

## **Union Calendar No. 435**

111th Congress, 2d Session - - - - - House Report 111-712

REPORT ON THE ACTIVITIES  
OF THE  
COMMITTEE ON THE JUDICIARY  
OF THE  
HOUSE OF REPRESENTATIVES  
DURING THE  
ONE HUNDRED ELEVENTH CONGRESS  
PURSUANT TO  
CLAUSE 1(d) RULE XI OF THE RULES OF THE  
HOUSE OF REPRESENTATIVES



JANUARY 3, 2011.—Committed to the Committee of the Whole House on  
the State of the Union and ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE

## COMMITTEE ON THE JUDICIARY

JOHN CONYERS, JR., Michigan, *Chairman*<sup>1</sup>

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DANIEL MAFFEI, New York	
JARED POLIS, Colorado	

<sup>1</sup>John Conyers, Jr., Michigan, elected to the Committee as Chairman pursuant to House Resolution 8, approved by the House January 6, 2009.

<sup>2</sup>Lamar Smith, elected to the Committee as ranking minority Member pursuant to House Resolution 12, approved by the House January 6, 2009.

Republican Members elected to the Committee pursuant to House Resolution 38, approved by the House January 9, 2009.

Democratic Members elected to the Committee pursuant to House Resolution 74, approved by the House January 21, 2009.

#### SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

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#### SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

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LINDA T. SÁNCHEZ, California	JASON CHAFFETZ, Utah
ANTHONY D. WEINER, New York	
CHARLES A. GONZALEZ, Texas	
JUDY CHU, California	

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TASK FORCE ON JUDICIAL IMPEACHMENT

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WILLIAM D. DELAHUNT, Massachusetts	F. JAMES SENSENBRENNER, JR., Wisconsin
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PEDRO PIERLUISI, Puerto Rico	LOUIE GOHMERT, Texas
CHARLES A. GONZALEZ, Texas	



## LETTER OF TRANSMITTAL

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HOUSE OF REPRESENTATIVES,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC, January 3, 2011.*

Hon. LORRAINE MILLER,  
*Clerk, House of Representatives,*  
*Washington, DC.*

DEAR Ms. MILLER: Pursuant to clause 1(d) of rule XI of the Rules of the House of Representatives, I am transmitting the report on the activities of the Committee on the Judiciary of the U.S. House of Representatives in the 111th Congress.

Sincerely,

JOHN CONYERS, Jr., *Chairman.*



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## Union Calendar No. 435

111TH CONGRESS }      HOUSE OF REPRESENTATIVES      {      REPORT  
2d Session      }      111-712

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### REPORT ON THE ACTIVITIES OF THE COMMITTEE ON THE JUDICIARY

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JANUARY 3, 2011.—Committed to the Committee of the Whole House on the State  
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Mr. CONYERS, from the Committee on the Judiciary,  
submitted the following

### R E P O R T

#### **Jurisdiction of the Committee on the Judiciary**

The jurisdiction of the Committee on the Judiciary is set forth in Rule X, 1.(k) of the rules of the House of Representatives for the 110th Congress:

#### **RULE X—ORGANIZATION OF COMMITTEES**

##### **COMMITTEES AND THEIR LEGISLATIVE JURISDICTIONS**

1. There shall be in the House the following standing committees, each of which shall have the jurisdiction and related functions assigned by this clause and clauses 2, 3, and 4. All bills, resolutions, and other matters relating to subjects within the jurisdiction of the standing committees listed in this clause shall be referred to those committees, in accordance with clause 2 of rule XII, as follows:

- (k) Committee on the Judiciary.
  - (1) The judiciary and judicial proceedings, civil and criminal.
  - (2) Administrative practice and procedure.
  - (3) Apportionment of Representatives.
  - (4) Bankruptcy, mutiny, espionage, and counterfeiting.
  - (5) Civil liberties.
  - (6) Constitutional amendments.
  - (7) Criminal law enforcement.
  - (8) Federal courts and judges, and local courts in the Territories and possessions.
  - (9) Immigration policy and nonborder enforcement.
  - (10) Interstate compacts generally.

- (11) Claims against the United States.
- (12) Meetings of Congress; attendance of Members, Delegates, and the Resident Commissioner; and their acceptance of incompatible offices.
- (13) National penitentiaries.
- (14) Patents, the Patent and Trademark Office, copyrights, and trademarks.
- (15) Presidential succession.
- (16) Protection of trade and commerce against unlawful restraints and monopolies.
- (17) Revision and codification of the Statutes of the United States.
- (18) State and territorial boundary lines.
- (19) Subversive activities affecting the internal security of the United States.

## Tabulation of Legislation and Activity

### LEGISLATION REFERRED TO COMMITTEE

#### Public Legislation:

House bills .....	818
House joint resolutions .....	59
House concurrent resolutions .....	29
House resolutions .....	126
	1,032
Senate bills .....	21
Senate joint resolutions .....	3
Senate concurrent resolutions .....	2
	26
Subtotal .....	1,058

#### Private Legislation:

House bills (claims) .....	0
House bills (copyrights) .....	1
House bills (immigration) .....	62
House resolutions (claims) .....	2
	65
Senate bills (claims) .....	0
Senate bills (immigration) .....	1
	1
Subtotal .....	66
Total .....	1,124

### ACTION ON LEGISLATION NOT REFERRED TO COMMITTEE

#### Held at desk for House action:

Senate bills .....	12
	12
Conference appointments:	
House bills .....	1
Senate bills .....	0
	1
Total .....	13

### FINAL ACTION

House concurrent resolutions approved (public) .....	8
House resolutions approved (public) .....	58
Public legislation vetoed by the President .....	1
Public Laws .....	54
Private Laws .....	2

**Printed Hearings***Serial No. and Title*

- 
1. District of Columbia House Voting Rights Act of 2009. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. January 27, 2009. (H.R. 157).
  2. Midnight Rulemaking: Shedding Some Light. Subcommittee on Commercial and Administrative Law. February 4, 2009.
  3. Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses. Committee on the Judiciary. February 25, 2009.
  4. Libel Tourism. Subcommittee on Commercial and Administrative Law. February 12, 2009.
  5. Lost Educational Opportunities in Alternative Settings. Subcommittee on Crime, Terrorism, and Homeland Security jointly with the Subcommittee on Healthy Families and Communities of the Committee on Education and Labor. March 12, 2009.
  6. Circuit City Unplugged: Why Did Chapter 11 Fail to Save 34,000 Jobs? Subcommittee on Commercial and Administrative Law. March 11, 2009.
  7. Carmelo Rodriguez Military Medical Accountability Act of 2009. Subcommittee on Commercial and Administrative Law. March 24, 2009. (H.R. 1478).
  8. Performance Rights Act. Committee on the Judiciary. March 10, 2010. (H.R. 848).
  9. Consumer Debt: Are Credit Cards Bankrupting Americans? Subcommittee on Commercial and Administrative Law. April 2, 2009.
  10. Helping Families Save Their Homes in Bankruptcy Act of 2009 and the Emergency Homeownership and Equity Protection Act. Committee on the Judiciary. January 22, 2009. (H.R. 200, H.R. 225).
  11. To Consider the Possible Impeachment of United States District Judge Samuel B. Kent. Task Force on Judicial Impeachment. June 3, 2009.
  12. James Zadroga 9/11 Health and Compensation Act of 2009. Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law jointly with the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. March 31, 2009. (H.R. 847).
  13. Treatment of Latin Americans of Japanese Descent, European Americans, and Jewish Refugees During World War II. Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. March 19, 2009.
  14. State Secret Protection Act of 2009. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. June 4, 2009. (H.R. 984).
  15. Youth Violence: Trends, Myths, and Solutions. Subcommittee on Crime, Terrorism, and Homeland Security. February 11, 2009.
  16. Lessons Learned from the 2008 Election. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. March 19, 2009.
  17. Continuity of Congress in the Wake of a Catastrophic Attack. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. July 23, 2009.
  18. Legal Issues Surrounding the Military Commissions System. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. July 8, 2009.
  19. Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws. Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law jointly with the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. April 2, 2009.
  20. Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States? Subcommittee on Crime, Terrorism, and Homeland Security. March 26, 2009.
  21. Sex Offender Registration and Notification Act (SORNA): Barriers to Timely Compliance by States. Subcommittee on Crime, Terrorism, and Homeland Security. March 10, 2009.
  22. Ramifications of Auto Industry Bankruptcies (Part 1). Committee on the Judiciary. May 21, 2009.
  23. VoIP: Who Has Jurisdiction to Tax It? Subcommittee on Commercial and Administrative Law. March 31, 2009.
  24. Trends Affecting Minority Broadcast Ownership. Committee on the Judiciary. July 9, 2009.
  25. Escalating Violence in Mexico and the Southwest Border as a Result of the Illicit Drug Trade. Subcommittee on Crime, Terrorism, and Homeland Security. May 6, 2009.

26. Proposals for Reform of the Military Commissions System. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. July 30, 2009.
27. Unfairness in Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity? Subcommittee on Crime, Terrorism, and Homeland Security. May 21, 2009. (H.R. 1459, H.R. 1466, H.R. 265, H.R. 2178, H.R. 18).
28. National Research Council's Publication "Strengthening Forensic Science in the United States: A Path Forward". Subcommittee on Crime, Terrorism, and Homeland Security. May 13, 2009.
29. Indigent Representation: A Growing National Crisis. Subcommittee on Crime, Terrorism, and Homeland Security. June 4, 2009.
30. Federal Bureau of Investigation. Committee on the Judiciary. May 20, 2009.
31. Competition and Commerce in Digital Books. Committee on the Judiciary. September 10, 2009.
32. Civil Rights Under Fire: Recent Supreme Court Decisions. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. October 8, 2009.
33. Too Big to Fail?: The Role of Antitrust Law in Government-Funded Consolidation in the Banking Industry. Subcommittee on Courts and Competition Policy. March 17, 2009.
34. A Constitutional Amendment Concerning Senate Vacancies. Subcommittee on the Constitution, Civil Rights, and Civil Liberties, jointly with the Subcommittee on the Constitution of the Senate Judiciary Committee. March 11, 2009. (S.J.Res 7, H.J.Res. 21).
35. USA PATRIOT Act. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. September 22, 2009.
36. Access to Justice Denied: Ashcroft v. Iqbal. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. October 27, 2009.
37. Bye, Bye, Bargains? Retail Price Fixing, the Leegin Decision, and Its Impact on Consumer Prices. Subcommittee on Courts and Competition Policy. April 28, 2009.
38. A New Age for Newspapers: Diversity of Voices, Competition, and the Internet. Subcommittee on Courts and Competition Policy. April 21, 2009.
39. Federal Arbitration Act: Is the Credit Card Industry Using It to Quash Legal Claims? Subcommittee on Commercial and Administrative Law. May 5, 2009.
40. Sunshine in Litigation Act of 2009. Subcommittee on Commercial and Administrative Law. June 4, 2009. (H.R. 1508).
41. Cell Tax Fairness Act of 2009. Subcommittee on the Commercial and Administrative Law. June 9, 2009.
42. Bankruptcy Judgeship Needs. Subcommittee on Commercial and Administrative Law. June 16, 2009.
43. To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr. (Part I). Task Force on Judicial Impeachment. November 17, 18, 2009.
44. To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr. (Part II). Task Force on Judicial Impeachment. December 8, 2009.
45. To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr. (Part III). Task Force on Judicial Impeachment. December 10, 2009.
46. To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr. (Part IV). Task Force on Judicial Impeachment. December 15, 2009.
47. Juvenile Justice Accountability and Improvement Act of 2009. Subcommittee on Crime, Terrorism, and Homeland Security. June 9, 2009.
48. Mandatory Minimums and Unintended Consequences. Subcommittee on Crime, Terrorism, and Homeland Security. July 14, 2009. (H.R. 2934, H.R. 834, H.R. 1466).
49. National Prison Rape Elimination Commission Report and Standards. Subcommittee on Crime, Terrorism, and Homeland Security. July 8, 2009.
50. Role of the Lending Industry in the Home Foreclosure Crisis. Subcommittee on Commercial and Administrative Law. September 9, 2009.
51. Proposals to Fight Fraud and Protect Taxpayers. Committee on the Judiciary. April 1, 2009. (H.R. 1748, H.R. 1292, H.R. 1667, H.R.1788, H.R. 1779, H.R. 1793, H.R. 78).
52. Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements. Subcommittee on Commercial and Administrative Law. June 25, 2009.
53. Home Foreclosures: Will Voluntary Mortgage Modification Help Families Save Their Homes? (Part I). Subcommittee on Commercial and Administrative Law. July 9, 2009.
54. Ramifications of Auto Industry Bankruptcies (Part II). Subcommittee on Commercial and Administrative Law. July 21, 2009.

55. Ramifications of Auto Industry Bankruptcies (Part III). Subcommittee on Commercial and Administrative Law. July 22, 2009.
56. Medical Debt: Is Our Healthcare System Bankrupting Americans? Subcommittee on Commercial and Administrative Law. July 28, 2009.
57. Mandatory Binding Arbitration: Is it Fair and Voluntary? Subcommittee on Commercial and Administrative Law. September 15, 2009.
58. An Undue Hardship? Discharging Educational Debt in Bankruptcy. Subcommittee on Commercial and Administrative Law. September 23, 2009.
59. Legal Services Corporation. Subcommittee on Commercial and Administrative Law. October 27, 2009.
60. Too Big to Fail: The Role for Bankruptcy and Antitrust Law in Financial Regulation Reform (Part I). Subcommittee on Commercial and Administrative Law. October 22, 2009.
61. Protecting Employees in Airline Bankruptcies. Subcommittee on Commercial and Administrative Law. December 16, 2009.
62. Competition in the Ticketing and Promotion Industry. Subcommittee on Courts and Competition Policy. February 26, 2009.
63. Railroad Antitrust Enforcement Act of 2009. Subcommittee on Courts and Competition Policy. May 19, 2009. (H.R. 233).
64. Transparency and Integrity in Corporate Monitoring. Subcommittee on Commercial and Administrative Law. November 19, 2009.
65. Home Foreclosures: Will Voluntary Mortgage Modification Help Families Save Their Homes? (Part II). Subcommittee on Commercial and Administrative Law. December 11, 2009.
66. Impact of Federal Habeas Corpus Limitations on Death Penalty Appeals. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. December 8, 2009.
67. Over-Criminalization of Conduct/Over-Federalization of Criminal Law. Subcommittee on Crime, Terrorism, and Homeland Security. July 22, 2009.
68. State Taxation: The Role of Congress in Defining Nexus. Subcommittee on Commercial and Administrative Law. February 4, 2010.
69. Domestic and International Trademark Implications of HAVANA CLUB and Section 211 of the Omnibus Appropriations Act of 1999. Committee on the Judiciary. March 3, 2010.
70. Expansion of Top Level Domains and Its Effects on Competition. Subcommittee on Courts and Competition Policy. September 23, 2009.
71. First Amendment and Campaign Finance Reform After Citizens United. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. February 3, 2010.
72. Executive Accountability Act of 2009. Subcommittee on Crime, Terrorism, and Homeland Security. July 27, 2009. (H.R. 743).
73. Biologics and Biosimilars: Balancing Incentives for Innovation. Subcommittee on Courts and Competition Policy. July 14, 2009.
74. Reauthorization of the Innocence Protection Act. Subcommittee on Crime, Terrorism, and Homeland Security. September 22, 2009.
75. Crime Victims Rights Act of 2004. Subcommittee on Crime, Terrorism, and Homeland Security. September 29, 2009.
76. Cyberbullying and Other Online Safety Issues for Children. Subcommittee on Crime, Terrorism, and Homeland Security. September 30, 2009. (H.R. 1966, H.R. 3630).
77. Girls in the Juvenile Justice System: Strategies to Help Girls Achieve Their Full Potential. Subcommittee on Crime, Terrorism, and Homeland Security. October 20, 2009.
78. Racial Disparities in the Criminal Justice System. Subcommittee on Crime, Terrorism, and Homeland Security. October 29, 2009.
79. Equal Justice for Our Military Act of 2009. Subcommittee on Courts and Competition Policy. June 11, 2009. (H.R. 569).
80. Protecting the American Dream (Part I): A Look at the Fair Housing Act. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. March 11, 2010.
81. Civil Rights Division of the Department of Justice. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. December 3, 2009.
82. Legal Issues Relating to Football Head Injuries (Part I and Part II). Committee on the Judiciary. October 28, 2009 and January 4, 2010.
83. Department of Justice With Attorney General Eric Holder. Committee on the Judiciary. May 14, 2009.
84. Democracy Restoration Act of 2009. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. March 16, 2010. (H.R. 3335).
85. Report by the Office of the Inspector General of the Department of Justice on the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Re-

- quests for Telephone Records. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. April 14, 2010.
86. Youth Prison Reduction Through Opportunities, Mentoring, Intervention, Support, and Education (PROMISE) Act. Subcommittee on Crime, Terrorism, and Homeland Security. July 15, 2009. (H.R. 1064).
87. Civil Access to Justice Act of 2009. Subcommittee on Commercial and Administrative April 27, 2010. (H.R. 3764).
88. Protecting the American Dream (Part II): Combating Predatory Lending Under the Fair Housing Act. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. April 29, 2010.
89. Federal Bureau of Prisons Oversight. Subcommittee on Crime, Terrorism, and Homeland Security. July 21, 2009.
90. State Taxation: The Impact of Congressional Legislation on State and Local Government Revenues. Subcommittee on Commercial and Administrative Law. April 15, 2010.
91. Private Student Loan Bankruptcy Fairness Act of 2010. Subcommittee on Commercial and Administrative Law. April 22, 2010. (H.R. 5043).
92. Patent Reform Act of 2009. Committee on the Judiciary. April 30, 2009. (H.R. 1260).
93. State Taxation: The Role of Congress in Developing Apportionment Standards. Subcommittee on Commercial and Administrative Law. May 6, 2010.
94. Piracy of Live Sports Broadcasting Over the Internet. Committee on the Judiciary. December 16, 2009.
95. Achieving the Promise of the Americans with Disabilities Act in the Digital Age—Current Issues, Challenges, and Opportunities. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. April 22, 2010.
96. Combating Organized Retail Crime—The Role of Federal Law Enforcement. Subcommittee on Crime, Terrorism, and Homeland Security. November 5, 2009.
97. To Amend Title 18, United States Code, to Include Constrictor Snakes of the Species Python Genera as Injurious Animal. Subcommittee on Crime, Terrorism, and Homeland Security. November 6, 2009. (H.R. 2811)
98. Electronic Communications Privacy Act Reform. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. May 5, 2010.
99. Help Find the Missing Act or Billy's Law. Subcommittee on Crime, Terrorism, and Homeland Security. January 21, 2010. (H.R. 3695).
100. Keeping Youth Safe While In Custody: Sexual Assault in Adult and Juvenile Facilities. Subcommittee on Crime, Terrorism, and Homeland Security. February 23, 2010.
101. Credit Card Fair Fee Act of 2009. Committee on the Judiciary. April 28, 2010. (H.R. 2695).
102. Recent Inspector General Reports Concerning the FBI. Subcommittee on Crime, Terrorism, and Homeland Security. February 24, 2010.
103. Ethical Imperative for Reform of Our Immigration System. Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. July 14, 2010.
104. United States Citizenship and Immigration Services. Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. March 23, 2010.
105. Pay to Delay: Are Patent Settlements that Delay Generic Drug Market Entry Anticompetitive? Subcommittee on Courts and Competition Policy. June 3, 2009.
106. Too Big to Fail: The Role for Bankruptcy and Antitrust Law in Financial Regulation Reform (Part II). Subcommittee on Courts and Competition Policy. November 17, 2009.
107. Competition in the Airline Industry. Committee on the Judiciary. June 16, 2010.
108. Protecting Older Workers Against Discrimination Act. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. June 10, 2010. (H.R. 3721).
109. ECPA Reform and the Revolution in Location Based Technologies and Services. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. June 24, 2010.
110. Americans with Disabilities Act at 20—Celebrating Our Progress, Affirming Our Commitment. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. July 22, 2010.
111. Executive Office for Immigration Review. Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. June 17, 2010.
112. Design Patents and Auto Replacement Parts. Committee on the Judiciary. March 22, 2010.

