H.R. 3624, to amend Title 28, United

States Code, to prevent fraudulent joinder.

[The bill follows:]

********** COMMITTEE INSERT **********

Chairman Goodlatte. Without objection, the bill is considered as read and open for amendment at any point. And I will begin by recognizing myself for an opening statement. Hardworking Americans are some of the leading victims of frivolous lawsuits and the extraordinary costs that our legal system imposes. Every day, local business owners routinely have lawsuits filed against them based on claims they have no substantive connection to as a means of forum shopping on the part of the lawyers filing the case. These lawsuits impose a tremendous burden on small businesses and their employees. The Fraudulent Joinder Prevention Act will help reduce litigation abuse that regularly drags small business into court for no other reason than as part of a lawyer's forum shopping strategy. In order to avoid the jurisdiction of the federal courts, plaintiffs' attorneys regularly join in-state defendants to the lawsuits they file in state court, even if the in-state defendants' connection to the controversy are minimal or nonexistent.

Typically, the innocent but fraudulently joined in-state defendant is a small business, or the owner or employee of a small business. Even though these innocent in-state defendants ultimately do not face any liability as a result of being named as a defendant, they nevertheless have to spend money to hire a lawyer and take valuable time away from running their businesses to deal with matters related to a lawsuit to which they have no real connection. Trial lawyers join these unconnected in-state defendants to their lawsuits because the current rules for determining whether the fraudulent joinder has occurred provide little disincentive to adding an in-state defendant, no matter how frivolous the claim against that defendant. Currently, a case can be kept in state court by simply joining as a defendant a local party that shares the same local residence as the person bringing the lawsuit. When the primary defendant moves to remove the case to federal court, the addition of that local defendant will generally defeat removal under a variety of approaches judges currently take to determine whether the joined defendant prevents removal to federal court.

One approach judges take is to require a showing that there is no possibility of recovery against the local defendant before a case can be removed to federal court or some practically equivalent standard. Others require the

judge to resolve any doubts regarding the removal in favor of the person bringing the lawsuit. Still others require the judge to find that the local defendant was added in bad faith before they allow the case to be removed to federal court. The current law is so unfairly heavy-handed against innocent local parties joined to lawsuits that federal appeals court Judge J. Harvie Wilkinson of the Fourth Circuit Court of Appeals has publicly supported congressional action to change the standard for joinders, saying, "That is exactly the kind of approach to federal jurisdiction reform that I like because it is targeted, and there is a problem with fraudulent jurisdiction as it exists today, I think, and that is that you have to establish that the joinder of a non-diverse defendant is totally ridiculous and that there is no possibility of ever recovering that it is a sham that it is corrupt in everything. That is very hard to do. So I think making the fraudulent joinder law a bit more realistic appeals to me, because it seems to me the kind of intermediate step that addresses real problems. One of the problems here is that fraudulent jurisdiction, the bar is so terribly high."

The Fraudulent Joinder Prevention Act brings some balance to a federal court's ability to determine whether a case that has been removed from state to federal court should remain in federal court. It does this by requiring

federal judges to apply concepts to the fraudulent joinder determination that they already regularly use in other areas of the law. I understand Mr. Buck will be offering a substitute amendment to make some technical changes to the bill, and so I will let him explain that amendment in more detail. But the policy of the bill remains the same, namely to allow judges to review more evidence earlier in a case to determine whether or not a plausible case can be made for the in-state defendants' liability under state law, or that there is no good faith intent on the part of the trial lawyers to continue the case against all defendants. I urge my colleagues to support this legislation, and I recognize the ranking member, Mr. Conyers, for his opening statement.

[The prepared statement of Chairman Goodlatte follows:]

********** COMMITTEE INSERT **********

Mr. Conyers. I thank the chairman, and I would, just to point out to the members of this distinguished committee, that this may be found to be yet another effort to deny access to justice for potentially thousands, hundreds of thousands, of plaintiffs seeking relief under state law in a state court. Now, under current law, a defendant may remove a case alleging solely state law claims to a federal court only if there is complete diversity of citizenship between all plaintiffs and all defendants with an exception. If the plaintiff adds an in-state defendant to the case solely to defeat diversity jurisdiction, this constitutes a fraudulent joinder, and in such circumstance, the case may be removed to a federal court. In determining whether a joinder was fraudulent, the court must consider only whether there was any basis for a claim against the non-diverse defendant, and the case to remain in federal court, the defendant must show

that there was no possibility of recovery, or no reasonable basis for adding the diverse defendant.

This, my friends, is a very high standard which has guided our federal courts for more than a century and has functioned well. Apparently, there is a move on now to fix a system that is not broken. They now seek to require a federal court, when considering a remand motion in a case, that was removed from state court to federal court on diversity grounds, and where there is also an in-state defendant, to deny such a motion if the plaintiff fails to demonstrate that there was a plausible claim for relief against, and an in-state defendant, or that the plaintiff had a good faith intention to prosecute the action against each in-state defendant or to seek a joint judgement. Now, while the substitute amendment that we will discuss later changes the particular wording of these requirements, they remain in the bill substantively unchanged. The bill's proponents claim that this legislation is necessary, as I understand it, because the fraudulent joinder doctrine has been articulated differently by different courts. Well, that is nothing new. Yet, these distinctions do not substantively matter, as all courts must consider whether there is some basis in law, in fact, for a plaintiff to pursue a claim against an in state defendant. If there is, then the federal court must remand the case back to state

court. Were uniformity truly the concern of the bill's proponents, the legislation would simply pick one of the existing articulations of the fraudulent joinder standard and codify into law.

Instead, it is clear from the bill's radical changes to long-standing jurisdictional practice that the true purpose of this measure, in my view, is simply to stifle the ability of plaintiffs to have their choice of form, and possibly even their day in court. In addition, the bill would sharply increase the costs of litigation for plaintiffs, and further burden the federal court system. The bill effectively requires a court to engage in a substantial merits inquiry at a case's initial procedural stage without the benefit of any substantial discovery, which will create more uncertainty, more costs, and more unnecessary complexity at such an early stage of the litigation. For example, the bill applies a vague, open-ended plausibility standard that will undoubtedly require substantial litigation in the corresponding development of a substantial body of case law to implement it.

Finally, the amendments made by this bill raise fundamental federalism concern. Removal of a state court case to federal court always implicates federalism concerns, which is why the federal courts generally disfavor federal jurisdiction, and read removal statutes narrowly, by

applying sweeping and vaguely-worded new standards through the determination of when a state case must be remanded to state court. This bill denies state courts the ability to decide and to -- ultimately, to shape state law. So H.R. 3624, by intruding deeply into state sovereignty, in my view, violates our fundamental constitutional structure, and accordingly, I oppose this problematic bill and urge my colleagues to carefully examine the matter before me. I thank the chairman, and I yield back.

[The prepared statement by Mr. Conyers follows:]

********** COMMITTEE INSERT **********

Chairman Goodlatte. The chair thanks the gentleman, and I would now like to recognize the sponsor of the legislation, the gentleman from Colorado, Mr. Buck, for his opening statement.

Mr. Buck. Thank you, Mr. Chairman. Mr. Chairman, current federal court rules allow trial lawyers to keep their cases in state court if they sue a defendant from another state, as long as they also sue a local defendant in the state in which they are filing the case. Not surprisingly, these rules have been abused by trial lawyers, who fraudulently sue local defendants, not because those local defendants have any real connection to the lawsuit, but because suing them allows the trial lawyers to keep their case in a preferred state court forum. If a local defendant has no real connection to the controversy, joinder of that defendant is referred to as fraudulent joinder. The Supreme Court has recognized, since the early 1900s, the fraudulent joinder doctrine as an exception to the complete

diversity rule. The doctrine allows the district court to disregard, for jurisdictional purposes, the citizenship of certain non-diverse defendants under certain circumstances. The doctrine of fraudulent joinder prevents plaintiffs' attempts to wrongfully deprive parties entitled to sue the in federal courts of the protection of their rights in those tribunals.