113. Enforcement of the Criminal Laws Against Medicare and Medicaid Fraud. Subcommittee on Crime, Terrorism, and Homeland Security. March 4, 2010.
114. Criminal Justice Reinvestment Act of 2009, and the Honest Opportunity Probation with Enforcement (HOPE) Initiative Act of 2009. Subcommittee on Crime, Terrorism, and Homeland Security. May 11, 2010. (H.R. 4080, H.R. 4055).
115. Rape Kit Backlogs: Failing the Test of Providing Justice to Sexual Assault Survivors. Subcommittee on Crime, Terrorism, and Homeland Security. May 20, 2010.
116. Sharing and Analyzing Information to Prevent Terrorism. Committee on the Judiciary. March 24, 2010.
117. Impact of China's Antitrust Law and Other Competition Policies on U.S. Companies. Subcommittee on Courts and Competition Policy. July 13, 2010.
118. Examining the State of Judicial Recusals After *Caperton v. A.T. Massey*. Subcommittee on Courts and Competition Policy. December 10, 2009.
119. Is There Life After *Trinko* and *Credit Suisse*? The Role of Antitrust in Regulated Industries. Subcommittee on Courts and Competition Policy. June 15, 2010.
120. Health Insurance Industry Antitrust Enforcement Act of 2009. Subcommittee on Courts and Competition Policy. October 8, 2009. (H.R. 3596).
121. Competition in the Media and Entertainment Distribution Market. Committee on the Judiciary. February 25, 2010.
122. End Discriminatory State Taxes for Automobile Renters Act of 2009. Subcommittee on Commercial and Administrative Law. June 15, 2010. (H.R. 4175).
123. Protecting Employees and Retirees in Business Bankruptcies Act of 2010. Subcommittee on Commercial and Administrative Law. May 25, 2010. (H.R. 4677).
124. Open Access to the Courts Act of 2009. Subcommittee on Courts and Competition Policy. December 16, 2009. (H.R. 4115).
125. Legal Issues Concerning State Alcohol Regulation. Subcommittee on the Courts and Competition Policy. March 18, 2010.
126. Antitrust Implications of *American Needle v. NFL*. Subcommittee on Courts and Competition Policy. January 20, 2010.
127. Administrative Conference of the United States. Subcommittee on Commercial and Administrative Law. May 20, 2010.
128. Removal Clarification Act of 2010. Subcommittee on Courts and Competition Policy. May 25, 2010. (H.R. 5281).
129. *United States v. Stevens*: The Supreme Court's Decision Invalidating the Crush Video Statute. Subcommittee on Crime, Terrorism, and Homeland Security. May 26, 2010.
130. Legal Liability Issues Surrounding the Gulf Coast Oil Disaster. Committee on the Judiciary. May 27, 2010.
131. Racial Profiling and the Use of Suspect Classifications in Law Enforcement Policy. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. June 17, 2010.
132. Civil Division of the United States Department of Justice. Subcommittee on Commercial and Administrative Law. June 24, 2010.
133. Federal Trade Commission's Bureau of Competition and the U.S. Department of Justice's Antitrust Division. Subcommittee on Courts and Competition Policy. July 27, 2010.
134. Tribal Law and Order Act of 2009. Subcommittee on Crime, Terrorism, and Homeland Security. December 10, 2009. (H.R. 1924).
135. United States Patent and Trademark Office. Committee on the Judiciary. May 5, 2010.
136. United States Department of Justice. Committee on the Judiciary. May 13, 2010.
137. Senior Financial Empowerment Act of 2009. Subcommittee on Crime, Terrorism, Homeland Security. May 25, 2010. (H.R. 3040).
138. Proposed Combination of Comcast and NBC-Universal. Committee on the Judiciary. June 7, 2010.
139. Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated. Subcommittee on Crime, Terrorism, and Homeland Security. June 9, 2010.
140. Role and Operations of the United States Secret Service. Subcommittee on Crime, Terrorism, and Homeland Security. June 29, 2010.
141. Medical Bankruptcy Fairness Act. Subcommittee on Commercial and Administrative Law. July 15, 2010. (H.R. 901).
142. Ensuring Justice for Victims of the Gulf Coast Oil Disaster. Committee on the Judiciary. July 21, 2010.
143. Federal Rulemaking and the Regulatory Process. Subcommittee on Commercial and Administrative Law. July 27, 2010.

144. Online Privacy, Social Networking, and Crime Victimization. Subcommittee on Crime, Terrorism, and Homeland Security. July 28, 2010.
145. Protecting the American Dream (Part III): Advancing and Improving the Fair Housing Act on the 5-Year Anniversary of Hurricane Katrina. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. July 29, 2010.
146. Domestic Minor Sex Trafficking. Subcommittee on Crime, Terrorism, and Homeland Security. September 15, 2010.
147. Competition in the Evolving Digital Marketplace. Subcommittee on Courts and Competition Policy. September 16, 2010.
148. Holocaust Insurance Accountability Act of 2010. Subcommittee on Commercial and Administrative Law. September 22, 2010.
149. ECPA Reform and the Revolution in Cloud Computing. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. September 23, 2010.
150. Protecting America's Harvest. Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. September 24, 2010.
151. Reining in Overcriminalization: Assessing the Problems, Proposing Solutions. Subcommittee on Crime, Terrorism, and Homeland Security. September 28, 2010.
152. Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010. Committee on the Judiciary. September 29, 2010.
153. Courtroom Use: Access to Justice, Effective Judicial Administration, and Courtroom Security. Subcommittee on Courts and Competition Policy. September 29, 2010.
154. Reauthorization of the Second Chance Act. Subcommittee on Crime, Terrorism, and Homeland Security. September 29, 2010.
155. Role of Immigration in Strengthening America's Economy. Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. September 30, 2010.
156. Faith-Based Initiatives: Recommendations of the President's Advisory Council on Faith-Based and Community Partnerships and Other Current Issues. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. November 18, 2010.
157. Antitrust Laws and Their Effects on Healthcare Providers, Insurers, and Patients. Subcommittee on Courts and Competition Policy. December 1, 2010.
158. Foreclosed Justice: Causes and Effects of the Foreclosure Crisis (Part I and II). Committee on the Judiciary. December 2, 15, 2010.
159. Civil Liberties and the National Security. Subcommittee on the Constitution, Civil Rights, and Civil Liberties. December 9, 2010.
160. Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks. Committee on the Judiciary. December 16, 2010.

#### **Committee Prints**

##### *Serial No. and Title*

1. Federal Rules of Appellate Procedure. December 1, 2009.
2. Federal Rules of Civil Procedure. December 1, 2009.
3. Federal Rules of Criminal Procedure. December 1, 2009.
4. Federal Rules of Evidence. December 1, 2009.
5. Federal Rules of Bankruptcy. December 1, 2009.
6. Federal Rules of Appellate Procedure. December 1, 2010.
7. Federal Rules of Civil Procedure. December 1, 2010.
8. Federal Rules of Criminal Procedure. December 1, 2010.
9. Federal Rules of Evidence. December 1, 2010.
10. Federal Rules of Bankruptcy. December 1, 2010.

#### **House Documents**

##### *H. Doc. No. and Title*

- 111-7. National Drug Control Strategy 2009 Annual Report. Message from the President of the United States transmitting the Administration's 2009 National Drug Control Strategy, pursuant to 21 U.S.C. 1504. Referred jointly to the Committees on Armed Services, Education and Labor, Energy and Commerce, Foreign Affairs, Homeland Security, Judiciary, Natural Resources, Oversight and Government Reform, Small Business, Transportation and Infrastructure, Veterans' Affairs, and Ways and Means. January 15, 2009. (Presidential Message No. 005).
- 111-28. Amendments to the Federal Rules of Appellate Procedure. Communication from the Chief Justice, the Supreme Court of the United States transmitting amendments to the Federal Rules of Appellate Procedure that have been adopted

by the Supreme Court, pursuant to 28 U.S.C. 2074. Referred to the Committee on the Judiciary. April 21, 2009. (Executive Communication No. 01263).

111-29. Amendments to the Federal Rules of Civil Procedure. Communication from the Chief Justice, the Supreme Court of the United States transmitting amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court, pursuant to 28 U.S.C. 2072. Referred to the Committee on the Judiciary. April 21, 2009. (Executive Communication No. 01264).

111-30. Amendments to the Federal Rules of Criminal Procedure. Communication from the Chief Justice, the Supreme Court of the United States transmitting amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court, pursuant to 28 U.S.C. 2074. Referred to the Committee on the Judiciary. April 21, 2009. (Executive Communication No. 01265).

111-31. Amendments to the Federal Rules of Bankruptcy Procedure. Communication from the Chief Justice, the Supreme Court of the United States transmitting amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court, pursuant to 28 U.S.C. 2075. Referred to the Committee on the Judiciary. April 21, 2009. (Executive Communication No. 01266).

111-107. National Drug Control Strategy 2010. Message from the President of the United States transmitting the Administration's 2010 National Drug Control Strategy, pursuant to 21 U.S.C. 1504. Referred jointly to the Committees on Armed Services, Education and Labor, Energy and Commerce, Foreign Affairs, Homeland Security, Judiciary, Natural Resources, Oversight and Government Reform, Small Business, Transportation and Infrastructure, Veterans' Affairs, and Ways and Means. May 12, 2010. (Presidential Message No. 0060).

111-110. Amendments to the Federal Rules of Criminal Procedure. Communication from the Chief Justice, the Supreme Court of the United States transmitting amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court, pursuant to 28 U.S.C. 2074. Referred to the Committee on the Judiciary. May 13, 2010. (Executive Communication No. 07472).

111-111. Amendments to the Federal Rules of Civil Procedure. Communication from the Chief Justice, the Supreme Court of the United States transmitting amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court, pursuant to 28 U.S.C. 2072. Referred to the Committee on the Judiciary. May 13, 2010. (Executive Communication No. 07473).

111-112. Amendments to the Federal Rules of Appellate Procedure. Communication from the Chief Justice, the Supreme Court of the United States transmitting amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court, pursuant to 28 U.S.C. 2074. Referred to the Committee on the Judiciary. May 13, 2010. (Executive Communication No. 07474).

111-113. Amendments to the Federal Rules of Evidence. Communication from the Chief Justice, the Supreme Court of the United States transmitting amendments to the Federal Rules of Evidence that have been adopted by the Supreme Court, pursuant to 28 U.S.C. 2072. Referred to the Committee on the Judiciary. May 13, 2010. (Executive Communication No. 07475).

111-114. Amendments to the Federal Rules of Bankruptcy Procedure. Communication from the Chief Justice, the Supreme Court of the United States transmitting amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court, pursuant to 28 U.S.C. 2075. Referred to the Committee on the Judiciary. May 13, 2010. (Executive Communication No. 07476).

111-152. Veto Message on H.R. 3808. Message from the President of the United States transmitting notification of the veto of H.R. 3808, the "Interstate Recognition of Notarizations Act of 2010". Referred to the Committee on the Judiciary. November 18, 2010. (Presidential Message No. 0074).

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#### Legislation Enacted into Law

A variety of legislation within the Committee's jurisdiction was enacted into law during the 110th Congress. The public laws are listed below and are more fully detailed in the subsequent sections of this report recounting the activities of the Committee and its individual subcommittees.

#### Public Laws

Public Law 111-2. Lilly Ledbetter Fair Pay Act of 2009. (S. 181). (Approved January 29, 2009).

Public Law 111-9. To extend certain immigration programs. (H.R. 1127). (Approved March 20, 2009).

- Public Law 111–10. Fraud Enforcement and Recovery Act. (S. 386). (Approved May 20, 2009).
- Public Law 111–16. Statutory Time-Periods Technical Amendments Act of 2009. (H.R. 1626). (Approved May 7, 2009).
- Public Law 111–22. Helping Families Save Their Homes Act of 2009. (S. 896). (Approved May 20, 2009).
- Public Law 111–30. Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Extension Act. (H.R. 2675). (Approved June 19, 2009).
- Public Law 111–36. Webcaster Settlement Act of 2009. (H.R. 2344). (Approved June 30, 2009).
- Public Law 111–41. Korean War Veterans Recognition Act. (H.R. 2632). (Approved July 27, 2009).
- Public Law 111–45. To authorize the Director of the United States Patent and Trademark Office to use funds made available under the Trademark Act of 1946 for patent operations in order to avoid furloughs and reductions-in-force, and for other purposes. (H.R. 3114). (Approved August 7, 2009).
- Public Law 111–48. Miami Dade College Land Conveyance Act. (H.R. 838). (Approved August 12, 2009).
- Public Law 111–49. Judicial Survivors Protection Act of 2009. (S. 1107). (Approved August 12, 2009).
- Public Law 111–62. A joint resolution granting the consent and approval of Congress to amendments made by the State of Maryland, the Commonwealth of Virginia, and the District of Columbia to the Washington Metropolitan Area Transit Regulation Compact. (S.J.Res. 19). (Approved August 19, 2009).
- Public Law 111–79. Foreign Evidence Request Efficiency Act of 2009. (S.1289). (Approved October 19, 2009).
- Public Law 111–83. Department of Homeland Security Appropriations Act, 2010. (H.R. 2892). (Approved October 28, 2009).
- Public Law 111–94. Proclaiming Casimir Pulaski to be an honorary citizen of the United States posthumously. (H.J.Res. 26). (Approved November 6, 2009).
- Public Law 111–95. A bill to amend title 36, United States Code, to grant a federal charter to the Military Officers Association of America, and for other purposes. (S. 832). (Approved November 6, 2009).
- Public Law 111–113. Reserve Officers Association Modernization Act of 2009. (S. 1599). (Approved December 14, 2009).
- Public Law 111–122. Human Rights Enforcement Act of 2009. (S. 1472). (Approved December 22, 2009).
- Public Law 111–141. An act to extend expiring provisions of the USA PATRIOT Improvement and Reauthorization Act of 2005 and Intelligence Reform and Terrorism Prevention Act of 2004 until February 28, 2011. (H.R. 3961). (Approved February 27, 2010).
- Public Law 111–143. Criminal History Background Checks Pilot Extension Act of 2009. (S. 2950) (Approved March 1, 2010).
- Public Law 111–144. Temporary Extension Act of 2010. (H.R. 4691). (Approved March 2, 2010).
- Public Law 111–145. Travel Promotion Act of 2009. (H.R. 1299). (Approved March 4, 2010).
- Public Law 111–146. Trademark Technical and Conforming Amendment Act of 2010. (S. 2968). (Approved March 17, 2010).
- Public Law 111–154. Prevent All Cigarette Trafficking Act of 2009. (S. 1147). (Approved March 31, 2010).
- Public Law 111–157. Continuing Extension Act of 2010. (H.R. 4851). (Approved April 15, 2010).
- Public Law 111–160. A joint resolution granting the consent and approval of Congress to amendments made by the State of Maryland, the Commonwealth of Virginia, and the District of Columbia to the Washington Metropolitan Area Transit Regulation Compact. (S.J.Res. 25) (Approved April 14, 2010).
- Public Law 111–174. Federal Judiciary Administrative Improvements Act of 2010. (S. 1782). (Approved May 27, 2010).
- Public Law 111–175. Satellite Television Extension and Localism Act of 2010. (S. 3333). (Approved May 12, 2010).
- Public Law 111–190. To amend the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 to extend the operation of such Act, and for other purposes. (H.R. 5330). (Approved June 9, 2010).
- Public Law 111–192. Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010. (H.R. 3962). (Approved June 25, 2010).
- Public Law 111–203. Dodd-Frank Wall Street Reform and Consumer Protection Act. (H.R. 4173). (Approved July 21, 2010).

- Public Law 111-211. Indian Arts and Crafts Amendments Act of 2010. (H.R. 725). (Approved July 29, 2010).
- Public Law 111-220. Fair Sentencing Act of 2010. (S. 1789). (Approved August 3, 2010).
- Public Law 111-223. Securing the Protection of Our Enduring and Established Constitutional Heritage Act. (H.R. 2765). (Approved August 10, 2010).
- Public Law 111-225. Cell Phone Contraband Act of 2010. (S. 1749). (Approved August 10, 2010).
- Public Law 111-268. Combat Methamphetamine Enhancement Act of 2010. (H.R. 2923). (Approved October 12, 2010).
- Public Law 111-272. Law Enforcement Officers Safety Act Improvements Act of 2010. (S. 1132). (Approved October 12, 2010).
- Public Law 111-273. Secure and Responsible Drug Disposal Act of 2010. (S. 3397). (Approved October 12, 2010).
- Public Law 111-287. International Adoption Simplification Act. (S. 1376). (Approved November 30, 2010).
- Public Law 111-293. Help HAITI Act of 2010. (H.R. 5283). (Approved December 9, 2010).
- Public Law 111-294. Animal Crush Video Prohibition Act of 2010. (H.R. 5566). (Approved December 9, 2010).
- Public Law 111-295. Copyright Cleanup, Clarification, and Corrections Act of 2010. (S. 3689). (Approved December 9, 2010).
- Public Law 111-306. A bill to require the accreditation of English language training programs, and for other purposes. (S. 1338). (Approved December 14, 2010).
- Public Law 111-307. Asian Carp Prevention and Control Act. (S. 1421). (Approved December 14, 2010).
- Public Law 111-314. Charles 'Pete' Conrad Astronomy Awards Act. (H.R. 3237). (Approved December 18, 2010).
- Public Law 111-327. Bankruptcy Technical Corrections Act of 2010. (H.R. 6198). (Approved December 22, 2010).
- Public Law 111-341. Criminal History Background Checks Pilot Extension Act of 2010. (S. 3998). (Approved December 22, 2010).
- Public Law 111-342. Preserving Foreign Criminal Assets for Forfeiture Act of 2010. (S. 4005). (Approved December 22, 2010).
- Public Law 111-347. James Zadroga 9/11 Health and Compensation Act of 2010. (H.R. 847). (Approved January 2, 2011).
- Public Law 111-349. To establish a pilot program in certain United States district courts to encourage enhancement of expertise in patent cases among district judges. (H.R. 628). (Approved January 4, 2011).
- Public Law 111-350. To enact certain laws relating to public contracts as title 41, United States Code, "Public Contracts". (H.R. 1107). (Approved January 4, 2011).
- Public Law 111-369. Access to Criminal History Records for State Sentencing Commissions Act of 2010. (H.R. 6412). (Approved January 4, 2011).
- Public Law 111-356. Northern Border Counternarcotics Strategy Act of 2010. (H.R. 4748). (Approved January 4, 2011).
- Public Law 111-364. Diesel Emissions Reduction Act of 2010. (H.R. 5809). (Approved January 4, 2011).

### **Private Laws**

Private Law 111–1. A bill for the relief of Shigeru Yamada. (S. 4010). (Approved December 22, 2010).

Private Law 111–2. Private bill for the relief of Hotaru Nakama Ferschke. (S. 1774). (Approved December 22, 2010).

### **Conference Appointments**

Members of the Committee were named by the Speaker as conferees on the following bills which were not referred to the Committee but which contained legislative language within the Committee's Rule X jurisdiction:

H.R. 4173—A bill to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end “too big to fail”, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes. “Dodd-Frank Wall Street Reform and Consumer Protection Act”. Passed the House December 11, 2009 (223 yeas; 202 nays). Passed the Senate, amended, May 20, 2010 (59 yeas; 39 nays). The Senate requested a conference May 20, 2010. The Senate appointed conferees May 25, 2010. The House agreed to a conference and appointed conferees June 9, 2010 (including from the Committee on the Judiciary). Conference report filed in the House June 29, 2010 (H. Rept. 111–517). The House agreed to the conference report June 30, 2010 (237 yeas; 192 nays). The Senate agreed to the conference report July 15, 2010 (60 yeas; 39 nays). Became Public Law 111–203, July 21, 2010.