However, despite its importance, the Supreme Court has not clarified, or elaborated, upon the fraudulent joinder doctrine since first recognizing it in several cases in the early 1900s. Without guidance from the Supreme Court or Congress on the contours of fraudulent joinder, lower federal courts, as described by one commentator, have been forced to grapple with several issues raised by the doctrine, and in doing so, have created conflicts among the circuits with respect to the standard and procedure used to evaluate allegations of fraudulent joinder. Indeed, another commentator has observed that presently courts take divergent approaches when analyzing claims of fraudulent joinder. Predicting what test a court will apply to determine fraudulent joinder is difficult, as the standards can shift even with the same opinion. According to another commentator, the present standards are poorly defined, and thus subject to inconsistent interpretation and application. Another commentator has written that rather than adopting

one universal approach, courts attempt to discern fraudulent joinder by applying a collection of amorphous approaches.

However, one aspect is consistent across different applications of the doctrine. And that is that in every court, the burden of proving fraudulent joinder is one of the heaviest burdens known to civil law. This unfairness, as the chairman pointed out, led respected federal appeals court judge Jay Harvie Wilkinson to publicly support congressional action to change the standards for joinder to allow judges a greater ability to make the right decision on questions of removal. Congress has the authority to regulate the jurisdiction of the lower federal courts. As an exercise of that authority, the Fraudulent Joinder Prevention Act establishes a uniform standard for determining whether a defendant has been fraudulently joined to a lawsuit, in order to defeat federal diversity jurisdiction. It also makes clear that federal courts may consider evidence outside the pleadings when deciding a motion to remand a case that has been removed to federal court, as well as whether the plaintiff has shown a good faith intent to pursue a judgment against a non-diverse defendant.

The Framers included federal diversity jurisdiction in the Constitution to provide a neutral, federal forum in which inter-state controversies could be adjudicated.

Accordingly, as the Supreme Court has held, the Constitution presumes that state attachments, state prejudices, state jealousies and state interests might sometimes obstruct or control, or be supposed to obstruct or control, the regular administration of justice. This legislation will help ensure that Congress' extension of federal diversity jurisdiction, is living up to the Framers' intentions in a manner fair to everyone. Thank you, Mr. Chairman, and I yield back.

[The prepared statement by Mr. Buck follows:]

********** COMMITTEE INSERT **********

Chairman Goodlatte. The chair thanks the gentleman, and is pleased to recognize the ranking member of the Subcommittee on the Constitution and Civil Justice, the gentleman from Tennessee, Mr. Cohen, for his opening statement.

Mr. Cohen. Thank you, Mr. Chair. Messaging is important. And the Fraudulent Joinder Prevention Act of 2015 could also be called the Corporate Defendant Forum Shopping Act, because in actuality, that is what it facilities. If enacted, the bill would upend a century of legal doctrine governing how a federal court decides whether to remand a case that was removed by an out-of-state defendant on diversity grounds, and where there is also at least one in-state defendant in the case. Under this doctrine, known as the fraudulent joinder doctrine, a

federal court retains jurisdiction over a case lacking complete diversity, only when there is no reasonable basis for the plaintiff's claim against the in-state defendant. There is simply no evidence that federal courts applying current law have failed to properly address fraudulent joinders.

What H.R. 3624's proponents really object to is the fact that current law generally favors remand of cases raising state law issues to state courts. This is in keeping with the longstanding judicial recognition that constitutionally, federal courts are courts of limited jurisdiction, and should therefore construe removal statutes strictly and narrowly. Tellingly, the Supreme Court has not seen it necessary to change the fraudulent joinder doctrine, or ever stated any concern about the way federal courts have been applying that doctrine. In short, after a century of application, the Court has not deemed it necessary to alter the way federal courts deal with fraudulent joinder.

In addition to being unnecessary, the bill increases the complexity and costs surrounding remand motions. The bill effectively requires litigation on the merits at the nascent stage of the case, potentially dissuading plaintiffs from pursuing meritorious claims. H.R. 3624 requires the application of vague and undefined standards, which invites further litigation over the meaning and scope of those

standards. What constitutes a quote "plausible" unquote claim is not self-evident. We know this because courts have been struggling to apply the plausibility standard with respect to pleadings in federal court, after the Supreme Court's Ashcroft v. Iqbal decision applied such a standard to pleadings under the Rules of Civil Procedure, Number 8. That decision has produced a substantial amount of litigations, led to increased uncertainty, complexity and litigation costs. There is no reason to think that the same thing will not happen once such a "plausibility" standard is imported into the remand context, as H.R. 3624 would do. Similarly, the bill's required inquiry into plaintiffs' objective good faith intention will result in increased litigation as well. The bill does not define good faith intention. It is not used otherwise in Title 28. The increase in costs and complexity would not only drain limited resources of plaintiffs, but also burden the already strained federal judicial resources.

Finally, this bill violates states' rights by denying state courts the ability to shape state law. State courts are the final authorities on state procedural and substantive law, and state law claims ought to be left to state courts, except in the narrowest circumstances. This bill would further deny state courts that authority by making it easier for federal courts to retain jurisdiction

when only state law claims are at issue, and possibly imposing new heightened pleading standards on state courts. H.R. 3624 represents just the latest in a long line of attempts to deny plaintiffs access to state courts, and to extend, inappropriately, the reach of federal courts into state law matters. Ironically, on so many matters here, we hear about states' rights, and we hear from the other side about the rights of each state to make their decisions. But when it comes down to plaintiffs, we do not care about states' rights, we care about defendants, and that is unfortunate. But it is the hobgoblin of simple minds, I guess. With the reasons stated, I oppose the bill.

[The prepared statement of Mr. Cohen follows:]

********** COMMITTEE INSERT **********

Chairman Goodlatte. Without objection, all other members' opening statements will be made a part of the record. Are there any amendments? I now recognize the gentlemen from Colorado, Mr. Buck, for purposes of offering an amendment in the nature of a substitute. The Clerk will report the amendment.

Ms. Williams. Amendment in the nature of a substitute to H.R. 3624, offered by Mr. Buck of Colorado. Strike all after the enacting clause.

[The amendment offered by Mr. Buck follows:]

********** COMMITTEE INSERT **********

Chairman Goodlatte. Without objection, the amendment in the nature of a substitute is considered as read, and I will recognize Mr. Buck to explain the amendment.

Mr. Buck. Thank you, Mr. Chairman. This substitute amendment retains the policy of H.R. 3624, while clarifying the narrow application of its anti-fraudulent joinder

standard, avoiding inadvertent unsettling of other doctrines of removal law, and assuring that courts can continue to consider all varieties of fraudulent joinder. It was crafted with the input of experts in the field, and I want to give particular thanks to Professor Arthur Hellman, the Sally Ann Semenko Endowed Chair at the University of Pittsburgh School of Law, and the author of a seminal case book on federal courts. And Cary Silverman, who testified on behalf of this legislation last year. With these technical corrections, the basic policy of the bill remains to allow courts greater discretion, to allow the removal of cases to federal court where the joining of a local defendant is improper.

Specifically, the substitute amendment makes the following changes. Since fraudulent joinder is only a problem in a sub-class of cases involving diversity of citizenship jurisdiction, the substitute makes clear that it applies only in the following cases. First it applies to cases that are removed under the general diversity statue, 28 USC 1332(a), in which there is a motion to remand on the ground that diversity is thwarted by the presence of a defendant that as a citizen of the same state as the plaintiff, under the general remand standard. Second, it applies to cases in which a defendant is a citizen of the state in which the action was brought, because courts have

also been applying fraudulent joinder doctrine when a plaintiff who is not a citizen in the forum state names a citizen of the forum state as a defendant. Third, if either of those criteria are met, it applies where the motion to remand is opposed solely on the ground that the joinder of the defendants is fraudulent, thereby confining the application of the bill to the opposition to remand on the grounds of fraudulent joinder.

Fraudulent joinder requiring denial of a motion to remand is then defined as including the following. First, a situation in which actual fraud, namely the making of false allegations, exists in the pleading of jurisdictional facts. Second, a situation in which, based on the complaint and material submitted, it is not plausible to conclude, as a legal matter, that applicable state law would impose liability on each defendant. Third, a situation in which state or federal law clearly bars all claims in the complaint against all defendants, as for example, through the affirmative defense of statute of limitations, expiration, federal preemption or state or federal laws that provide immunity from suit. And fourth, where objective evidence drawn from the plaintiffs' collective actions during the course of the litigation clearly demonstrates there is no good faith intention to prosecute the action against all defendants, or seek a joint judgment against

them.