### **Summary of Activities of the Committee on the Judiciary**

During the 111th Congress, the full Judiciary Committee retained original jurisdiction with respect to a number of legislative and oversight matters. This included exclusive jurisdiction over antitrust and liability issues. In addition, a number of specific agency oversight hearings and legislative issues were handled by the Committee and its Subcommittees.

### **INTELLECTUAL PROPERTY ACTIVITIES**

During the 111th Congress, the full Judiciary Committee retained original jurisdiction over intellectual property legislation and oversight matters. Intellectual property laws, which primarily are patents, copyrights and trademarks, were created to promote innovation and creativity. Industries that have grown around the creation and use of intellectual property rights play a critical role in our economy. The United States Patent and Trademark Office is responsible for examination and registration of patent and trademark rights. The Copyright Office is responsible for examination

and registration of copyrights. Civil enforcement of Federal intellectual property laws may be obtained through the Federal courts by private right of action. Criminal enforcement of Federal intellectual property laws is carried out by the Department of Justice.

*Hearing on Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses (Serial No. 111-3)*

On February 25, 2009, the Committee held a hearing regarding the Satellite Home Viewer Extension and Reauthorization Act of 2004 and related issues. Witnesses included: Marybeth Peters, Register of Copyright, U.S. Copyright Office; Fritz Attaway, Executive Vice President, Motion Picture Association of America; Bob Gabrielli, Senior Vice President, DIRECTV; Chris Murray, Internet and Telecommunications Counsel, Consumers Union; Kyle McSlarrow, President and Chief Executive Officer, National Cable and Telecommunications Association; and David Rehr, President and Chief Executive Officer, National Association of Broadcasters.

*Hearing on Competition and Commerce in Digital Books (Serial No. 111-31)*

On September 10, 2009, the Committee held a hearing on competition in the digital book industry, including issues related to the Google books settlement. Witnesses included: David C. Drummond, Senior Vice President of Corporate Development and Chief Legal Officer, Google Inc.; Paul Misener, Vice President of Global Policy, Amazon.com; Marc Maurer, J.D., President, National Federation of the Blind; John M. Simpson, Consumer Advocate, Consumer Watchdog; Paul Aiken, Executive Director, Authors Guild; Marybeth Peters, Register of Copyrights, U.S. Copyright Office; Randal C. Picker, Paul H. and Theo Leffmann Professor of Commercial Law, University of Chicago Law School; and David Balto, Senior Fellow, Center for American Progress.

*Hearing on Piracy of Live Sports Broadcasting Over the Internet (Serial No. 111-94)*

On December 16, 2009, the Committee held a hearing to examine how the piracy of live sporting events transmitted over the Internet impacts sports leagues, consumers, broadcasters, and copyright owners. Witnesses included: Michael J. Mellis, Sr. Vice President and General Counsel, MLB Advanced Media, L.P.; Lorenzo Fertitta, Chief Executive Officer, Ultimate Fighting Championship; Michael Seibel, Chief Executive Officer, Justin.TV Inc.; Ed Durso, Executive Vice President, Administration, ESPN, Inc.; and Christopher S. Yoo, Professor of Law and Communication, University of Pennsylvania Law School.

*Hearing on Domestic and International Trademark Implications of HAVANA CLUB and Section 211 of the Omnibus Appropriations Act of 1999 (Serial No. 111-69)*

On March 3, 2010, the Committee held a hearing on the domestic and international trademark implications of Section 211 of the Omnibus Appropriations Act of 1999. Section 211 of the Omnibus Appropriations Act of 1999 prevents recognition of ownership rights

in trademarks nationalized and confiscated by the Cuban government. The World Trade Organization (WTO) ruled that the law violated the WTO Agreement on Trade Related Aspects of Intellectual Property, and hearing evaluated competing proposals to bring the U.S. into compliance with its treaty obligations. The following witnesses gave testimony and submitted written statements for the record: Mark Z. Orr, Vice President of North American Affairs, Pernod Ricard USA, Inc.; Bruce A. Lehman, Former Assistant Secretary of Commerce and Expert Counsel for Bacardi, USA; Mark T. Esper, Ph.D, Executive Vice President, Global Intellectual Property Center, U.S. Chamber of Commerce; William A. Reinsch, President, National Foreign Trade Council; and John K. Veroneau, Partner, Covington & Burling, LLP.

*Hearing on Design Patents and Auto Replacement Parts (Serial No. 111-112)*

On March 22, 2010, the Committee held a hearing on the intellectual property and economic impact of design patents in exterior automotive parts. The hearing examined the use of design patent protection for exterior automotive parts, whether an exception to this protection is needed for replacement parts, and what impact such an exception might have on the United States intellectual property system and United States treaty obligations related to intellectual property. The following witnesses gave testimony and submitted written statements for the record: Jack Gillis, Director of Public Affairs, Consumer Federation of America; Damian Porcari, Licensing and Enforcement, Ford Global Technologies, LLC; Robert C. Passmore, Senior Director, Personal Lines, Property Casualty Insurers Association of America; and Perry Saidman, Saidman Design Law Group.

*Hearing on the United States Patent and Trademark Office (Serial No. 111-135)*

On May 5, 2010, the Committee held a hearing on the United States Patent and Trademark Office (USPTO). The hearing took a close look at initiatives of USPTO to reduce the patent application backlog, improve examiner production and satisfaction, and strengthen the organization's information technology infrastructure. The hearing also focused on the role that inconsistent funding of the USPTO plays in its operational challenges. The following witnesses gave testimony and submitted a written statement for the record: Honorable David Kappos, Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office; Robert Budens, President, Patent Office Professional Association; James Johnson, Counsel, Sutherland Asbill & Brennan LLP and Board Member of the Trademark Public Advisory Committee; and Damon Matteo, Vice President and Chief Intellectual Property Officer, Palo Alto Research Center and Chair of the Patent Public Advisory Committee.

**OVERSIGHT HEARINGS ON EXECUTIVE BRANCH AGENCIES AND THEIR ACTIVITIES**

During the 111th Congress, the Committee and its Subcommittees held extensive hearings concerning the work of Executive

Branch agencies under the Committee's jurisdiction. This included not only the Department of Justice (DOJ), but also such agencies as the U.S. Patent and Trademark Office, the Administrative Conference of the United States, and the Department of Homeland Security. With respect to DOJ and its component agencies alone, the Committee and its Subcommittees held 25 such hearings during the 111th Congress. These hearings included testimony from the Attorney General, the Director of the FBI, and other officials from DOJ's Antitrust, Civil, Civil Rights, Criminal, and National Security Divisions, the Office of Justice Programs, the Office of Legal Policy, the Executive Office of Immigration Review, the FBI, Bureau of Prisons, and Bureau of Alcohol, Tobacco, Firearms, and Explosives.

Hearings held by each Subcommittee are described in the relevant sections of this report. Full Committee hearings on agency oversight included the following:

*Hearing on the Department of Justice With Attorney General Eric Holder (Serial No. 111-83)*

On May 14, 2009, Attorney General Holder appeared before the Committee for an oversight hearing concerning the Department of Justice.

*Hearing on the Federal Bureau of Investigation (Serial No. 111-30)*

On May 20, 2009, Director Robert S. Mueller III appeared before the Committee for an oversight hearing concerning the Federal Bureau of Investigation.

*Classified Hearing on the Patriot Act and Related Matters*

On October 29, 2009, the Committee held a classified oversight hearing concerning the operation of the Patriot Act and related matters. Witnesses included Assistant Attorney General for National Security David S. Kris and Michael E. Leiter, Director of the National Counterterrorism Center.

*Sharing and Analyzing Information To Prevent Terrorism (Serial No. 111-116)*

On March 24, 2010, the Committee held a hearing focusing on the efforts of the FBI and other federal agencies to improve the sharing and analyzing of information to prevent terrorism. Witnesses included Timothy J. Healy, Director of the FBI's Terrorist Screening Center; Russell E. Travers, Deputy Director for Information Sharing and Knowledge Development, National Counterterrorism Center; Patrick F. Kennedy, Undersecretary for Management, Department of State; and Patricia Cogswell, Acting Deputy Assistant Secretary, Office of Policy, Department of Homeland Security.

*Hearing on the United States Patent and Trademark Office (Serial No. 111-135)*

On May 5, 2010, the Committee held an oversight hearing on the United States Patent and Trademark Office (PTO). Witnesses included David J. Kappos, Undersecretary of Commerce for Intellectual Property and Director of the U.S. PTO; Robert D. Budens, President of the Patent Office Professional Association; James H.

Johnson. Board Member, Trademark Public Advisory Committee; and Damon C. Matteo, Chairman, Patent Public Advisory Committee.

*Hearing on the United States Department of Justice (Serial No. 111-136)*

On May 13, 2010, Attorney General Eric Holder appeared before the Committee for his second oversight hearing concerning the Department of Justice.

**CONTINUATION OF INVESTIGATIONS ON U.S. ATTORNEY REMOVALS, THE POLITICIZATION OF THE DEPARTMENT OF JUSTICE, AND OLC APPROVAL OF WATERBOARDING AND OTHER INTERROGATION TECHNIQUES**

As described in the Activities Report for the 110th Congress, in 2007, the Committee undertook an extensive investigation into the abrupt removal of a number of U.S. Attorneys in 2006 and related allegations of politicization of the Department of Justice.<sup>2a</sup> Because the White House asserted executive privilege and immunity to Congressional subpoena, as a result of which the Committee was unable to obtain access to relevant White House documents and to procure the recorded testimony of key White House officials, the full House held several such officials in contempt and the Committee was forced to file a civil lawsuit seeking the subpoenaed documents and testimony.<sup>3</sup> The federal district court found in favor of the Committee, largely upholding the Committee's authority.<sup>4</sup> As of the end of the 110th Congress, the decision was on appeal.

In March, 2009, the Committee reached an agreement with the former Bush Administration to resolve the Committee's lawsuit and the previously issued contempt citations.<sup>5</sup> Pursuant to that agreement, the Committee proceeded over the next several months to receive access to previously subpoenaed White House documents and to obtain the on-the-record testimony of former White House officials Harriet Miers and Karl Rove. Committee members and staff questioned Ms. Miers at a deposition session on June 15, 2009, and questioned Mr. Rove on July 7 and 20, 2009.

On August 11, 2009, the Committee publicly released over 5,400 pages of White House documents and more than 700 pages of Miers and Rove transcripts, and also forwarded them to the special U.S. Attorney investigating the U.S. Attorney firings.

On July 21, 2010, the Department of Justice wrote a detailed letter to Chairman Conyers concerning the special U.S. Attorney's investigation.

The letter noted that the joint Office of Professional Responsibility/Office of the Inspector General report concluded that "then Attorney General Gonzales made a 'series of statements after the removals' that were 'inaccurate and misleading' to Congress and

<sup>2a</sup> See Report on the Activities of the Committee on the Judiciary of the House of Representatives During the One Hundred and Tenth Congress Pursuant to Clause 1 (D) Rule XI of the House of Representatives, H. Rep. 110-941 (January, 2009) at 31-40.

<sup>3</sup> See *Committee on the Judiciary v. Miers*, Civil Action No. 08-0409 (JDB) (United States District Court for the District of Columbia, filed March 10, 2008).

<sup>4</sup> *Committee on the Judiciary v. Miers*, 558 F.Supp. 2d 53 (D.D.C. 2008).

<sup>5</sup> See Agreement Concerning Accommodation in Committee on the Judiciary, U.S. House of Representatives v. Harriet Miers, et al. (March 4, 2009)

others, and that other improper conduct occurred.” However, it explained that the investigation did not find sufficient evidence to meet the high standard for criminal prosecution of any of the officials involved. The letter also stated explicitly that the actions of former DOJ leadership “were contrary to DOJ principles” and that Attorney General Holder had “taken steps to ensure those mistakes will not be repeated.”<sup>6</sup>

During the 111th Congress, the Committee also pursued the investigation begun in 2008 concerning the prior approval by DOJ’s Office of Legal Counsel (OLC) of waterboarding and other “enhanced” interrogation techniques.<sup>7</sup> Specifically, the Committee made arrangements to obtain the testimony of the author of several key OLC memos, then director of OLC and now federal judge Jay Bybee. Judge Bybee was interviewed on the record by Committee members and staff on May 26, 2010, and the transcript and related documents were publicly released and forwarded to the Department of Justice on July 15, 2010. Judge Bybee testified that a number of the harsh interrogation techniques reportedly used by the CIA in 2001–04 had not been approved by OLC, which is relevant to the Department’s continuing investigation of the use of such techniques.<sup>8</sup>

#### OVERSIGHT CONCERNING THE GULF OIL SPILL

The full Committee held several oversight hearings concerning liability issues relating to the disastrous Gulf Coast oil spill of April, 2010 and to victim compensation efforts led by Gulf Coast Claims Facility Administrator Kenneth Feinberg. These included the following:

*Hearing on Liability Issues Surrounding the Gulf Coast Oil Disaster (Serial No. 111–130)*

On May 27, 2010, the Committee heard testimony from a number of witnesses concerning liability issues stemming from the April 20, 2010 explosion on the Deepwater Horizon oil vessel that killed 11 workers and resulted in an environmental and economic disaster in the Gulf Coast region. These witnesses included: Keith D. Jones, father of Gordon Jones who died while working on the Deepwater Horizon; Rachel G. Clingman, Acting General Counsel, Transocean, Ltd.; Douglas Harold Brown, Chief Mechanic, Transocean, Ltd. and survivor of the Deepwater Horizon explosion; James W. Ferguson, Senior Vice President and Deputy General Counsel, Halliburton, Inc.; Stephen L. Stone, Offshore Oil Rig Roustabout, Transocean, Ltd., and survivor of the Deepwater Horizon explosion; William C. Lemmer, Sr. Vice President and General Counsel, Cameron International Corporation; Byron Encalade, President, Louisiana Oysters Association; Vincent J. Folet, Partner,

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<sup>6</sup>See Letter from Assistant Attorney General Ron Weich to Chairman Conyers (July 21, 2010) at 4,5,6.

<sup>7</sup>By early 2009, the prior OLC opinions had been revoked and the use of waterboarding and other “enhanced” interrogation techniques had been banned. A description of the Committee’s 2008 investigation on the subject can be found in House Committee on the Judiciary Majority Staff, Final Report to Chairman John Conyers, Jr., Reining in the Imperial Presidency: Lessons and Recommendations Relating to the Presidency of George W. Bush (March, 2009) at 119–125.

<sup>8</sup>The transcript of and documents used in the Bybee interview were made available on the Committee Web site.

Holland and Knight LLP; Hon. Jim Hood, Attorney General, State of Mississippi; Tom C. Galligan, Jr., President and Professor, Colby-Sawyer College; and Daryl Willis, Vice President, Resources, BP America.

*Hearing on Ensuring Justice for the Victims of the Gulf Coast Oil Disaster (Serial No. 111-142)*

On July 21, 2010, the Committee conducted a hearing examining the procedures for the submission and resolution of claims by individuals and businesses for costs and damages incurred as a result of the Gulf Coast oil disaster. The sole witness was Kenneth P. Feinberg, the Administrator of the Gulf Coast Claims Facility.

OVERSIGHT ON ANTITRUST ACTIVITIES

The Committee on the Judiciary has jurisdiction over competition policy and all laws relevant to antitrust. In addition, the Committee has jurisdiction over the federal agencies empowered to enforce those laws, the Antitrust Division of the U.S. Department of Justice as well as the Bureau of Competition of the Federal Trade Commission. The bulk of antitrust issues were examined at the subcommittee level this past session by the Subcommittee on Courts and Competition Policy. However, the Committee exercised its general oversight over antitrust to examine competition in minority broadcast ownership, the media and entertainment distribution markets, and the airline industry. With respect to legislation, the Committee held a hearing examining the implications of legislation that would have created short-term collective bargaining rights for merchants seeking to reduce the interchange surcharges charged by banks for credit card transactions. In addition, the Committee passed legislation that would have removed the anti-trust exemption for railroad companies as well as health insurance companies.

*Hearing on Trends Affecting Minority Broadcast Ownership (Serial No. 111-24)*

On July 9, 2009, the Committee held a hearing to examine issues facing small and minority-owned terrestrial radio stations, such as ratings systems, advertising revenue, and competition. Witnesses included: Kendall Minter, Chairman of the Board, Rhythm and Blues Foundation; Andrew Schwartzman, President, Media Access Project; Michael Skarzynski, President, Arbitron, Inc.; and James L. Winston, Executive Director, National Association of Black Owned Broadcasters.

*Hearing on Competition in the Media and Entertainment Distribution Market (Serial No. 111-121) and Field Hearing on the Proposed Combination of Comcast and NBC Universal (Serial No. 111-138)*

On February 25, 2010, the Committee held a hearing on competition in modern media markets and the issue of horizontal and vertical mergers, including discussion of the proposed merger of Comcast and NBC Universal. Witnesses included: Brian L. Roberts, Chairman and Chief Executive Officer, Comcast Corporation; Jeff Zucker, President and Chief Executive Officer, NBC Universal;

Jean M. Prewitt, President and Chief Executive Officer, Independent Film & Television Alliance; Thomas W. Hazlett, Professor of Law & Economics, George Mason University School of Law; Mark Cooper, Ph.D., Director of Research, Consumer Federation of America; Larry Cohen, President, Communications Workers of America; Andrew Jay Schwartzman, President and Chief Executive Officer, Media Access Project; and Marc H. Morial, President and Chief Executive Officer, National Urban League.

On June 7, 2010, the Committee held a field hearing at the Donald P. Loker Conference Center at the California Science Center, Los Angeles, California, to further discuss these and related issues. Witnesses included: Will Griffin, President and Chief Operating Officer, Hip Hop On Demand; Alex Nogales, President and CEO, National Hispanic Media Coalition; Samuel Kang, Managing Attorney, The Greenlining Institute; Allen Hammond, Phil and Bobbie Sanfilippo Professor of Law, Santa Clara University School of Law; Alfred C. Liggins III, resident and Chief Executive Officer, Radio One, Inc.; Stanley E. Washington, Chairman and Chief Executive Officer, National Coalition of African American Owned Media; Paula Madison, Executive Vice President, Diversity, NBC Universal; Jim Weitkamp, District 9 Vice President, Communications Workers of America; Suzanne de Passe, Co-Chair, de Passe Jones Entertainment; Darnell M. Hunt, Ph.D., Professor of Sociology, University of California, Los Angeles; Kathryn F. Galan, Executive Director, National Association of Latino Independent Producers; and Frank G. Washington, Chairman and Chief Executive Officer, Tower of Babel, LLC.

*Hearing on Competition in the Airline Industry (Serial No. 111-107)*

On June 16, 2010, the Committee held a hearing regarding competition in the airline industry, including the proposed merger of United and Continental Airlines. Witnesses included: Glenn F. Tilton, Chairman, President and Chief Executive Officer, UAL Corporation; Jeffrey A. Smisek, Chairman, President and Chief Executive Officer, Continental Airlines; Darren Bush, Ph.D., J.D., Associate Professor of Law, University of Houston Law Center; Jay Pierce, Chairman, Continental Master Executive Council, Air Line Pilots Association, International; Wendy J. Morse, Chairman, United Master Executive Council, Air Line Pilots Association, Intl.; William S. Swelbar, Research Engineer, Department of Aeronautics and Astronautics, Massachusetts Institute of Technology; Robert Roach, Jr., General Vice President—Transportation, The International Association of Machinists and Aerospace Workers; and Patricia A. Friend, International President, Association of Flight Attendants—CWA.