Finally, the substitute amendment makes it clear that the district court may allow the defendant to amend the complaint to meet objections to remand. Regarding the bill's reference to good faith, I would add that the hearing on this legislation, Chairman Conyers stated, "If uniformity were truly the concern of the bill's proponents, the legislation would simply pick one of the existing articulations of the fraudulent joinder standard, and codify it into law." Well, that is what the base bill and the substitute amendment does. It codified the line of cases in which judges considered whether fraudulent joinder has occurred by examining whether or not the plaintiff has a good faith intent of pursuing a judgment against the defendant. Such an existing articulation of that fraudulent joinder standard includes the Third Circuit case of Boyer v. Snap-on Tools, in which the court held that joinder is fraudulent where there is no real intention in good faith to prosecute the action against the defendant, or seek a joint judgment. I encourage all my colleagues to support this substitute amendment. I yield back.

Mr. Conyers. Mr. Chairman.

Chairman Goodlatte. The gentleman from Michigan seeks recognition.

Mr. Conyers. I thank the chair, and I would point out

to my colleagues…

Chairman Goodlatte. The gentleman is recognized for five minutes.

Mr. Conyers. That I oppose the amendment, and the nature of a substitute. As already noted, H.R. 3624 raises several significant concerns, including the fact that it is unnecessary, that it will raise the party's litigation costs and burdens by imposing vague and subjective standards on courts considering motions to remand, and that it violates federalism. The substitute amendment fails to address any of these fundamental concerns, so my objections continue. In fact, the substitute amendment makes this flawed measure even worse, which only further heightens my opposition to this legislation, if that is possible.

For example, the substitute amendment would add more grounds for which a court could deny a motion to remand a diversity case, one of which is particularly concerning. Specifically, the substitute amendment requires a court to deny a motion to remand when it finds that there was "actual fraud and depleting of jurisdictional facts." As with the bill in general, there is no evidence of actual fraud in the joinder of in-state defendants in state cases. Moreover, this new requirement is designed simply to bolster the rhetorical point made by the bill's supporters that cases of fraudulent joinder actually involve fraud, when in fact the

term "fraudulent joinder" is a term of art meant to refer to improper joinder. In terms of substance, this actual fraud requirement, like the good faith intent requirement, forces a court to inquire into a plaintiff's subjective state of mind. In most cases, this will be a vague and difficult standard to apply, and may lead to more litigation and increased costs, and unnecessary complexity at a nascent stage of a case.

Members of the committee, I am also concerned about a new provision that effectively repeals the existing local defendant exemption to diversity jurisdiction, provided for in Section 1441(b)(2) of Title 28 of the United States Code. The addition of this provision simply illustrates the intent behind the bill, which is to deny plaintiffs their choice of a forum, and to deny state courts their ability to shape the law. The substitute amendment does nothing to alleviate my concerns with this bill, and appears, in my view, to make the bill worse. And so I continue my opposition to this measure, and urge my colleagues to do the same. I thank the chairman.

Chairman Goodlatte. The chair thanks the gentleman. What purpose does the gentleman from Michigan seek recognition?

Mr. Trott. Move to strike the last word.

Chairman Goodlatte. The gentleman is recognized for

five minutes.

Mr. Trott. I wanted to speak in favor of H.R. 3624 and the amendment. And, you know, the opponents of this amendment have offered several arguments as to why it is a bad idea. First, they have suggested that somehow the amendment in the bill is going to deny the plaintiff their day in court. That is not correct, they will have a day in court. It will just be in federal court. They have argued that the discovery will place an onerous burden on plaintiffs. That is not correct. All it will require is that the plaintiffs go into court, and prove that they have some reasonable basis for including the state defendant. Third, they have argued that it really is inconsistent with the idea of federalism, and what is contemplated in our Constitution. Well, I would submit that our Constitution recognized that forum shopping might state interests and jealousies to undermine and obstruct justice, and undermine the integrity of our courts, so the bill just tries to address that problem. And to deny that there is forum shopping in our judicial process is to be delusional.

But the argument that is most insulting is that this is just another bill to benefit corporations at the expense of poor plaintiffs. Well, when you allow forum shopping, and plaintiffs to go into state court, and the hypothetical that comes to my mind is, let us say you are a manufacturer in

Detroit, and you sell some parts to a company in Indianapolis, and the company in Indianapolis hires a trucking company in Indiana to go pick the parts, and you want to start a lawsuit in state court in Indiana, and you make up some ridiculous claim relating to the trucking company in Indiana so that you can end up in state court, and hometown the defendant in Detroit. If you cannot go into court, and state a reasonable basis for the claim against the trucking company in Indiana, then you belong in federal court. That is what our Constitution contemplates, that is what this bill will correct, and I strongly support the amendment, and yield back.

Chairman Goodlatte. The chair thanks the gentleman. What purpose does the gentleman from Georgia seek recognition?

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

Chairman Goodlatte. The gentleman is recognized for five minutes.

Mr. Johnson. Thank you, Mr. Chairman. I speak in opposition to the amendment. This is a legislative solution to a problem that is nonexistent. I guess there is a problem, though. The problem is that multinational corporations would prefer their claims, or claims against them, to be heard in federal courts, as opposed to state courts. Now, why is that? Why would multinational

corporations prefer to be sued in federal courts than in state courts? Well, it has to do with how the judges are selected. Judges are selected -- are nominated by the President and confirmed by the Senate. And speaking of legislative inaction, the Senate, if you pay close attention, has not been exercising its responsibility to confirm federal judges. We have got 72 federal judicial vacancies in existence now. Sixty-three of them in the district courts, the trial courts. Thirty-two judicial emergencies that -- judicial nominations have been pending for years, and now the backlog in federal court is such that a judicial emergency has been declared. So in our trial courts, where the makers of this bill would like to see cases go is backlogged, and so you do not get justice. Justice delayed is justice denied.

And then the Senate keeps refraining from confirming judges, and judges appointed by the executive branch, by the President, and they do not like the judges selected by the President. They would prefer to have a Republican, silk stocking Republican President, who can appoint silk stocking federal judges, multi-national corporate lawyers, appoint them to the bench so that they would be the ones that decide the cases. I would predict that if a Republican is elected President, you will see these judicial emergencies disappear, and a bunch of right-wing, free market, multi-

national corporate judges, silk stocking, all of them, will be appointed and confirmed, and then they will be the ones that decide the cases that are removed out of state court into federal court. Now, it is intriguing to me that my friends on the other side talk about states' rights. They are the party of states' rights. But ironically, they want to cut the people in the state's ability to bring a lawsuit in their own state court because they prefer for the feds to get it. And there is only one reason for that, and that is because the federal judges who they want to stack the courts with will decide the cases against the people and in favor of the corporations.

So let's not get sidetracked by the complicated rules for removal of cases to federal courts. The issue of diversity jurisdiction, joinder of parties, you know, all of those procedural niceties and requirements: yes, those are part of the federal law, but what they are looking to do with this legislation is to change 100 years of federal precedent in the law. They want to change that to fix a problem that does not exist. So I want the people to ask themselves, why are they doing that? Why do they want to take away your ability to sue in the state court where you live, instead of in some federal court stacked with silk stocking lawyers who prefer corporate defendants? Because that is the way that they were raised. That is who they

have been representing, and that is who they are predisposed to rule in favor of. And with that, I will yield the balance of my time.

Chairman Goodlatte. The question occurs on the amendment in the nature of a substitute.

All those in favor, respond by saying aye.

Those opposed, no.

In the opinion of the chair, the ayes have it, and the amendment in the nature of substitute is agreed to.

Where are we now? A reporting quorum being present.

Mr. Conyers. Mr. Chairman?

Chairman Goodlatte. Yes.

Mr. Conyers. May I put a statement into record please?

Chairman Goodlatte. Yes.

Mr. Conyers. This is a letter directed to yourself and me of 17 national organizations who strongly oppose H.R. 3624, the Fraudulent Joinder Prevention Act. I ask unanimous consent that it be entered into the record.

Chairman Goodlatte. Without objection, it will be made a part of the record. A reporting quorum being present, the question is on the motion to report the Bill H.R. 3624 as amended favorably to the House.