**OVERSIGHT ON BANKRUPTCY AND FORECLOSURE ACTIVITIES**

*Hearing on Ramifications of Auto Industry Bankruptcies (Serial No. 111-22)*

On May 21, 2009, the Committee held a hearing on the economic and social consequences of automobile industry bankruptcies. Witnesses included: Joan Claybrook, President Emeritus, Public Cit-

izen; Andrew Grossman, Senior Legal Policy Analyst, The Heritage Foundation; Damon Lester, President, National Association of Minority Dealers; Randy Henderson, Owner, Webster Chrysler Jeep, Inc.; Clarence Ditlow, Executive Director, Center for Auto Safety; Lynn M. LoPucki, Security Pacific Bank Professor of Law, UCLA Law School; Ralph Nader, Consumer Advocate; David Arthur Skeel, M.D., S. Samuel Arsh Professor of Corporate Law, University of Pennsylvania Law School; and Bruce Fein, Principal, The Lichfield Group.

*Hearing on Foreclosed Justice: Causes and Effects of the Foreclosure Crisis—Part II (Serial No. 111-000 as listed on Jan. 6, 2011)*

On December 2, 2010, the Committee heard testimony from a number of witnesses concerning the implications of faulty foreclosure-related documentation practices by mortgage servicers from the perspective of three federal government regulators and a state court judge. Additionally, Members discussed concerns about the effectiveness of the Treasury Department's Home Affordable Modification Program in addressing the continuing home foreclosure crisis. The witnesses were Phyllis Caldwell, Chief of Homeownership Preservation, Department of the Treasury; Edward DeMarco, Acting Director, Federal Housing Finance Agency; Julie Williams, Chief Counsel, Office of the Comptroller of the Currency; and Judge F. Dana Winslow, New York State Supreme Court.

On December 15, 2010, the Committee received testimony from witnesses on the implications of faulty foreclosure-related documentation practices by mortgage servicers from the perspective of consumer advocates, a former homeowner who lost her home in foreclosure, an academic, and a representative of the securitization industry. The hearing examined: (1) whether foreclosure documentation irregularities undermine due process; (2) whether the entities seeking foreclosures actually have the right to do so; and (3) the status of loan modifications and other loss mitigation efforts. Witnesses included Senator Sheldon Whitehouse for the State of Rhode Island; James A. Kowalski, Jr., Esq.; Thomas A. Cox, Maine Attorneys Saving Homes Project; Dr. Joseph Mason, Louisiana State University; Sandra Hines, a former homeowner; Vanessa G. Fluker, Esq.; Tom Deutsch, American Securitization Forum; and Professor Christopher Peterson, S.J. Quinney College of Law, University of Utah.

#### OTHER OVERSIGHT ACTIVITIES

The Committee held several hearings and forums relating to legal issues concerning football head injuries. These included the following:

*Hearing on Legal Issues Relating to Football Head Injuries (Serial No. 111-82)*

On October 28, 2009, the Committee conducted a hearing and heard from a number of witnesses with respect to legal issues relating to football head injuries. These witnesses included: Hon. Bill Pascrell, Jr., U.S. House of Representatives, 8th District, New Jersey; Roger S. Goodell, Commissioner, National Football League;

DeMaurice Smith, Executive Director, NFL Players Association; Gay Culverhouse, Former President, Tampa Bay Buccaneers; Dr. Andrew M. Tucker, Member, NFL Mild Traumatic Brain Injury Committee; Dr. Robert C. Cantu, Clinical Professor of Neurosurgery, Boston University School of Medicine; David R. Weir, Lead Author, NFL's Player Care Foundation Study of Retired NFL Players; George Martin, Executive Director, NFL Alumni Association; Tiki Barber and Merril Hoge, Retired NFL Players; Dick Benson, High School Football Safety Advocate; Eleanor M. Perfetto, Wife of Former NFL Player Ralph Wenzel; Christopher Nowinski, Co-Director, Center for the Study of Traumatic Encephalopathy, Boston University; Dr. Ann C. McKee, Associate Professor, Neurology and Pathology, Boston University School of Medicine; Dr. Joseph Maroon, Vice Chair, Department of Neurosurgery, University of Pittsburgh; Dr. Julian Bailes, Chairman, Department of Neurosurgery, West Virginia School of Medicine; and Dr. Joel Morgenlander, Professor of Neurology, Duke University Medical Center.

*Hearing on Legal Issues Relating to Football Head Injuries Part II  
(Serial No. 111-82)*

On January 4, 2010, at the Wayne State School of Medicine Conference Center in Detroit, Michigan, the Committee further examined legal issues relating to football head injuries. Witnesses included: DeMaurice Smith, Executive Director, NFL Players Association; Dr. Joseph C. Maroon, Vice Chair, Department of Neurosurgery, University of Pittsburgh; David Klossner, Director of Health and Safety, National Collegiate Athletic Association; Bob Colgate, Assistant Director, National Federation of State High School Associations; Scott Hallenbeck, Executive Director, USA Football; Lemuel J. Barney, Kyle Turley, and Bernard P. Parrish, Retired NFL Players; Dr. Bennet I. Omalu, Co-Director, Brain Injury Research Institute, West Virginia University; Dr. Ira Casson, Former Co-Chairman, NFL Mild Traumatic Brain Injury Committee; Vincent R. Ferrara, Founder and CEO, Xenith, LLC; Dan Arment, President, Riddell; R. David Halstead, Technical Director, Southern Impact Research Center; Dr. Randall R. Benson, Assistant Professor of Neurology, Wayne State University; Dr. Jeffrey S. Kutcher, Department of Neurology, University of Michigan; Christopher Nowinski, Co-Director, Center for the Study of Traumatic Encephalopathy; Robert L. Schmidt, Chairman, Vincent T. Lombardi Foundation; George Martin, Executive Director, NFL Alumni Association; and Luther Campbell, Trainer of Professional Athletes.

*Forum on Head Injuries and Other Sports Injuries in Youth, High School, College, and Professional Football*

On February 1, 2010, at the Prairie View A&M University College of Nursing in Houston, Texas, the Committee held a forum concerning the prevention of head injuries in all levels of football and the education of players, parents, educators, and the public about the dangers of concussions. Participants included: Jon Butler, Vice President, National Council of Youth Sports; Ron Courson, Director of Sports Medicine, University of Georgia Athletic Association; Dick Benson, High School Football Safety Advocate; Chester

Pitts, NFL Player, Houston Texans, Dr. Stan Herring, Team Physician for Seattle Seahawks, American College of Sports Medicine; Patrick Donohue, Esq., Founder of the Sarah Jane Brain Foundation; Dr. Bennet Omalu, Co-Director, Brain Injury Research Institute, West Virginia University; Dr. Howard Derman, Concussion Specialist for Houston Texans, Director, Headache and Pain Center at Methodist Hospital; Trevor Cobb, Retired NFL Player; James Hardin, Head Athletic Trainer, University of Texas in Austin; Kevin Sumlin, Head Football Coach, University of Houston, Dr. Cindy Ivanhoe, Associate Professor, Baylor University; Wes Speights, Athletic Trainer, Houston Independent School District; and Christopher Pichon, Principal, Landis Elementary School.

*Forum on Key Issues Related to the Identification and Prevention of Head Injuries in Football*

On May 24, 2010, at the Alexander Hamilton U.S. Custom House in New York, New York, the Committee held a forum relating to key issues concerning the identification and prevention of football head injuries. Participants included: Dr. Hunt Batjer, Co-Chair; NFL Head, Neck and Spine Committee; Dr. Richard C. Ellenbogen, Co-Chair, NFL Head, Neck and Spine Committee; Dr. Thom A. Mayer, Medical Director, NFL Players Association; Dr. Walter J. Koroshetz, Deputy Director, National Institute of Neurological Disorders, National Institutes of Health; Charlotte D. Bingham, Managing Director, Equal Opportunity Office, Texas Tech University System; Tammy Plevretes, Football Safety Advocate; Nolan Harrison, Corey Louchiey, Retired NFL Players; and Dr. Daniel L. Alkon, Scientific Director, Blanchette Rockefeller Neurosciences Institute.

*Hearing on the Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks (Serial No. Not Available as of Jan. 6, 2011)*

On December 16, 2010, the Committee held a hearing on the legal issues raised by the recent release of U.S. government documents by WikiLeaks, including the constitutional and statutory issues raised by calls for a criminal prosecution of the organization. Witnesses included: Geoffrey R. Stone of the University of Chicago; Abbe D. Lowell of McDermott, Will & Emery LLP; Kenneth L. Wainstein of O'Melveny & Myers LLP; Gabriel Schoenfeld of the Hudson Institute; Steven I. Vladeck of American University; Thomas S. Blanton of the National Security Archive at George Washington University; and legal advocate Ralph Nader of the District of Columbia.

#### LEGISLATIVE ACTIVITIES

*H.R. 628, "Pilot Program in District Courts for Patent Cases"*

*Summary.*—Introduced by Representative Darrell Issa, H.R. 628 establishes a pilot program in certain United States district courts to develop expertise in trying patent-related cases among district court judges.

*Legislative History.*—Introduced on January 22, 2009, H.R. 628 was referred to the House Committee on the Judiciary. On March

17, 2009, under suspension the House passed H.R. 628 without amended by recorded vote 409–7 (Roll No. 130). On March 18, 2009, H.R. 628 was referred to the Senate Committee on the Judiciary. On December 13, 2010, H.R. 628 was passed by the Senate, with an amendment, by unanimous consent. On January 4, 2011 President Obama signed H.R. 628. and became Public Law No.: 111–349.

*H.R. 801, the “Fair Copyright in Research Works Act”*

*Summary.*—Introduced by Chairman John Conyers, Jr., H.R. 801 amends title 17, United States Code, to prohibit any federal agency from imposing any condition, in connection with a funding agreement, that requires the transfer or license to or for a federal agency, or requires the absence or abandonment, of specified exclusive rights of a copyright owner in an extrinsic work.

*Legislative History.*—Introduced on February 3, 2009, H.R. 801 was referred to the House Committee on the Judiciary Committee. On March 16, 2009, H.R. 801 was referred to the Subcommittee on Courts and Competition Policy. No further action was taken on the bill.

*H.R. 848, the “Performance Rights Act”*

*Summary.*—Introduced by Chairman John Conyers, Jr., H.R. 848, would extend the scope of public performance rights to terrestrial broadcast performances. H.R. 848 grants performers the right to receive compensation from terrestrial radio, and contains significant protections for the broadcast radio industry, including a scale-based fee system for radio stations with gross annual revenues of less than \$1.25 million, a one-to-three-year-delay of the bill's implementation as to smaller and noncommercial broadcasters, and a requirement that, in making any royalty determinations, the Copyright Royalty Judges consider the effect on minority and religious broadcasters and religious and minority royalty recipients.

*Legislative History.*—Introduced on February 4, 2009, H.R. 848 was referred to the House Committee on the Judiciary. On February 4, 2009, Senator Patrick Leahy introduced a similar bill, S. 379, the Performance Rights Act. On March 10, 2009, the full House Committee on the Judiciary held a legislative hearing on H.R. 848. The following witnesses appeared and submitted statements for the record: Billy Corgan, Vocalist and Lead Guitarist, The Smashing Pumpkins; Mitch Bainwol, Chairman and Chief Executive Officer, Recording Industry Artist Association (RIAA); Paul Almeida, President, Department for Professional Employees, AFL-CIO; W. Lawrence Patrick, President, Patrick Communications; Stan Liebowitz, Ph.D., Ashbel Smith Distinguished Professor of Managerial Economics, University of Texas at Dallas; and Steve Newberry, Chairman of the Radio Board, National Association of Broadcasters (NAB). On May 13, 2009, the Committee met in open session to mark-up and ordered H.R. 848, as amended, favorably reported by a roll call vote of 21 to 9. On December 14, 2010 the Committee on the Judiciary reported the bill. (H. Rept. 111–680).

*H.R. 1107, To enact certain laws relating to public contracts as title 41, United States Code, “Public Contracts”*

*Summary.*—Introduced by Rep. John Conyers, Jr., H.R. 1107 revises and restates certain laws relating to public contracts and re-enacts those laws as title 41, United States Code. The bill was prepared by the Office of the Law Revision Counsel of the House of Representatives, as part of its responsibility under 2 U.S.C. 285b to submit to the Committee on the Judiciary proposed bills to enact titles of the United States Code into positive law.

*Legislative History.*—Introduced on February 23, 2009, H.R. 1107 was referred to the House Committee on the Judiciary. On March 18, 2009, the Committee ordered the bill, H.R. 1107, favorably reported, by a voice vote. On May 6, 2009, H.R. 1107 passed the House by voice vote without amendment under suspension of the rules. On December 2, 2010 the Senate passed H.R. 1007, with an amendment, by unanimous consent. On December 17, 2010, on motion to suspend the rules, the House agreed to the Senate amendments by record vote 385–0. On January 4, 2011, President Obama signed H.R. 1107 and became Public Law No.: 111–350.

*H.R. 1260, the “Patent Reform Act of 2009”*

*Summary.*—Introduced by Representative John Conyers, Jr., H.R. 1260, the Patent Reform Act of 2009, amends several provisions of the patent law. Specifically, it provides rules regarding the calculation of damages, establishes a post-grant opposition procedure, revises inter partes reexamination, permits third parties to submit prior art, makes changes to venue in patent cases, and switches the United States patent filing system from a first-to-invent system, to a first-inventor-to-file system.

*Legislative History.*—Introduced on March 3, 2009, H.R. 1260 was referred to the House Committee on the Judiciary. On April 30, 2009, pursuant to notice, the Committee held a legislative hearing on H.R. 1260. The following witnesses appeared and submitted statements for the record: David Simon, Chief Patent Counsel, Intel, Inc.; Phillip S. Johnson, Chief Intellectual Property Counsel, Johnson & Johnson; John R. Thomas, Professor, Georgetown University Law School; Jack W. Lasersohn, Partner, Vertical Group; Dean Kamen, Inventor, DEKA Research and Development Inc.; Mark Chandler, Senior Vice President, Cisco; and Bernard Cassidy, Senior Vice President and General Counsel, Tessera Inc.

*H.R. 2196, the “Design Piracy Prohibition Act”*

*Summary.*—Introduced by Representative William Delahunt, H.R. 2196 would amend title 17, United States Code, to extend protection to fashion design, and for other purposes. The bill includes clothing, handbags, duffel bags, tote bags, and eyeglass frames as protected items.

*Legislative History.*—Introduced on April 30, 2009, H.R. 2196 was referred to the Committee on the Judiciary. No further action was taken on the bill. On August 5, 2010, the Senate introduced S. 3728, the Innovative Design Protection and Piracy Prevention Act. S. 3728 was reported by Senator Leahy with an amendment in the nature of a substitute, without a written report on December

6, 2010. S. 3728 was placed on the Senate Legislative Calendar under General Orders on December 6, 2010.

*H.R. 2344, the “Webcaster Settlement Act of 2009”*

*Summary.*—Introduced by Representative Jay Inslee, H.R. 2344 amends section 114 of title 17, United States Code, to allow the recording industry to negotiate and enter into alternative royalty fee agreements with webcasters within thirty days of its enactment.

*Legislative History.*—Introduced on May 12, 2009, H.R. 2344 was referred to the Committee on the Judiciary. On May 13, 2009, the Committee met in open session and ordered the bill favorably reported without amendment, by voice vote, a quorum being present. On May 21, 2009, Senator Ron Wyden introduced S. 1145, the Webcaster Settlement Act. S. 1145 was referred to the Senate Judiciary Committee. On June 9, 2009, the House passed H.R. 2344 on a motion to suspend the rules, by voice vote. On June 17, 2009 the Senate passed S. 1145 without amendment by Unanimous Consent. On June 30, 2009 President Obama signed H.R. 2344. and became Public Law No.: 111–36.

*H.R. 2695, the “Credit Card Fair Fee Act of 2009”*

*Summary.*—Introduced by Representative John Conyers, Jr., H.R. 2695 permits merchants to collectively negotiate with banks and payment card networks regarding rates and terms for access to the networks in a limited series of negotiations. H.R. 2695 creates an antitrust exemption that is limited to the duration and content of these negotiation sessions, which are scheduled and overseen by the Department of Justice.

*Legislative History.*—Introduced on April 28, 2010, H.R. 2695 was referred to the Judiciary Committee. On that same day, the Committee to examine the merits of Congress granting a limited antitrust exemption to merchants, banks, and payment networks so that the parties can negotiate a fair credit card interchange rate. Witnesses at the hearing included: Dave Carpenter, President, J.D. Carpenter Companies on behalf of the National Association of Convenience Stores; Ed Mierzwinski, Director, Consumer Program, U.S. PIRG; John Blum, Vice President of Operations, Chartway Federal Credit Union, on behalf of the National Association of Federal Credit Unions; and Douglas Kantor, Partner, Steptoe & Johnson LLP, on behalf of the National Association of Convenience Stores, the Society of Independent Gasoline Marketers of America, and the Merchants Payments Coalition. (Serial No. 111–101)

*H.R. 3114, To authorize the Director of the United States Patent and Trademark Office to use funds made available under the Trademark Act of 1946 for patent operations in order to avoid furloughs and reductions-in-force, and for other purposes*

*Summary.*—Introduced by Representative John Conyers, Jr., H.R. 3114 gave the Director of the United States Patent and Trademark Office (USPTO) temporary authority to use funds made available for trademark registration purposes for patent administration expenses, notwithstanding provisions restricting the use of such fees to activities relating trademark registrations, provided the Di-

rector certifies to Congress that the use of such funds is reasonably necessary to avoid USPTO furloughs or a reduction-in-force.

*Legislative History.*—Introduced on July 7, 2009, H.R. 3114 was referred to the House Committee on the Judiciary. On the same day, under suspension of the rules the House passed H.R. 3114 by voice vote. On July 8, 2009, H.R. 3114 was received by the Senate and read twice. On July 16, 2009, the Senate passed H.R. 3114 without amendment by unanimous consent. On August 7, 2009, H.R. 3114 was signed by the President and become Public Law 111-45.

*H.R. 3570, the “Satellite Home Viewer Update and Reauthorization Act”*

*Summary.*—Introduced by Chairman John Conyers, Jr., H.R. 3570 would amend title 17, United States Code, to reauthorize the satellite statutory license, to conform the satellite and cable statutory licenses to all-digital transmissions, and for other purposes. The bill would modernize, improve and simplify the compulsory copyright licenses governing the retransmission of distant and local television signals by cable and satellite television operators, under Sections 111, 119 and 122 of Chapter 17 of the United States Code.

*Legislative History.*—Introduced on September 15, 2009, H.R. 3570 was referred to the Committee on the Judiciary. On February 25, 2009, the full House Committee on the Judiciary held a hearing on “Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses”. The purpose of the hearing was to assess the Satellite Extension and Reauthorization Act. The following witnesses participated: Ms. Marybeth Peters, Register of Copyrights, U.S. Copyright Office; Mr. Fritz Attaway, Executive Vice President, the Motion Picture Association; Mr. Bob Gabrielli, Senior Vice President, DIRECTV, Inc; Mr. Chris Murray, Internet and Telecommunications Counsel, Consumers Union; Mr. Kyle McSlarrow, President and CEO, the National Cable & Telecommunications Association (NATA); Mr. David K. Rehr, President and CEO, the National Association of Broadcasters (NAB). On September 16, 2009 a committee markup was held and the bill was ordered to be reported by a roll call vote of 34 to 0. On October 28, 2009 the Committee filed an amended report. (H. Rept. 111-319). On October 28, 2009 the bill was placed on the Union Calendar, Calendar No. 182. On May 7, 2010, Senator Patrick Leahy introduced S. 3333, the “Satellite Television Extension and Localism Act of 2010”. On May 27, 2010, President Obama signed S. 3333. (Public Law No.: 111-175). See S. 3333 for further action.

*H.R. 4515, the “Trademark Technical and Conforming Amendment Act of 2010”*

*Summary.*—Introduced by Representative John Conyers, Jr., H.R. 4515, the “Trademark Technical and Conforming Amendment Act of 2010” makes available an existing six-month grace period for trademark applications to applications filed in the United States Patent and Trademark Office (USPTO) pursuant to the Madrid Protocol, an international agreement that streamlines trademark filing in multiple countries. Additionally, this legislation gives the

Director of the USPTO discretion to allow applicants to correct good faith and harmless errors.

*Legislative History.*—Introduced on January 26, 2010, H.R. 4515 was referred to the House Committee on the Judiciary. No further action was taken on the bill. A measure that incorporated much of H.R. 4515, S. 3325, the Trademark Technical and Conforming Amendment Act of 2010, was subsequently signed by the President on March 17, 2010 and became Public Law 111–146. See S. 2968 for further action.

*H.R. 4954, “To amend title 35, United States Code, to provide recourse under the patent law for persons who suffer competitive injury as a result of false markings”*

*Summary.*—Introduced by Representative Darrell E. Issa, H.R. 4954 limits the right to file a civil action for false marking of a patent to persons who have suffered a competitive injury as a result of the false marking. The bill allows recovery of damages adequate to compensate for the injury.

*Legislative History.*—Introduced on March 25, 2010, H.R. 4954 was referred to the House Committee on the Judiciary. No further action was taken on the bill.

*H.R. 5322, the “Patent and Trademark Office Funding Stabilization Act of 2010”*

*Summary.*—Introduced by Representative John Conyers, Jr., H.R. 5322, the Patent and Trademark Office Funding Stabilization Act of 2010, would give the Director of the United States Patent and Trademark Office (USPTO) authority to set or adjust patent and trademark fees for a 10-year period, establishes the United States Patent and Trademark Office Public Enterprise Fund within the Treasury, requires all funds collected by the USPTO to be deposited in the Public Enterprise Fund, makes such funds available until expended, and establishes a temporary 15% surcharge on all patent fees.

*Legislative History.*—Introduced on May 18, 2010, H.R. 5322 was referred to the House Committee on the Judiciary. No further action was taken on the bill.

*H. Con. Res. 328, “Expressing the sense of the Congress regarding the successful and substantial contributions of the amendments to the patent and trademark laws that were initially enacted in 1980 by Public Law 96–517 (commonly referred to as the “Bayh-Dole Act”) on the occasion of the 30th anniversary of its enactment.”*

*Summary.*—Introduced by Representative John Conyers, Jr., H. Con. Res. 328 expresses the sense of Congress that the Bayh-Dole Act and its amendments have helped to spur innovation, benefitted public health and safety, and has led to the development of new domestic industries and private sector jobs. Expresses the gratitude of Congress for the bipartisan leadership of specified former Members on the 30th anniversary of enactment of the Bayh-Dole Act.

*Legislative History.*—Introduced on November 15, 2010, H. Con. Res. 328 was referred to the House Committee on the Judiciary. On the same day, under suspension of the rules the House passed

H.Con.Res. 328 by a recorded vote 385–1 (Roll No. 568). The bill was received by the Senate and referred to the Senate Committee on the Judiciary on November 17, 2010.

*H. Res. 1208, Supporting the goals of World Intellectual Property Day*

*Summary.*—Introduced by Representative Adam Smith, H. Res. 1208 expresses support for the goals of World Intellectual Property Day to promote, inform, and teach the importance of intellectual property and recognizes the importance of intellectual property and the challenges and threats to its protection.

*Legislative History.*—Introduced on March 23, 2010, H. Res. 1208 was referred to the Committee on the Judiciary. On March 27, 2010, H. Res. 1208 was passed by the House on a motion to the suspend the rules by voice vote.

*S. 1670, the “Satellite Television Modernization Act of 2009”*

*Summary.*—Introduced by Senator Leahy, S. 1670 would reauthorize, modernize, and simplify important portions of the Copyright Act used by satellite providers and cable systems that facilitate the retransmission of broadcast stations to consumers.

*Legislative History.*—Introduced on September 15, 2009, S. 1670 was referred to the Committee on the Judiciary. On February 25, 2009, the Senate Committee on the Judiciary held a hearing on “Ensuring Television Carriage in the Digital Age.” The following witnesses testified: Charlie Ergen, Chairman and CEO of DISH Network, L.L.C.; K. James Yager, CEO of Barrington Broadcasting Group, L.L.C., and Chairman of the National Association of Broadcaster’s Television Board; Martin D. Franks, Executive Vice President for Policy, Planning and Government Relations, CBS Corporation; David L. Cohen, Executive Vice President, Comcast Corporation; and the Honorable Robert M. Hartwell, Vermont State Senator, Bennington District. The following materials were submitted for the Record: statement of Gigi B. Sohn, President of Public Knowledge; statement of the Association of Public Television Stations; statement of Bob Gabrielli, Senior Vice President, DIRECTV, Inc.; and statement of Mike Mountford, CEO, National Programming Service. The Senate Judiciary Committee considered S. 1670 on September 24, 2009. The Committee voted to report the Satellite Television Modernization Act of 2009, as amended, favorably to the Senate by voice vote. The report was filed on November 10, 2009 (Report No. 111–98).

*S. 2968, the “Trademark Technical and Conforming Amendment Act of 2010”*

*Summary.*—Introduced by Senator Patrick Leahy, S. 2968, the “Trademark Technical and Conforming Amendment Act of 2010,” makes available an existing six-month grace period for trademark applications to applications filed pursuant to the Madrid Protocol, which is an international agreement that streamlines trademark filing in multiple countries. Additionally, this legislation gives the Director of the USPTO discretion to allow applicants to correct good faith and harmless errors. The legislation also requires a study and report to Congress on concerning harm done businesses

through trademark litigation and the best use of Federal resources to protect trademarks and prevent counterfeiting.

*Legislative History.*—S. 2968 was introduced on January 28, 2010, read twice, considered, read the third time, and passed without amendment by unanimous consent. On January 29, 2010, S. 2968 was received by the House and referred to the House Committee on the Judiciary. On March 3, 2010, under suspension of the rules, the House passed S. 2968 without amendment by voice vote. On March 17, 2010, H.R. 2968 was signed by the President and became Public Law 111–146.

*S. 3333, the “Satellite Television Extension and Localism Act of 2010”*

*Summary.*—Introduced by Senator Patrick Leahy, S. 3333 would modernize and extend important statutory copyright licenses that allow cable and satellite companies to retransmit the content transmitted by television broadcasters.

*Legislative History.*—Introduced on May 7, 2010 and passed the same day in the Senate by unanimous consent. S. 3333 is a bill built upon earlier bills introduced by members of the House and Senate Judiciary and Commerce Committees, and over a year of hearings, markups, and negotiations. On May 12, 2010, S. 3333 passed the House on motion to suspend the rules and passed by a voice vote. On May 27, 2010, President Obama signed the bill (Public Law No.: 111–175).

*S. 3689, the Copyright Cleanup, Clarification, and Corrections Act of 2010*

*Summary.*—Introduced by Senator Leahy, S. 3689, streamlines operating procedures of the United States Copyright Office, including elimination of the requirement to keep a hard copy version of the directory of internet service providers in the office and permitting the Office to accept electronic signatures. The bill also clarifies that nonmusical works distributed by phonograph before 1978 are not automatically public domain if they lacked a copyright notice, as Congress clarified with respect to musical works in 1997. The bill also corrects several technical errors in the copyright code.

*Legislative History.*—Introduced on August 2, 2010 and passed without amendment by unanimous consent. On August 9, 2010 the bill was referred to the House Committee on the Judiciary and to the Committee on Budget, for a period to be subsequently determined by the Speaker of the House, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned. On November 15, 2010 Chairman John Conyers moved to suspend the rules and pass the bill, as amended. On November 15, 2010 the bill was considered under suspension of the rules. The bill passed by a roll call vote of 385 to 0, with one member voting present. On November 19, 2010 the Senate agreed to the House amendments by unanimous consent. On December 9, 2010 President Obama signed the bill. (Public Law No: 111–295).

*S. 3728, the Innovative Design Protection and Piracy Prevention Act*

*Summary.*—Introduced by Senator Charles Schumer, S. 3728 amends title 17, United States Code, to extend protection to fash-

ion design, and for other purposes. The bill provides protection for articles includes clothing, handbags, purses, wallets, tote bags, belts, and eyeglass frames.

*Legislative History.*—Introduced on August 5, 2009, S. 3728 was referred to the Committee on the Judiciary. On December 6, 2009 Committee on Judiciary favorably reported the bill with an amendment in the nature of a substitute without a written report. On December 6, 2009, S. 3728 was placed on the Senate Legislative Calendar under General Orders, Calendar No. 674.



## SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW<sup>1</sup>

STEVE COHEN, Tennessee, *Chairman*

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MELVIN L. WATT, North Carolina	JIM JORDAN, Ohio
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HENRY C. "HANK" JOHNSON, JR., Georgia	HOWARD COBLE, North Carolina
ROBERT C. "BOBBY" SCOTT, Virginia	STEVE KING, Iowa
JOHN CONYERS, JR., Michigan	
JUDY CHU, California	

<sup>1</sup>Subcommittee chairmanship and assignments approved January 22, 2009.

### *Tabulation of subcommittee legislation and activity*

Legislation referred to the Subcommittee .....	44
Legislation reported favorably to the full Committee .....	4
Legislation reported adversely to the full Committee .....	0
Legislation reported without recommendation to the full Committee .....	0
Legislation reported as original measure to the full Committee .....	0
Legislation discharged from the Subcommittee .....	2
Legislation pending before the full Committee .....	3
Legislation reported to the House .....	1
Legislation discharged from the Committee .....	0
Legislation pending in the House .....	1
Legislation passed by the House .....	1
Legislation pending in the Senate .....	1
Legislation vetoed by the President .....	0
Legislation enacted into public law .....	0
Legislation enacted into public law as part of another bill .....	3
Legislation on which hearings were held .....	9
Days of legislative hearings .....	9
Days of oversight hearings .....	26

### LEGISLATIVE ACTIVITIES

#### *H.R. 901, the "Medical Bankruptcy Fairness Act"*

*Summary.*—Until full implementation of the health care reform legislation that was enacted earlier this year, the United States will continue to lag in the provision of health care for all of its citizens. Medicare and Medicaid cover only the elderly and indigent, respectively. In addition, some families earn "too much money to qualify for public health insurance but too little to afford a private policy" and as a result they are "caught in a Catch 22 that puts many U.S. workers at risk of financial ruin."<sup>9</sup> As a result, many

<sup>9</sup> Lisa Baertlein, Health Care Crisis Squeezes Working Families, Wash. Post, May 23, 2007. For example,

Volunteer Cindy Holland has no medical insurance, and her husband's health benefits as a full-time paramedic do not extend to family members and their three children go without.  
\* \* \*

John Holland, like most Americans, gets his health insurance through his job as a paramedic with a private ambulance company, which pays half the expense.

Continued

go without insurance. Approximately 45.7 million Americans, or 15.3 percent, did not have health insurance in 2007, the last year for which data are available.<sup>10</sup> While the health care reform legislation enacted in March 2010 will address many of these concerns, many of its provisions will not go into effect until 2014 or beyond.

At any rate, even the insured face economic distress.<sup>11</sup> According to one study, “29 percent of low- and middle-income households with credit card debt reported that medical expenses contributed to current level of credit card debt.”<sup>12</sup> The study suggests that “medical debt among the insured results from a variety of causes and the interaction of a number of factors, including the adequacy of people’s insurance plans, the nature of their medical needs, the cost of their treatments, and their financial resources.”<sup>13</sup> In particular, the study identified several reasons why the insured accrued debt, including the cost of premiums and deductibles, coverage caps, and uninsured medical conditions.<sup>14</sup>

A 2005 study demonstrated a significant connection between medical debt and financial hardship.<sup>15</sup> The study, which surveyed 1,692 low and moderate income people in various locales around the nation,<sup>16</sup> found that one-quarter of the respondents stated that they had housing problems as a result of their medical debt.<sup>17</sup> These problems included: (1) the inability to qualify for a mortgage; (2) the inability to make rent or mortgage payments; (3) being rejected from renting a home; and (4) being forced to move to less expensive housing.<sup>18</sup> Some of the respondents reported that they were evicted or were rendered homeless because of medical debt.<sup>19</sup> The financial ramifications of medical debt represent only part of the problem. Research shows that “privately insured adults with

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When Cindy, 36, shopped for coverage for herself and their children, she found it would cost about \$1,000 a month, excluding dental insurance.

“It would kill us financially to do the insurance—if we want to keep a roof over our head and food in my kids. You end up rolling the dice,” said Cindy, a California native who works a pair of part-time jobs on top of firefighting.

*Id.*

<sup>10</sup>U.S. Census Bureau, *Income, Poverty and Health Insurance Coverage in the United States: 2007*, (Doc. P60-235), August 2008.

<sup>11</sup>Reed Abelson, *Insured, But Bankrupted by Health Crises*, N.Y. Times, July 1, 2009, available at <http://www.nytimes.com/2009/07/01/business/01meddebt.html?r=1>

<sup>12</sup>Cindy Zeldin & Mark Rukavina, *Borrowing To Stay Healthy: How Credit Card Debt Is Related to Medical Expenses*, Demos/The Access Project, at 1 (2006). This study also found:

Within that group, 69 percent had a major medical expense in the previous three years. Overall, 20 percent of indebted low- and middle-income households reported both having a major medical expense in the previous three years and that medical expenses contributed to their current level of credit card debt.

*Id.*

Another study, which surveyed 383 people living in Missouri, found that “[m]edical bills can cripple hardworking families.” Sidney D. Watson et al., *Living in the Red—Medical Debt and Housing Security in Missouri, Survey Findings and Profiles of Working Families*, The Access Project, at 1 (2007).

<sup>13</sup>Carol Pryor et al., *The Illusion of Coverage: How Health Insurance Fails People When They Got Sick*, The Access Project, at 5 (2007).

<sup>14</sup>*Id.* at 5–6; see also Mark Rukavina et al., *Not Making the Grade: Lessons Learned from the Massachusetts Student Health Insurance Mandate*, The Access Project (May 2007) (finding mandatory health insurance coverage for students attending institutions of higher learning in Massachusetts was inadequate as the program allowed unreasonable levels of cost-sharing).

<sup>15</sup>Robert W. Seifert, *Home Sick—How Medical Debt Undermines Housing Security*, The Access Project (Nov. 2005).

<sup>16</sup>These locales were Bridgeport, Connecticut; Des Moines, Iowa; Phoenix, Arizona; Providence, Rhode Island; St. Louis, Missouri; Tulsa, Oklahoma; and West Palm Beach, Florida. *Id.* at 27.

<sup>17</sup>*Id.* at 1.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

medical debt are more likely than those without debt to skip recommended treatments, leave drug prescriptions unfilled, and postpone care due to cost[.]”<sup>20</sup>

In June 2009, the authors of the 2005 medical bankruptcy paper published a follow-up study in the *American Journal of Medicine*, which, in contrast to the earlier study, was based on “national random-sample survey of bankruptcy filers.”<sup>21</sup> The authors surveyed a random sample of 2,314 bankruptcy filers in 2007, abstracted their court records, and performed follow-up interviews with 1,032 of them.

The authors found that 62.1 percent of the 2007 sample had a medical cause.<sup>22</sup> Of these medical debtors, 92 percent had medical debts over \$5,000 or 10 percent of pretax family income.<sup>23</sup> The rest had lost significant income or had mortgaged their home to pay medical bills.<sup>24</sup> The authors additionally found that 77.9 percent of the individuals whose illness led to bankruptcy had health insurance at the onset of the bankrupting illness and that 60.3 percent had private insurance as their primary coverage.<sup>25</sup> Limiting the definition of “medical bankruptcy” to only those cases where the debtor specifically cited illness or medical bills as the cause of bankruptcy, 44.4 percent of bankruptcy filings were “medical bankruptcies.”<sup>26</sup>

*Legislative History.*—Rep. Carol Shea-Porter introduced H.R. 901, the “Medical Bankruptcy Fairness Act,” on February 4, 2009. The bill would amend Section 522 of the Bankruptcy Code to allow a “medically distressed debtor” (as defined in the Act) to exempt up to \$250,000 of the debtor’s interest in the residence of the debtor or the debtor’s dependent. The Act would also create an exemption to the “means test” contained in Section 707(b) of the Bankruptcy Code for medically distressed debtors and economically distressed caregivers.

The Subcommittee on Commercial and Administrative Law held an oversight hearing on “Medical Debt: Is Our Health Care System Bankrupting Americans?” on Tuesday, July 28, 2009. The witnesses were: Elizabeth Edwards, Senior Fellow, Center for American Progress; Dr. Stephani Woolhandler, Professor of Medicine, Harvard Medical School; Aparna Mathur, Ph.D., Research Fellow, American Enterprise Institute; and Professor John A.E. Pottow, Professor of Law, University of Michigan Law School.

On July 15, 2010, the Subcommittee held a hearing on H.R. 901. The witnesses were the Honorable Cecelia Morris, Judge, United States Bankruptcy Court for the Southern District of New York; Aparna Mathur, Ph.D., American Enterprise Institute; and Peter Wright, Franklin Pierce Law Center.

No further action was taken with respect to H.R. 901 during the 111th Congress.

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<sup>20</sup> Carol Pryor et al., *The Illusion of Coverage: How Health Insurance Fails People When They Got Sick*, The Access Project, at 3 (2007).

<sup>21</sup> David U. Himmelstein, et al. *Medical Bankruptcy in the United States, 2007*, *Am. J. Med.*, June 2009.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 4.

<sup>26</sup> *Id.* at 5.

*H.R. 1478, the “Carmelo Rodriguez Military Medical Accountability Act of 2009”*

*Summary.*—H.R. 1478, the “Carmelo Rodriguez Military Medical Accountability Act of 2009,” would amend the Federal Tort Claims Act (FTCA)<sup>27</sup> to allow service members to sue for damages when they are harmed by medical malpractice committed by government-employed or directed healthcare providers. It would amend the FTCA by adding a new section 2681 to chapter 171 of title 28 of the United States Code. Section 2681(a) would allow service members to sue the government to redress healthcare-related malpractice (and only healthcare-related malpractice) committed by government-employed or directed healthcare providers. The new section 2681 would not apply, however, to “any claim arising out of the combatant activities of the Armed Forces during time of armed conflict.” This exclusion is broader than the exclusion that appears in the existing FTCA, which is limited to claims “arising out of the combatant activities . . . during time of war,”<sup>28</sup> and has been interpreted to apply only to combatant activities pursuant to a formal declaration of war.

*Legislative History.*—Representative Maurice Hinchey (D–NY) introduced H.R. 1478 on March 12, 2009. On March 24, 2009, the CAL Subcommittee held a hearing on H.R. 1478.<sup>29</sup> The hearing consisted of two witness panels. The first panel included Representative Maurice Hinchey. The second witness panel included: retired Major General John D. Altenburg, Jr., a former Deputy Judge Advocate General of the United States Army and of counsel at Greenberg Traurig, LLP; Eugene R. Fidell, the Florence Rogatz Visiting Lecturer at Yale Law School, the President of the National Institute of Military Justice, and of counsel to the law firm of Feldesman Tucker Leifer Fidell LLP; Ivette Rodriguez, the sister of Carmelo Rodgriguez, the deceased Marine sergeant after whom H.R. 1478 is named; and Stephen A. Saltzburg, the Wallace and Beverley Woodbury Professor of Law at the University of Virginia Law School, a member of the House of Delegates of the American Bar Association, and the co-chair of the ABA’s Military Justice Committee of the Criminal Justice Section, who testified on behalf of the ABA. On May 19, 2009, the CAL Subcommittee marked up H.R. 1478, and ordered the bill to be favorably reported, as amended, by a roll call vote. On October 7, 2009, the Committee marked up H.R. 1478, and ordered the bill to be favorably reported, as amended by the Subcommittee, by a roll call vote of 14 to 12, a quorum being present. Congress took no further action on H.R. 1478 before the end of the 111th Congress.

*H.R. 1521, the “Cell Tax Fairness Act of 2009”*

*Summary.*—H.R. 1521, the “Cell Tax Fairness Act of 2009,” would impose on States and localities a five-year moratorium on any new discriminatory taxes on mobile services, mobile service providers, and mobile service property.