All those in favor, respond by saying aye.

Those opposed, no.

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

reported favorably.

Mr. Conyers. A recorded vote is…

Chairman Goodlatte. A vote has been requested, and the clerk will call the roll.

Ms. Williams. Mr. Goodlatte?

Chairman Goodlatte. Aye.

Ms. Williams. Mr. Goodlatte votes aye.

Mr. Sensenbrenner?

[No response.]

Mr. Smith?

[No response.]

Mr. Chabot?

Mr. Chabot. Aye.

Ms. Williams. Mr. Chabot votes aye.

Mr. Issa?

Mr. Issa. Aye.

Ms. Williams. Mr. Issa votes aye.

Mr. Forbes?

Mr. Forbes. Aye.

Ms. Williams. Mr. Forbes votes aye.

Mr. King?

Mr. King. Aye.

Ms. Williams. Mr. King votes aye.

Mr. Franks?

Mr. Franks. Aye.

Ms. Williams. Mr. Franks votes aye.

Mr. Gohmert?

Mr. Gohmert. Aye.

Ms. Williams. Mr. Gohmert votes aye.

Mr. Jordan?

[No response.]

Mr. Poe?

[No response.]

Mr. Chaffetz?

Mr. Chaffetz. Aye.

Ms. Williams. Mr. Chaffetz votes aye.

Mr. Marino?

Mr. Marino. Yes.

Ms. Williams. Mr. Marino votes yes.

Mr. Gowdy?

[No response.]

Mr. Labrador?

[No response.]

Mr. Farenthold?

[No response.]

Mr. Collins?

[No response.]

Mr. DeSantis?

[No response.]

Ms. Walters?

Ms. Walters. Aye.

Ms. Williams. Ms. Walters votes aye.

Mr. Buck?

Mr. Buck. Aye.

Ms. Williams. Mr. Buck votes aye.

Mr. Ratcliffe?

[No response.]

Mr. Trott?

Mr. Trott. Aye.

Ms. Williams. Mr. Trott votes aye.

Mr. Bishop?

Mr. Bishop. Aye.

Ms. Williams. Mr. Bishop votes aye.

Mr. Conyers?

Mr. Conyers. No.

Ms. Williams. Mr. Conyers votes no.

Mr. Nadler?

Mr. Nadler. No.

Ms. Williams. Mr. Nadler votes no.

Ms. Lofgren?

[No response.]

Ms. Jackson Lee?

[No response.]

Mr. Cohen?

Mr. Cohen. No.

Ms. Williams. Mr. Cohen votes no.

Mr. Johnson?

Mr. Johnson. No.

Ms. Williams. Mr. Johnson votes no.

Mr. Pierluisi?

[No response.]

Ms. Chu?

Ms. Chu. No.

Ms. Williams. Ms. Chu votes no.

Mr. Deutch?

[No response.]

Mr. Gutierrez?

[No response.]

Ms. Bass?

[No response.]

Mr. Richmond?

[No response.]

Ms. DelBene?

Ms. DelBene. No.

Ms. Williams. Ms. DelBene votes no.

Mr. Jeffries?

Mr. Jeffries. No.

Ms. Williams. Mr. Jeffries votes no.

Mr. Cicilline?

Mr. Cicilline. No.

Ms. Williams. Mr. Cicilline votes no.

Mr. Peters?

Mr. Peters. No.

Ms. Williams. Mr. Peters votes no.

Chairman Goodlatte. The gentleman from Puerto Rico.

Mr. Pierluisi. No.

Ms. Williams. Mr. Pierluisi votes no.

Chairman Goodlatte. Has every member voted who wishes to vote? The clerk will report.

Ms. Williams. Mr. Chairman, 13 members voted aye; 10 members voted no.

Chairman Goodlatte. The ayes have it, and the bill as amended is ordered reported favorably to the House. Members will have two days to submit views. And without objection, the bill will be reported as a single amendment in the nature of a substitute incorporating all adopted amendments, and staff is authorized to make technical and conforming changes. This concludes the business of the committee today. Thanks to all of our members for attending. And the mark up is adjourned.

[Whereupon, at 12:11 p.m., the committee adjourned subject to the call of the chair.]