<sup>27</sup> 28 U.S.C. §§ 1346(b)(1), 2671–2680.

<sup>28</sup> 28 U.S.C. § 2680(j).

<sup>29</sup> H.R. 1478, the Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. (2009).

*Legislative History.*—Representative Zoe Lofgren (D-CA) introduced H.R. 1521 on March 16, 2009. On June 9, 2009, the CAL Subcommittee held a hearing on H.R. 1521.<sup>30</sup> Witnesses at the hearing included supporters of the legislation: Robert D. Atkinson, President of Information Technology and Innovation Foundation; Indiana Representative Mara Candelaria Reardon; and Florida Representative Joseph A. Gibbons. The CAL Subcommittee also received testimony from opponents of the legislation: Joanne Hovis, President of Columbia Telecommunications Corporation, who spoke on behalf of the National Association of Telecommunications Officers and Advisors, the National Association of Counties, the Government Finance Officers Association, the United States Conference of Mayors, and the National League of Cities; and Don Stapley, President of the National Association of Counties, who spoke on behalf of the Government Finance Officers Association, the United States Conference of Mayors, and the National League of Cities. On September 15, 2010, the CAL Subcommittee marked up H.R. 1521, and ordered it to be favorably reported, by voice vote. The Committee took no further action on H.R. 1521 before the end of the 111th Congress.

*H.R. 2247, the “Congressional Review Act Improvement Act”*

*Summary.*—H.R. 2247, the “Congressional Review Act Improvement Act,” amends the Congressional Review Act (CRA) to reduce administrative burdens and duplicative paperwork by repealing the requirement that agencies submit copies of all final rules and reports thereon directly to both the House and the Senate. The bill instead requires that the House and Senate receive a weekly list of all final rules from the Comptroller General of the Government Accountability Office and to have such list printed in the Congressional Record with a statement of referral for each rule. The bill does not affect the authority of Congress under the CRA to disapprove an agency rule.

*Legislative History.*—Rep. Steve Cohen introduced H.R. 2247 on May 5, 2009. The Committee on the Judiciary held no hearings on H.R. 2247 during the 111th Congress. The Subcommittee on Commercial and Administrative Law, however, held an oversight hearing on the CRA on November 6, 2007, during the 110th Congress. Testimony was received from the Honorable John V. Sullivan, Parliamentarian, House of Representatives; Morton Rosenberg, Specialist in American Public Law, Congressional Research Service, and Professor Sally Katzen, George Mason University School of Law. At that hearing, Mr. Sullivan testified about the burdens of implementing the CRA imposed on the Office of the Parliamentarian. Mr. Sullivan had previously testified before the Subcommittee in the 109th Congress on the same topic.<sup>31</sup> Additionally,

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<sup>30</sup> H.R. 1521, the Cell Tax Fairness Act of 2009: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. (2009).

<sup>31</sup> 10th Anniversary of the Congressional Review Act: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 110th Cong. 38–42 (2006) (statement of John V. Sullivan, Parliamentarian, U.S. House of Representatives).

Mr. Sullivan's predecessor, Charles W. Johnson, testified before the Subcommittee in the 105th Congress on the same topic.<sup>32</sup>

On May 13, 2009, the Committee met in open session and considered H.R. 2247. On May 20, 2009, the Committee met in open session and ordered H.R. 2247, favorably reported, without amendment, by voice vote, a quorum being present.

On June 12, 2009, the Committee reported H.R. 2247 as H. Rep. No. 111–150. On June 16, 2009, the House passed H.R. 2247 under suspension of the rules by a 414–0 vote.

H.R. 2247 was referred to the Senate Committee on Homeland Security and Government Affairs, which took no action on the bill during the 111th Congress.

*H.R. 2765, the “Securing the Protection of our Enduring and Established Constitutional Heritage Act” or the “SPEECH Act”*

*Summary.*—H.R. 2765 is intended to dissuade potential defamation plaintiffs from circumventing First Amendment protections by filing suit in foreign jurisdictions that lack similar protections, a phenomenon referred to as “libel tourism.” The bill amends title 28 of the United States Code to add provisions to prevent U.S. courts from recognizing or enforcing a foreign defamation judgment when (1) such judgment is inconsistent with the First Amendment; (2) enforcement would be inconsistent with Section 230 of the Communications Act of 1934, providing immunity for interactive computer services from suits based on content hosted by such services; or (3) the foreign court’s assertion of personal jurisdiction over the defamation defendant is inconsistent with the due process standards of the United States Constitution. H.R. 2765 also provides for a declaratory judgment remedy for a defamation defendant based on one of the grounds enumerated in the bill. H.R. 2765 also contains a fee-shifting provision that requires a court, absent exception circumstances, to award a reasonable attorney’s fee to a party that successfully resists recognition or enforcement of a foreign defamation judgment based on one of the grounds enumerated in the bill.

*Legislative History.*—On February 12, 2009, the Subcommittee on Commercial and Administrative Law held a hearing on the problem of libel tourism and possible legislative alternatives for addressing it. Witnesses included Bruce D. Brown, a partner at the law firm of Baker & Hostetler LLP; Rachel Ehrenfeld, Director of the American Center for Democracy; Laura R. Handman, a partner at the law firm of Davis Wright Tremaine; and Linda J. Silberman, the Martin Lipton Professor of Law at New York University Law School.

On June 9, 2009, Rep. Steve Cohen introduced H.R. 2765. On June 10, 2009, the Committee on the Judiciary met in open session to consider H.R. 2765 and ordered H.R. 2765 favorably reported without amendment, by a voice vote. On June 15, 2009, the Committee reported H.R. 2765 as H. Rep. No. 111–154 (2009). On that same day, the House of Representatives passed the bill by voice vote on motion to suspend the rules.

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<sup>32</sup> Congressional Review Act: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 105th Cong. 12–21 (1997) (statement of Charles W. Johnson III, Parliamentarian, U.S. House of Representatives).

On July 14, 2010, the Senate Committee on the Judiciary reported H.R. 2765 favorably with an amendment in the nature of a substitute, which passed the Senate on July 19, 2010.

On July 27, 2010, the House passed the Senate amendment to H.R. 2765 by voice vote on motion to suspend the rules.

On August 10, 2010, the President signed H.R. 2765 into law as Public Law No. 111-223.

*H.R. 3764, the “Civil Access to Justice Act of 2009”*

*Summary.*—H.R. 3764, the “Civil Access to Justice Act of 2009,” would re-authorize the Legal Services Corporation by amending the Legal Services Corporation Act (42 U.S.C. 2996 et al.). H.R. 3764 would authorize \$750,000,000 for LSC for each of the next five fiscal years; create new limitations on Federal funding; eliminate most of the limitations on non-Federal funding sources; and strengthen corporate governance and internal controls.

*Legislative History.*—Representative Bobby Scott introduced H.R. 3764 on October 8, 2009. On April 27, 2010, the CAL Subcommittee held a hearing on H.R. 3764.<sup>33</sup> The hearing consisted of two witness panels. The first panel included Representative Bobby Scott and Senator Tom Harkin. The second witness panel included: John Levi, Chairman of the Board of the Legal Services Corporation; Jeffrey Schantz, Inspector General of the Legal Services Corporation; Ken Boehm, Chair of the National Legal and Policy Center; and Rebekah Diller, Deputy Director, Justice Program, Brennan Center for Justice. The CAL Subcommittee took no further action on H.R. 3764 before the end of the 111th Congress.

*H.R. 4175, the “End Discriminatory State Taxes for Automobile Renters Act of 2009”*

*Summary.*—H.R. 4175, the “End Discriminatory State Taxes for Automobile Renters Act of 2009,” would prohibit a State or locality from levying or collecting a new discriminatory tax on the rental of motor vehicles, the business of renting motor vehicles, or motor vehicle rental property.

*Legislative History.*—Representative Rick Boucher (D-VA) introduced H.R. 4175 on December 2, 2009. On June 15, 2010, the CAL Subcommittee held a hearing on H.R. 4175.<sup>34</sup> The hearing consisted of two witness panels. The first panel included Representative Rick Boucher. The second witness panel included: Raymond T. Wagner, Jr., Vice President, Government Affairs of Enterprise Holdings, a motor vehicle rental company; Timothy Firestone, Chief Administrative Officer for Montgomery County, Maryland, who testified on behalf of the National League of Cities, the National Association of Counties, the United States Conference of Mayors, and the Government Finance Officers Association; and Sally Greenberg, Executive Director of the National Consumers League, a consumer rights organization. The CAL Subcommittee took no further action on H.R. 4175 before the end of the 111th Congress.

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<sup>33</sup> H.R. 3764, the Civil Access to Justice Act of 2009: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. (2010).

<sup>34</sup> H.R. 4175, the End Discriminatory State Taxes for Automobile Renters Act of 2009: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. (2010).

*H.R. 4283—Transparency and Integrity in Corporate Monitoring Act of 2009*

*Summary.*—H.R. 4283, the Transparency and Integrity in Corporate Monitoring Act of 2009, prohibits United States attorneys or assistant United States attorneys who participate in the investigation or prosecution of an organization for a criminal offense for which a deferred prosecution or non-prosecution agreement is made from acting as or working for, for a specified period of time after their service, corporate monitors selected to oversee the implementation of such agreements. The bill also authorizes the Attorney General to seek a civil penalty or injunctive relief to address violations of the Act.

*Legislative History.*—On November 19, 2009, the Subcommittee on Commercial and Administrative Law held a hearing on “Transparency and Integrity in Corporate Monitoring.” The hearing included one panel, with testimony from the following four witnesses: Anthony Barkow, Executive Director, Center on the Administration of Criminal Law, New York University School of Law; Ms. Eileen R. Larence, Director of Homeland Security and Justice, U.S. Government Accountability Office; Mr. Gil M. Soffer, Partner, Katten Muchin Rosenman, LLP; and, Mr. Brandon L. Garrett, Associate Professor of Law, University of Virginia.

On December 11, 2009, CAL Subcommittee Chairman Steve Cohen (D-TN) introduced H.R. 4283, the Transparency and Integrity in Corporate Monitoring Act of 2009, to prohibit United States attorneys and assistant United States attorneys from acting as or working for corporate monitors for specified periods after their service with the Government terminates. Nine members of Congress co-sponsored the bill.

On April 26, 2010, the bill was referred to the Subcommittee on Courts and Competition Policy. No further action was taken on the legislation in the 111th Congress.

*H.R. 4506, the “Bankruptcy Judgeship Act of 2010”*

*Summary.*—Pursuant to 28 U.S.C. § 152(b)(2), the Judicial Conference of the United States is required periodically to submit to Congress recommendations regarding the number of bankruptcy judges needed and to identify in which districts they are needed.<sup>35</sup> On February 9, 2009, the Judicial Conference transmitted recommendations concerning additional bankruptcy judgeships to the Chairman and Ranking Member of the House Judiciary Committee and to the Majority and Minority Leaders of the House of Representatives.<sup>36</sup>

The Judicial Conference asserted that its proposal is “essential to the efficient functioning of the bankruptcy court system,” noting that bankruptcy “case filings are increasing dramatically in the current state of our economy.”<sup>37</sup> According to the Judicial Conference, filings have “increased steadily since [the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)]

<sup>35</sup> 28 U.S.C. § 152(b)(2) (2007).

<sup>36</sup> Letter from James C. Huff, Secretary of the Judicial Conference of the United States, to the Hon. John Conyers, Jr., Chairman of the H. Comm. on the Judiciary (February 9, 2009) (on file with Subcommittee).

<sup>37</sup> *Id.*

took effect, and are even approaching record pre-BAPCPA levels.”<sup>38</sup>

The Judicial Conference proposed the addition of 13 bankruptcy judgeships in 10 judicial districts and the conversion of 22 existing temporary bankruptcy judgeships in 15 judicial districts to permanent status.<sup>39</sup> Additionally, the Judicial Conference proposes to extend two existing temporary judgeships for an additional five years.<sup>40</sup> Overall, the proposal affects 25 judicial districts in 9 of the 12 geographically based federal judicial circuits (all except the Seventh, Tenth, and District of Columbia Circuits).<sup>41</sup>

*Legislative History.*—Rep. Steve Cohen introduced H.R. 4506 together with Judiciary Committee Chairman Rep. John Conyers, Jr., and Ranking Member Rep. Lamar S. Smith on January 26, 2010. The bill adopts the recommendations of the Judicial Conference of the United States, authorizing 13 new permanent bankruptcy judgeships, converting 22 temporary judgeships to permanent judgeships, and extending authorization for 2 temporary judgeships for 5 more years. To offset mandatory costs, the bill also raises filing fees by \$1.00 for Chapter 7 and Chapter 13 cases and by \$42.00 for Chapter 11 cases.

No legislative hearing was held on H.R. 4506. The Subcommittee on Commercial and Administrative Law held a hearing on “Bankruptcy Judgeship Needs” on June 16, 2009. At that hearing, the Subcommittee considered the Judicial Conference’s bankruptcy judgeship recommendations, as reflected in H.R. 4506. Testimony was received from the Honorable Barbara M.G. Lynn, Judge, United States District Court for the Northern District of Texas, on behalf of the Judicial Conference of the United States; the Honorable David S. Kennedy, Chief Judge of the United States Bankruptcy Court for the Western District of Tennessee, on behalf of the National Conference of Bankruptcy Judges; William Jenkins, Jr., Director, Homeland Security and Justice Issues, Government Accountability Office; and Carey D. Ebert, President of the National Association of Consumer Bankruptcy Attorneys.

On January 27, 2010, the Committee met in open session and ordered H.R. 4506 favorably reported without amendment, by voice vote, a quorum being present. The Committee reported the bill on March 9, 2010 as H. Rep. No. 111–430 (2010). On March 12, 2010, the House of Representatives passed H.R. 4506 on motion to suspend the rules by a recorded vote of 345–5.

On May 27, 2010, the Senate Committee on the Judiciary reported H.R. 4506 favorably to the full Senate without amendment.

*H.R. 4677, the “Protecting Employees and Retirees in Business Bankruptcies Act of 2010”*

*Summary.*—Chapter 11, in essence, is a statutorily-orchestrated mechanism by which parties, “having divergent, if not mutually exclusive, interests are given an opportunity to work out their economic differences with the shared goal of maximizing the return for

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<sup>38</sup> Judicial Conference of the United States, Bankruptcy Judgeship Recommendations 4 (2009) (on file with Subcommittee).

<sup>39</sup> Id., Table 1.

<sup>40</sup> Id.

<sup>41</sup> Id.

all.”<sup>42</sup> As one writer observed, “Much bankruptcy law and analysis searches for an ‘equitable’ resolution of issues as a way of placing some flex in the joints of what is perceived to be an otherwise rigid statutory scheme.”<sup>43</sup> Chapter 11 offers: (1) Immediate relief from the forces which threaten to destroy the debtor beyond repair, in combination with provisions to keep it in operation while the salvage job is assayed and undertaken; and (2) a legal framework in which non-consenting creditors and other parties can be bound by the desires of a majority of their peers, or otherwise prevented from fractious disruption of the debtor’s affairs.<sup>44</sup>

The Bankruptcy Code contains several provisions dealing with labor issues in Chapter 11. These include Section 1113, which establishes procedures and standards by which a Chapter 11 debtor may reject a collective bargaining agreement.<sup>45</sup> As enacted, Section 1113 “seeks to reconcile the policy of the Bankruptcy Code, which fosters rehabilitation of debtors, with that of labor law, which seeks to protect employee rights through collective bargaining.”<sup>46</sup> Section 1113 provides the exclusive means by which a collective bargaining agreement may be rejected.<sup>47</sup> A Chapter 11 plan may not be confirmed unless the debtor has complied with section 1113.<sup>48</sup> In addition, a debtor is prohibited from unilaterally terminating or altering any provision of a collective bargaining agreement without having first complied with section 1113.<sup>49</sup>

In recent years, news headlines have been filled with numerous reports about the bankruptcy filings of corporate giants such as CIT Group, Chrysler, General Motors, Lehman Brothers, Linens ’n Things, Delphi Corporation, Delta Air Lines, Enron, and WorldCom.<sup>50</sup> In 2002 alone, the ten largest companies filing for bankruptcy employed nearly 445,000 employees.<sup>51</sup> In 2009, the number of businesses filing for bankruptcy protection rose by 38 percent over the previous year’s filings.<sup>52</sup> In many of these cases,

<sup>42</sup> Susan Jensen-Conklin, Do Confirmed Chapter 11 Plans Consummate? The Results of a Study and Analysis of the Law, 97 Comm. L. J. 297, 299 (1992).

<sup>43</sup> Thomas H. Jackson, Of Liquidation, Continuation, and Delay: An Analysis of Bankruptcy Policy and Nonbankruptcy Rules, 60 Am. Bankr. L. J. 399, 399 (1986).

<sup>44</sup> Paul F. Festerse, Equitable Powers in Bankruptcy Rehabilitation: Protection of the Debtor and the Doomsday Principle, 46 Am. Bankr. L. J. 311, 311 (1972).

<sup>45</sup> 11 U.S.C. 1113 (2006).

<sup>46</sup> Alan N. Resnick, & Henry J. Sommer, 7 Collier on Bankruptcy ¶ 1113.01 (15th ed. rev’d 2007).

<sup>47</sup> 11 U.S.C.A. 1113(a) (2006).

<sup>48</sup> 11 U.S.C.A. 1129(a)(1) (2006); Alan N. Resnick, & Henry J. Sommer, 7 Collier on Bankruptcy ¶ 1113.02 (15th ed. rev’d 2007).

<sup>49</sup> 11 U.S.C.A. 1113(f) (2006).

<sup>50</sup> Tomoeh Murakami Tse, Taxpayers on Hook as Some Bailed Out Firms Prove Frail, Washington Post, Nov. 16, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/15/AR2009111502280.html>; Bill Vlasic and Nick Bunkley, Obama is Upbeat for G.M.’s Future, N.Y. Times, June 1, 2009, available at <http://www.nytimes.com/2009/06/02/business/02auto.html>; Andrew Ross Sorkin, Lehman Files for Bankruptcy; Merrill is Sold, N.Y. Times, Sept. 14, 2008, available at <http://www.nytimes.com/2008/09/15/business/15lehman.html?r=1>; Mae Anderson, Linens ’n Things Files for Bankruptcy, Associated Press, May 2, 2008, <http://www.usatoday.com/money/industries/retail/2008-05-02-linens.htm>; Delphi Files for Bankruptcy, CNNMoney.com, October 8, 2005, available at [http://money.cnn.com/2005/10/08/news/fortune500/delphi\\_bankrupt/index.htm](http://money.cnn.com/2005/10/08/news/fortune500/delphi_bankrupt/index.htm); Chris Isidore, Delta Air Lines Files for Bankruptcy, CNNMoney.com, Sept. 15, 2005, available at <http://money.cnn.com/2005/09/14/news/fortune500/delta/index.htm>; Christopher Edmonds, Enron Files for Chapter 11 Bankruptcy Protection, TheStreet.com, Dec. 2, 2001, <http://www.thestreet.com/story/10004757/enron-files-for-chapter-11-bankruptcy-protection.html>.

<sup>51</sup> Shawn Young, In Bankruptcy, Getting Laid Off Hurts Even Worse—WorldCom’s Ex-Employees Suffer Loss of Severance, End of Health Insurance—Moving into the Garage, Wall St. J., Sept. 20, 2002, at A1.

<sup>52</sup> Chelsea Emery, U.S. Business Bankruptcies Rise 38 Percent in 2009, Reuters, Jan. 5, 2010, <http://www.reuters.com/article/idUSN059048720100105>

workers made major concessions with regard to their job security, compensation, pensions, and health benefits. As the Wall Street Journal observed, once bankruptcy intervenes, “workers have to get in line with other unsecured creditors for severance benefits, unused vacation pay, expenses and commissions—a process that can leave them with mere pennies on the dollars that they’re owed.”<sup>53</sup> Pensions funded by a company’s stock are typically rendered worthless after the company files for bankruptcy.<sup>54</sup>

In contrast, the chief executives of these debtors often received extravagant incentive and retention bonuses. The inequity of such disparate pay packages is further heightened where the company’s financial difficulties stem from bad decisions made by management. “All too often,” as one bankruptcy judge observed, executive retention plans “have been widely used to lavishly reward—at the expense of the creditor body—the very executives whose bad decisions or lack of foresight were responsible for the debtor’s financial plight.”<sup>55</sup>

With respect to the rejection of collective bargaining agreements pursuant to Bankruptcy Code Section 1113, several issues are presented. First, there is a split among the federal circuits as to what constitutes sufficient grounds for rejecting a collective bargaining agreement within the meaning of Section 1113. Under that provision, a court may approve the rejection of a collective bargaining agreement if it is “necessary to permit the reorganization of the debtor.”<sup>56</sup> The Third Circuit interprets this phrase to mean “necessary to prevent liquidation,”<sup>57</sup> whereas the Second Circuit ap-

<sup>53</sup> Shawn Young, In Bankruptcy, Getting Laid Off Hurts Even Worse—WorldCom’s Ex-Employees Suffer Loss of Severance, End of Health Insurance—Moving into the Garage, Wall St. J., Sept. 20, 2002, at A1.

<sup>54</sup> See, e.g., Andrew Countryman, New Pension Rules Change Little in Post-Enron Era, Chi. Trib., Nov. 3, 2002 (“Perhaps the most enduring legacy of the Enron affair is the decimated 401(k) accounts of thousands of Enron workers); Simon Romero, Winnick Offers Restitution, N.Y. Times, Oct. 2, 2002 (reporting that several thousand employees of Global Crossing lost their retirement money when the company’s stock collapsed as a result of insider fraud); Shawn Young, In Bankruptcy, Getting Laid Off Hurts Even Worse—WorldCom’s Ex-Employees Suffer Loss of Severance, End of Health Insurance—Moving into the Garage, Wall St. J., Sept. 20, 2002, at A1 (reporting that WorldCom employees’ stock-backed pensions became “essentially worthless” in the wake of a “massive accounting scandal” and the company’s subsequent bankruptcy).

<sup>55</sup> In re U.S. Airways, Inc., 329 B.R. 793, 797 (Bankr. E.D. Va. 2005). While Bankruptcy Code section 503 restricts the use of key employee retention plans, the Chapter 11 bar has already pursued alternatives to avoid its restrictions. If, for example, the compensation package is intended to incentivize management, the arrangement may then be scrutinized under Bankruptcy Code section 363’s “more liberal business judgment review.” In re Global Home Products, LLC, 2007 WL 689747, at \*5 (Bankr. D. Del. Mar. 6, 2007). Section 363(b) allows a Chapter 11 debtor to use property of the bankruptcy estate that is not in the ordinary course of the debtor’s business, providing parties in interest, such as creditors, receive notice of the undertaking and have an opportunity to object. 11 U.S.C.A. § 363(b) (2006). Where there is a legitimate business justification for the undertaking, such as giving the debtor’s officers an incentive package or performance bonus, the courts will defer to the debtor. See, e.g., Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), 242 B.R. 147, 159 (D. Del. 1999) (citing “a sound business purpose” may justify an employee incentive plan); In re Global Home Products, LLC, 2007 WL 689747, at \*5 (Bankr. D. Del. Mar. 6, 2007); In re U.S. Airways, Inc., 329 B.R. 793, 795 (Bankr. E.D. Va. 2005). The court in the U.S. Airways case, for example, found that with respect to the debtor’s management employees (below the officer level), the proposed severance payments were appropriate. In re U.S. Airways, Inc., 329 B.R. at 801.

<sup>56</sup> 11 U.S.C.A. § 1113(b)(1) (2006).

<sup>57</sup> Wheeling Pittsburgh Steel Corp. v. United Steelworkers, 791 F.2d 1074, 1088 (3d Cir. 1986) (noting that “it appears from the legislators’ remarks that they placed the emphasis in determining whether and what modifications should be made to a negotiated collective bargaining agreement on the somewhat shorter term goal of preventing the debtor’s liquidation”).

plies “a more debtor-friendly” standard,<sup>58</sup> that focuses on the “debtor’s ultimate long-term economic health.”<sup>59</sup> As a result, the Second Circuit is often the venue sought by reorganizing debtors to file for relief under Chapter 11 because of its more employer favorable standard. It is “among the reasons that Delphi, a Michigan company, filed for bankruptcy in New York.”<sup>60</sup> As one commentator observed: “In case after case, bankruptcy courts have applied Congressional intent favoring long-term rehabilitation to sweep aside wage and benefits concessions won at the bargaining table.”<sup>61</sup>

Second, Chapter 11 may restrict self-help options available to organized labor. For example, the Second Circuit, in *In re Northwest Airlines Corp.*, held that a labor union may be enjoined from striking in response to the rejection of its collective bargaining agreement pursuant to Bankruptcy Code Section 1113.<sup>62</sup> This is apparently “the first federal appeals court to deny workers the right to strike following contract rejection in bankruptcy.”<sup>63</sup>

*Legislative History.*—House Judiciary Committee Chairman John Conyers, Jr. introduced H.R. 4677, the “Protecting Employees and Retirees in Business Bankruptcies Act of 2010,” on February 24, 2010. A substantially similar bill, H.R. 3652, the “Protecting Employees and Retirees in Business Bankruptcies Act of 2007,” was introduced by Chairman Conyers during the 110th Congress on September 25, 2007.

The Subcommittee on Commercial and Administrative Law held an oversight hearing on “Protecting Employees in Airline Bankruptcies” on December 16, 2009. The witnesses were: Capt. Chesley Sullenberger, U.S. Airline Pilots Association; Capt. Arnold Gentile, U.S. Airline Pilots Association; Capt. Bob Coffman, Coalition of Airline Pilots Associations; Marshall Huebner, Davis, Polk & Wardell LLP; Robert Roach, International Association of Machinists; and Stephen Nagrotsky, International Brotherhood of Teamsters. The purpose of the hearing was to consider whether the Bankruptcy Code should be amended to exempt airline employees from the Section 1113 process for rejecting collective bargaining agreements in airline bankruptcies.

The Subcommittee held a legislative hearing on H.R. 4677 on May 25, 2010. The witnesses were Babette Ceccotti, Cohen, Weiss, and Simon, LLP; Capt. John Prater, Air Line Pilots Association; James H.M. Sprayregen, Kirkland & Ellis LLP; Janette Rook, Association of Flight Attendants; Tim Conway, United Steelworkers;

<sup>58</sup> Commentary, Samuel J. Gerdano, *The Future of Collective Bargaining Under Bankruptcy—The Brave New World Facing the Old Economy Industries*, American Bankruptcy Institute (Mar. 2006) at <http://www.abiworld.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=41342> (last visited Sept. 4, 2007).

<sup>59</sup> Alan N. Resnick & Henry J. Sommer, *7 Collier on Bankruptcy* ¶ 1113.06[2][b] (15th ed. rev’d 2007); see, e.g., *Truck Drivers Local 807, Int’l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Carey Transp. Inc.*, 816 F.2d 82, 89 (2nd Cir. 1987) (“Thus, in virtually every case, it becomes impossible to weigh necessity as to reorganization without looking into the debtor’s ultimate future and estimating what the debtor needs to attain financial health.”).

<sup>60</sup> Commentary, Samuel J. Gerdano, *The Future of Collective Bargaining Under Bankruptcy—The Brave New World Facing the Old Economy Industries*, American Bankruptcy Institute (Mar. 2006) at <http://www.abiworld.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=41342> (last visited Sept. 4, 2007).

<sup>61</sup> Id.

<sup>62</sup> 483 F.3d 160 (2d Cir. 2007).

<sup>63</sup> Press Release, Association of Flight Attendants—CWA, AFL-CIO, *The Potential Impact of the Northwest Airlines Injunction on the Labor Movement*, at 1 (on file with the H. Comm. on the Judiciary).

Michael Bernstein, Arnold & Porter LLP; and Robert Roach, Jr., International Association of Machinists and Aerospace Workers.

On September 15, 2010, the Subcommittee met to markup H.R. 4677. During the markup, the Subcommittee adopted an amendment offered by Rep. Dan Maffei that carved an exception to the Section 1113 process for workers covered by Title II of the Railway Labor Act (i.e., airline employees.) The Subcommittee forwarded the bill to full Committee by an 8–4 vote.

No further action was taken on H.R. 4677 during the 111th Congress.

*H.R. 5043, the “Private Student Loan Bankruptcy Fairness Act of 2010”*

*Summary.*—Under Section 523(a)(8) of the Bankruptcy Code, educational debt is not dischargeable in bankruptcy unless the debtor seeking discharge of such debt demonstrates, through an adversary proceeding, that repayment of his or her educational debt would impose an undue hardship on the debtor and the debtor’s dependents.<sup>64</sup> This conditional dischargeability applies to debt resulting from federally issued loans, federally guaranteed loans, and private loans issued by nonprofit and for-profit institutions.<sup>65</sup> This provision also applies to debt resulting from obligations to repay funds received as an educational benefit, scholarship, or stipend.<sup>66</sup>

Congress first made student loan debt conditionally dischargeable in 1976 in an amendment to the Higher Education Act.<sup>67</sup> That provision was limited to debt from direct federal student loans and federally insured and guaranteed loans.<sup>68</sup> In 1978, Congress added this conditional dischargeability provision to the Bankruptcy Code as Section 523(a)(8).<sup>69</sup> As originally enacted in 1978, Section 523(a)(8) allowed a debtor to discharge his or her educational debt either by showing undue hardship or if her loan had been in repayment for more than five years at the time of her bankruptcy filing.<sup>70</sup> Congress perceived that federal student loan debtors were abusing the bankruptcy system by seeking to discharge student loan debt soon after graduation without attempting repayment and in the absence of extenuating circumstances.<sup>71</sup> Congress was also

<sup>64</sup> 11 U.S.C. § 523(a)(8) (2006). Some commentators have questioned whether there is any justification for the “undue hardship” test or have raised concerns about how courts apply the test. See, e.g., Rafael I. Pardo and Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 Am. Bankr. L.J. 179 (2009); John A.E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, Canadian Bus. L. J. 44, no. 2 (2007): 245–278. H.R. 5043, however, does not address the “undue hardship” test except to the extent that it exempts for-profit educational loan debt from that test.

<sup>65</sup> 11 U.S.C. § 523(a)(8) (2006).

<sup>66</sup> *Id.*

<sup>67</sup> 20 U.S.C. § 1087–3 (1976) (repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, § 316, 92 Stat. 2549, 2678 (effective Oct. 1, 1979)).

<sup>68</sup> *Id.*

<sup>69</sup> Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, § 316, 92 Stat. 2549, 2678 (effective Oct. 1, 1979).

<sup>70</sup> *Id.*

<sup>71</sup> Rafael I. Pardo, Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. Cin. L. Rev. 405 (2005). Whether Congress’s belief was warranted is debatable, given a lack of empirical evidence to support the perception that there was rampant abuse of the bankruptcy system by student loan debtors. *Id.*

seeking to protect the financial viability of the federal student loan program and, ultimately, to safeguard taxpayer money.<sup>72</sup>

Although student loans issued by private, for-profit institutions do not involve protecting the financial integrity of a government program, Congress nonetheless extended Section 523(a)(8) to cover debt resulting from such loans as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).<sup>73</sup> BAPCPA's legislative history sheds little light regarding the particular rationale for extending this kind of protection to loans issued by for-profit educational lenders.<sup>74</sup>

Section 523(a)(8) may pose a particularly difficult burden on debtors seeking to discharge private student loans because such debtors are more likely to become financially distressed and are more likely to need bankruptcy relief when they become financially distressed than debtors with federal student loans. This greater risk of bankruptcy stems from certain characteristics of private loans that federal loans do not have, but which are similar to other types of consumer loans like credit cards or subprime mortgages.<sup>75</sup>

Federal student loans offer certain protections to minimize the risk that a financially distressed debtor will need bankruptcy relief, whereas private student loans are not required to have, and often do not have, such consumer protections.<sup>76</sup> For example, federal loans have fixed interest rates (currently 5.6% for subsidized Stafford loans, 6.8% for unsubsidized loans<sup>77</sup>), whereas private loans often have variable rates that can be as high as 19%.<sup>78</sup> Federal loans have 1.5% origination fees<sup>79</sup>, whereas private loans have no limits on origination fees and can have fees of up to 10%.<sup>80</sup> Private lenders often charge additional fees such as late fees or fees for any deferments or forbearance, and half of the private loans in one survey had no forbearance option at all.<sup>81</sup> Federal loans also provide flexible options for distressed debtors, such as income-based repayment plans and partial or complete loan forgiveness in some circumstances, whereas private lenders are not required to offer such options.<sup>82</sup> Finally, in contrast to federal loans, most private loans

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<sup>72</sup> Id.

<sup>73</sup> Pub. L. No. 109-8, 119 Stat. 23, 59 (2005). Pursuant to section 1501 of the Act, most of its provisions became effective on October 17, 2005.

<sup>74</sup> H.R. Rep. No. 109-031 (2005).

<sup>75</sup> Deanne Loonin, *Too Small to Help: The Plight of Financially Distressed Private Student Loan Borrowers*, National Consumer Law Center, April 2009.

<sup>76</sup> Deanne Loonin and Alys Cohen, *Paying the Price: The High Cost of Private Student Loans and the Dangers for Student Borrowers*, National Consumer Law Center, March 2008.

<sup>77</sup> Federal Student Loan Amounts and Terms for 2009-10, The Project on Student Debt, June 2009, available at [http://projectonstudentdebt.org/files/pub/2009-10\\_loan\\_terms.pdf](http://projectonstudentdebt.org/files/pub/2009-10_loan_terms.pdf).

<sup>78</sup> Deanne Loonin, *Too Small to Help: The Plight of Financially Distressed Private Student Loan Borrowers*, National Consumer Law Center, April 2009; Deanne Loonin and Alys Cohen, *Paying the Price: The High Cost of Private Student Loans and the Dangers for Student Borrowers*, National Consumer Law Center, March 2008.

<sup>79</sup> Federal Student Loan Amounts and Terms for 2009-10, The Project on Student Debt, June 2009, available at [http://projectonstudentdebt.org/files/pub/2009-10\\_loan\\_terms.pdf](http://projectonstudentdebt.org/files/pub/2009-10_loan_terms.pdf). The origination fees for PLUS loans are 4%. Id.

<sup>80</sup> Deanne Loonin, *Too Small to Help: The Plight of Financially Distressed Private Student Loan Borrowers*, National Consumer Law Center, April 2009; Deanne Loonin and Alys Cohen, *Paying the Price: The High Cost of Private Student Loans and the Dangers for Student Borrowers*, National Consumer Law Center, March 2008.

<sup>81</sup> Id.

<sup>82</sup> Id. There is some evidence that some private lenders have begun to offer some flexible repayment options, but not income-based repayment. Id. Moreover, cancellations and settlements are rare. Id.

do not have any limits on loan amounts, increasing the risk that a borrower will become financially overextended.<sup>83</sup>

*Legislative History.*—On September 23, 2009, the Subcommittee on Commercial and Administrative Law held an oversight hearing on “An Undue Hardship? Discharging Educational Debt in Bankruptcy.” Representative Danny Davis testified on the first witness panel on behalf of the Congressional Black Caucus Community Reinvestment Task Force. On the second panel, the witnesses were: Lauren Asher, President, The Institute for College Access and Success; Rafael I. Pardo, Associate Professor of Law, Seattle University School of Law; J. Douglas Cuthbertson, Miles & Stockbridge PC; and Brett Weiss, Joseph, Greenwald & Laake, PA, on behalf of the National Association of Consumer Bankruptcy Attorneys.

Rep. Steve Cohen and Rep. Danny Davis introduced H.R. 5043, the “Private Student Loan Bankruptcy Fairness Act,” on April 15, 2010. The bill would make dischargeable in bankruptcy debt from private student loans issued by for-profit lenders. The current treatment of debt from student loans issued by governmental units or nonprofit institutions and obligations to repay funds for educational benefits, scholarships, and stipends under bankruptcy law would remain largely unchanged.

The Subcommittee held a legislative hearing on H.R. 5043 on April 22, 2010. The witnesses were Deanne Loonin, National Consumer Law Center; John Hupalo, Ramirez Capital Advisors; Valisha Cooks, a private student loan borrower; and Adrian Lapas, on behalf of the National Association of Consumer Bankruptcy Attorneys.

On September 15, 2010, the Subcommittee held a markup of H.R. 5043. The Subcommittee forwarded the bill to full Committee by a vote of 6–3.

No further action was taken on this bill during the 111th Congress.

#### OVERSIGHT ACTIVITIES

##### *DOJ Civil Division Oversight*

*Summary.*—On June 24, 2010, the Subcommittee on Commercial and Administrative Law held its first oversight hearing of the Civil Division of the United States Department of Justice since the Obama Administration took office. Moreover, it was the first oversight hearing on the Civil Division since 2003.<sup>84</sup>

The Civil Division is responsible for a broad range of litigation activity that includes defending the constitutionality of federal legislation, recovering money for the United States that was lost through fraud, enforcing federal consumer protection laws, defending immigration enforcement actions, and representing the United

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<sup>83</sup> Deanne Loonin, *Too Small to Help: The Plight of Financially Distressed Private Student Loan Borrowers*, National Consumer Law Center, April 2009; Thomas Harnisch, *The Public Realities of Private Student Loans*, American Association of State Colleges and Universities, April 2008.

<sup>84</sup> See Reauthorization of the U.S. Department of Justice: Executive Office for U.S. Attorneys, Civil Division, Environment and Natural Resources Division, Executive Office for U.S. Trustees, and Office of the Solicitor General, Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 108th Cong. (2003) (conducting oversight of multiple Justice Department components, including Civil Division).

States in habeas cases. The vast majority of the Civil Division's work is defensive in nature.

Among the issues discussed during the hearing were the implementation of new Freedom of Information Act guidelines, Guantánamo detainee habeas defense; the government's response to the Deepwater Horizon oil spill in the Gulf of Mexico; state legal challenges to health care reform legislation; potential federal government legal challenge to an Arizona immigration law; the status of litigation concerning the storage of spent nuclear waste; and the Division's role in response to mortgage fraud and the financial crisis; and abusive debt collection practices.

#### *Credit Cards and Bankruptcy*

*Summary.*—Holding credit card debt may be a particularly strong factor in pushing many people into bankruptcy. Professor Ronald Mann of Columbia University Law School conducted a study of several industrialized nations showing that high-interest-rate consumer debt strongly correlates with bankruptcy filings.<sup>85</sup> Moreover, a consumer with credit card debt is more likely to file for bankruptcy than a consumer with any other form of debt.<sup>86</sup> While many factors explain why credit card debt is a particularly difficult burden for many borrowers, that burden may be unnecessarily exacerbated by certain credit card lending practices.

The substantial increase in the number and amount of fees charged by credit card issuers has been a significant cause of unsustainable credit card debt.<sup>87</sup> For instance, the average late payment fee more than doubled from \$12.83 in 1995 to \$33.64 in 2005.<sup>88</sup> Some commentators believe that issuers impose these fees in higher amounts, impose them more quickly, and assess them more often than previously because issuers now rely on these fees as a major source of revenue, rather than as a way to deter bad borrowing behavior.<sup>89</sup> Over time, the amount accumulated penalty fees can exceed the amount of the underlying credit card purchases or cash advances, trapping a borrower in debt even after he or she has paid off the amount owed for the purchases or advances.<sup>90</sup>

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<sup>85</sup> See Abusive Credit Card Practices and Bankruptcy: Hearing on S. 257 Before the Subcomm. On Admin. Oversight and the Courts of the S. Comm. on the Judiciary, 111th Cong. 3 (2009) (statement of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center) (citing Ronald J. Mann, Charging Ahead: The Growth and Regulation of Payment Card Markets (2006)).

<sup>86</sup> *Id.*

<sup>87</sup> Examples of fees include cash advance, balance transfer, overseas transfer, late-payment, and over-limit fees. Lucy Lazarony, Credit card penalties get more severe, bankrate.com, available at <http://www.bankrate.com/brm/news/cc/20010514a.asp>.

<sup>88</sup> U.S. Gen. Accounting Office, Credit Cards: Increased Complexity in Rates and Fees Heighten Need for More Effective Disclosures to Consumers 18 (2006).

<sup>89</sup> See, e.g., Legislative Hearing Regarding H.R. 627, The Credit Cardholders' Bill of Rights of 2009 and H.R. 1456, The Consumer Overdraft Protection Fair Practices Act of 2009 Before the Subcomm. on Financial Inst. and Consumer Credit of the H. Comm. on Fin. Servs., 111th Cong. 14 (2009) (statement of Travis B. Plunkett, Legislative Director, Consumer Federation of America and Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group); Hearing on Credit Cards and Bankruptcy: Opportunities for Reform Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary, 110th Cong. 3 (2008) (statement of John Rao, Director, National Association of Consumer Bankruptcy Attorneys).

<sup>90</sup> See, e.g., *Discover Bank v. Owens*, 822 N.E.2d 869 (Ohio Mun. 2004) (finding that credit card lender was not entitled to collect unpaid balance from debtor because accumulation of \$1518 in over-limit fees, \$1,160 in late fees, \$369.62 in credit insurance fees, and \$6,008.66 in interest and other fees based on \$1,963 principal debt where debtor had already paid \$3,492 was unconscionable); *In re Blair*, No. 02-1140 (Bankr. W.D.N.C. filed Feb. 10, 2004) (finding

Similarly, credit card issuers have been imposing high penalty interest rates. A penalty interest rate is an increased interest rate imposed on a borrower for making a late payment, exceeding his or her credit limit, or based on some other triggering event.<sup>91</sup> Additionally, issuers sometimes apply penalty interest rates retroactively to debts that were already paid at a lower rate.<sup>92</sup> Penalty rate provisions were contained in 94% of new credit card solicitations in 2008.<sup>93</sup> Almost 11% of all balances borrowed on credit cards carry penalty pricing and most borrowers are unaware they are being charged the penalty rate.<sup>94</sup> The average penalty rate in 2008 is 16.9 percentage points higher than the average purchase rate.<sup>95</sup> Sometimes, penalty interest rates can be as high as 30% to 40%.<sup>96</sup>

Universal default provisions in credit card contracts allow credit card companies to raise interest rates for debtors who are late with payments, exceed credit limits, or otherwise have troubles with other creditors.<sup>97</sup> Some critics contend that it is unfair and abusive for credit card issuers to charge a higher interest rate when the borrower has met his or her obligations to that issuer.<sup>98</sup> Card issuers respond that interest rate penalties that increase because of universal default are related to the credit risk of the borrower.<sup>99</sup>

Over the last two decades, credit card issuers marketed aggressively to groups of borrowers that did not previously have much access to consumer credit, including moderate and low-income, financially troubled, college-age, elderly, and minority borrowers. On the one hand, these efforts gave many consumers a degree of purchasing power that they were once denied. On the other hand, whether because of a lack of extensive experience with consumer credit products or because of a lack of sufficient financial wherewithal, these types of borrowers were particularly vulnerable to being trapped by credit card debt, a problem exacerbated by the fact that such borrowers were also more likely to miss payments or exceed credit limits, thereby triggering the penalty fees and in-

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that a majority of credit card company's claims against bankruptcy debtor consisted of interest and fees rather than principal.

<sup>91</sup> Joshua M. Frank, *Priceless or Just Expensive? The Use of Penalty Rates in the Credit Card Industry*, Center For Responsible Lending, Dec. 16, 2008, at 4, available at <http://responsiblending.org/pdfs/priceless-or-just-expensive.pdf>.

<sup>92</sup> Hearing on Financial Services Issues: A Consumer's Perspective Before the Subcomm. On Financial Inst. and Consumer Credit, Sept. 15, 2004, at 16-17 (statement of Tamara Draut, Director of Economic Opportunity Program, Demos).

<sup>93</sup> Joshua M. Frank, *Priceless or Just Expensive? The Use of Penalty Rates in the Credit Card Industry*, Center For Responsible Lending, Dec. 16, 2008, at 1, available at <http://responsiblending.org/pdfs/priceless-or-just-expensive.pdf>.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Kathleen Day and Caroline E. Mayer, *Credit Card Penalties, Fees Bury Debtors*, Wash. Post, March 6, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A10361-2005Mar5.html>.

<sup>97</sup> Bill Burt, *Universal Default Rules Explained*, bankrate.com, <http://www.bankrate.com/brm/news/credit-management/20040120a1.asp>.

<sup>98</sup> See, e.g., Legislative Hearing Regarding H.R. 627, *The Credit Cardholders' Bill of Rights of 2009* and H.R. 1456, *The Consumer Overdraft Protection Fair Practices Act of 2009* Before the Subcomm. on Financial Inst. and Consumer Credit of the H. Comm. on Fin. Servs., 111th Cong. 17 (2009) (statement of Travis B. Plunkett, Legislative Director, Consumer Federation of America and Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group) (contending that it "is fundamentally unfair to impose a penalty interest rate on a consumer who has not made a late payment or defaulted on an obligation").

<sup>99</sup> *Id.*

terest rates that significantly increase their debt.<sup>100</sup> Lower income borrowers are more likely to rely on the credit cards for borrowing rather than simply for convenience.<sup>101</sup> They are also more likely to carry a monthly balance.<sup>102</sup> Arguably, the onus should be on the lender to foresee the financial trouble that such types of borrowers could end up in, rather than encouraging the most vulnerable consumers to accrue unsustainable debt.

Credit card lenders also often market aggressively to those exiting bankruptcy.<sup>103</sup> Lenders do so because consumers exiting bankruptcy because such consumers have had their debts wiped and cannot have any new debts discharged for several years.<sup>104</sup> Some bankruptcy attorneys and consumer advocates worry that this practice irresponsibly tempts desperate consumers.<sup>105</sup>

On April 2, 2009, the Subcommittee on Commercial and Administrative Law held a hearing on "Consumer Debt: Are Credit Cards Bankrupting Americans?" The witnesses were Adam Levitin, Associate Professor of Law, Georgetown University Law Center; David John of the Heritage Foundation; Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group; and Brett Weiss, a consumer bankruptcy attorney with the firm of Joseph, Greenwald & Laake, PA, on behalf of the National Association of Consumer Bankruptcy Attorneys.

#### *The Continuing Home Mortgage Foreclosure Crisis*

*Summary.*—The most recent statistics continue to paint a grim picture of the Nation's home foreclosure crisis. Between December 2007 and September 2010, more than 2.3 million homes were lost to foreclosure. One in every 78 households received at least one foreclosure filing in the first 6 months of this year. Sales of new and existing homes fell to the lowest levels on record in July 2010. Seven to 8 million U.S. homes are vacant or in the foreclosure process. Owners of about 11 million homes, or 23 percent of households with a mortgage, owed more than their property was worth as of June 30, 2010. Nearly 8% of both African Americans and Latinos have lost their homes to foreclosure as compared to 4.5% of whites. Analysts project that between 10 and 13 million foreclosures will have occurred by the time the crisis abates, as reported by the Center for Responsible Lending.

Bank reposessions of foreclosed homes increased 38% in the second quarter of 2010, for a record total of 269,952 for the quarter,

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<sup>100</sup> Kathleen Day and Caroline E. Mayer, Credit Card Penalties, Fees Bury Debtors, Washington Post, March 6, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A10361-2005Mar5.html>; Jennifer Wheary and Tamara Draut, Who Pays? The Winners and Losers of Credit Card Deregulation, Demos, August 1, 2007, p. 1 (finding that cardholders earning less than \$50,000 a year were twice as likely to pay interest rates above 20 percent and that African-American and Latino card holders were more likely than whites to pay interest rates higher than 20 percent).

<sup>101</sup> See Gallup Poll News Service, Average American Owes \$2900 in Credit Card Debt, April 16, 2004 (showing that households earning less than \$40,000 per year owed between 11% and 14.3% of their income in credit card debt, in contrast to households earning more than \$100,000 owing 2.3%).

<sup>102</sup> See Board of Governors of the Federal Reserve System, "Report to the Congress on Practices of the Consumer Credit Industry in Soliciting and Extending Credit and their Effects on Consumer Debt and Insolvency," June 2006 at 9 (stating that 61% of lowest income households with a credit card carry balances).

<sup>103</sup> Caroline E. Mayer, Bankrupt and Swamped with Credit Offers, Washington Post, April 15, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A54745-2005Apr14.html>.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

and the number of repossession of foreclosed homes is expected to top 1 million by year's end.<sup>106</sup> This was a 5% jump from the previous quarter.<sup>107</sup> Foreclosure filings—including default and auction notices and bank repossession—were reported on 932,234 properties in the first quarter of 2010, a 7 percent increase from the previous quarter and a 16 percent increase from the first quarter of 2009.<sup>108</sup> In the first quarter of 2010, one in 138 U.S. households received a foreclosure filing.<sup>109</sup> In 2009, a record 3 million homeowners received foreclosure notices.<sup>110</sup>

The dramatic growth in the number of home foreclosures began four years ago. In 2006, there were 1.2 million foreclosures in the United States, representing an increase of 42 percent over the prior year.<sup>111</sup> From 2007 through 2008, mortgage foreclosures were estimated to result in “a whopping \$400 billion worth of defaults and \$100 billion in losses to investors in mortgage securities,”<sup>112</sup> translating into “roughly one per 62 American households . . . .”<sup>113</sup> For example, the Mortgage Bankers Association issued a report in 2007 stating that the “number of Americans who fell behind on their mortgage payments rose to a 20-year high in the third quarter” of the prior year.<sup>114</sup>

The glut of foreclosures has adversely affected new home sales and depressed home values generally. Federal Reserve Chairman Ben Bernanke in January 2008 acknowledged that “housing starts and new home sales have both fallen by about 50 percent from their respective peaks.”<sup>115</sup> The *Wall Street Journal* reported in October 2008, “The relentless slide in home prices has left nearly one in six U.S. homeowners owing more on a mortgage than the home is worth, raising the possibility of a rise in defaults—the very misfortune that touched off the credit crisis [in 2007].”<sup>116</sup> The *Journal*

<sup>106</sup> Alejandro Lazo, U.S. Home Foreclosures Reach Record High in Second Quarter, L.A. Times, July 15, 2010, available at <http://www.latimes.com/business/realestate/la-fi-foreclosures-20100715,0,5786857.story>.

<sup>107</sup> Id.

<sup>108</sup> David M. Kinchen, Realty Trac: Foreclosures Up 7% in First Quarter 2010, [huntingtonnews.net](http://www.huntingtonnews.net/columns/100415-kinchen-columnsforeclosures.html), April 15, 2010, available at <http://www.huntingtonnews.net/columns/100415-kinchen-columnsforeclosures.html>.

<sup>109</sup> Id.

<sup>110</sup> Janet Morrissey, Still Hunting for a Bottom in Housing, Time, Jan. 7, 2010, available at <http://www.time.com/time/business/article/0,8599,1952132,00.html>.

<sup>111</sup> Nelson D. Schwartz, Can the Mortgage Crisis Swallow a Town?, N.Y. Times, Sept. 4, 2007.

<sup>112</sup> Op-ed, Mark Zandi, The Mortgage Mess, Boston Globe, July 22, 2007. Similarly, the Center for Responsible Lending, estimated that 20 percent of subprime home loans made between 2005 and 2006 could end in foreclosure. Geraldine Fabrikant, After Foreclosure, a Big Tax Bill From the I.R.S., N.Y. Times, Aug. 20, 2007.

In 2007, up to 2 million households were at risk of losing their homes through foreclosure. See, e.g., Steve Lohr, Loan by Loan, the Making of a Credit Squeeze, N.Y. Times, Aug. 19, 2007, at 1 Bus. Sec.; Evolution of an Economic Crisis? The Subprime Lending Disaster and the Threat to the Broader Economy: Hearing Before the Joint Economic Committee, 110th Cong. (2007) (prepared testimony of Martin Eakes, CEO of the Center for Responsible Lending) (citing a range of projected foreclosures with the highest at 1.7 million); Roger Lowenstein, Subprime Time—How Did Homeownership Become So Ricketty, N.Y. Times Magazine, Sept. 2, 2007, at 11.

<sup>113</sup> Nelson D. Schwartz, Can the Mortgage Crisis Swallow a Town?, N.Y. Times, Sept. 4, 2007.

<sup>114</sup> Brian Louis, Paulson Mortgage Plan Surfaces Too Late to Stem Housing Slide, Bloomberg.com (Dec. 7, 2007).

<sup>115</sup> Federal Reserve Chairman Ben S. Bernanke, Speech at the Women in Housing and Finance and Exchequer Club Joint Luncheon, Washington, DC (Jan. 10, 2008), at <http://www.federalreserve.gov/newssevents/speech/bernanke20080110a.htm>; see, e.g., Brian Louis, Paulson Mortgage Plan Surfaces Too Late to Stem Housing Slide, Bloomberg.com (Dec. 7, 2007) (reporting 48 percent drop in new home sales since 2005).

<sup>116</sup> James R. Hagerty & Ruth Simon, Housing Pain Gauge: Nearly 1 in 6 Owners “Under Water”—More Defaults and Foreclosures Are Likely as Borrowers with Greater Debt Than Value in Their Homes Are Put in a Tight Spot, Wall St. J., Oct. 8, 2008, at A5.

explained that more foreclosures are likely “because it is hard for borrowers in financial trouble to refinance or sell their homes and pay off their mortgage if their debt exceeds the home’s value.”<sup>117</sup> As a result, home values nationwide have fallen an average of 19% from their peak in 2006 and this “price plunge has wiped out trillions of dollars in home equity.”<sup>118</sup>

There are substantial societal and economic costs of home foreclosures that adversely impact American families, their neighbors, communities and municipalities. Foreclosures depress home values across entire communities. A single foreclosure “could impose direct costs on local government agencies totaling more than \$34,000.”<sup>119</sup> Federal Reserve Chairman Ben Bernanke noted, “At the level of the individual community, increases in foreclosed-upon and vacant properties tend to reduce house prices in the local area, affecting other homeowners and municipal tax bases.”<sup>120</sup> As a consequence of nearby foreclosures on subprime loans, forty million homeowners may see their property values decline as by more than \$350 billion.<sup>121</sup> Last year, home equity losses totaled \$7 trillion.<sup>122</sup>

During the 111th Congress, the Subcommittee on Commercial and Administrative Law held two oversight hearings on the Treasury Department’s Home Affordable Modification Program. On July 9, 2009, the Subcommittee held a hearing on “Home Foreclosures: Will Voluntary Mortgage Modification Help Families Save Their Homes.” The witnesses were: Alan M. White, Assistant Professor of Law, Valparaiso University School of Law; James H. Carr, Chief Operating Officer, National Community Reinvestment Coalition; Mark Calabria, Ph.D., Director of Financial Regulation Studies, Cato Institute; and Irwin Trauss, Philadelphia Legal Assistance. On December 11, 2009, the Subcommittee held a hearing on “Home Foreclosures: Will Voluntary Mortgage Modification Help Families Save Their Homes? Part II.” The witnesses were: Adam Levitin, Georgetown University Law Center; Faith Schwartz, HOPE NOW; Margery Golant, Golant & Golant, P.A.; and Henry H. Hildebrand, III, National Association of Chapter 13 Trustees.

The Subcommittee also held a hearing on “The Role of the Lending Industry in the Home Foreclosure Crisis” on September 9, 2009. The witnesses were: the Hon. Elizabeth Magner, United States Bankruptcy Judge for the Eastern District of Louisiana;

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<sup>117</sup> Id.

<sup>118</sup> Dennis Cauchon, Why Home Values May Take Decades To Recover, U.S.A. Today, Dec. 12, 2008, at 1A; see also Bob Willis & Shobhana Chandra, U.S. Economy: Housing Prices Collapse at Near-Depression Pace, Bloomberg.com (Dec. 23, 2008) (“Sales of single-family houses in the U.S. dropped in November [2008] by the most in two decades and resale prices collapsed at a pace reminiscent of the Great Depression, dashing hopes that the market was close to a bottom.”); Shobhana Chandra, U.S. Home Resales Fall; Prices Drop by Record 13.2%, Bloomberg.com (Dec. 23, 2008); Kathleen M. Howley, Mortgage Delinquencies, Foreclosures Rise to Record, Bloomberg.com (Dec. 5, 2008) (reporting that the median home price in the fourth quarter of 2008 will be 19% lower from the record in 2006’s second quarter, according to a November 24, 2008 forecast by Fannie Mae, the world’s largest mortgage buyer).

<sup>119</sup> William C. Apgar, et al., The Municipal Cost of Foreclosures: A Chicago Case Study, Home-ownership Preservation Foundation Housing Finance Policy Research Paper No. 2005-1, at 1 (Feb. 27, 2005).

<sup>120</sup> Ben Bernanke, Federal Reserve Chairman, Remarks at the Independent Community Bankers Conference (Mar. 4, 2008) (reprinted by Bloomberg.com, available at <http://www.bloomberg.com/apps/news?pid=20601068&sid=apeU.0IaETdM&refer=economy>).

<sup>121</sup> See Center for Responsible Lending, Updated Projections of Subprime Foreclosures in the United States and Their Impact on Home Values and Communities, Aug. 2008, available at <http://www.responsiblelending.org/pdfs/updated-foreclosure-and-spillover-brief-8-18.pdf>.

<sup>122</sup> Janet Morrissey, Still Hunting for a Bottom in Housing, Time, Jan. 7, 2010, available at <http://www.time.com/time/business/article/0,8599,1952132,00.html>.

Lewis D. Wrobel, Attorney at Law; Joseph Mason, Ph.D., Associate Professor, Department of Finance, E.J. Ourso College of Business, Louisiana State University; and Suzanne Sangree, Chief Solicitor, Baltimore City Department of Law.

On July 19, 2010, the Committee held a briefing at the Cecil C. Humphreys School of Law at the University of Memphis. There were three witness panels. Panel I consisted of: the Honorable A C Wharton, Mayor, City of Memphis and Webb Brewer, Brewer & Barlow PLC. Panel II consisted of the Honorable David Kennedy, Chief Judge, United States Bankruptcy Court for the Western District of Tennessee and the Honorable Jennie Latta, Judge, United States Bankruptcy Court for the Western District of Tennessee. Panel III consisted of Dr. Phyllis Betts, Director, Center for Community Building and Neighborhood Action, University of Memphis; Sapna Raj, Attorney, Memphis Area Legal Services; Steve Lockwood, Executive Director, Frayser Community Development Corporation; Beverly Anderson, Community Development Council of Greater Memphis; and Scott Bernstein, Center for Neighborhood Technology.

#### *Auto Industry Bankruptcies*

*Summary.*—The Committee devoted substantial efforts at examining the repercussions of the Chapter 11 bankruptcy filings by Chrysler LLC and General Motors Corporation in 2009 on American jobs, consumers, and the Nation's bankruptcy system. Over the course of three hearings, the Committee and its Subcommittee on Commercial and Administrative Law heard from a broad spectrum of stakeholders in the automobile industry as well as the government officials tasked with overseeing the industry's restructuring.

Among the issues that the Committee and its Subcommittee on Commercial and Administrative Law examined were: the impact of the termination of numerous G.M. and Chrysler automobile dealerships; the risk that the asset sales involving the viable assets of G.M. and Chrysler may have constituted impermissible *sub rosa* plans that undermined chapter 11's reorganization plan requirements; the treatment of those with tort claims against Old G.M. and Old Chrysler; the treatment of future asbestos claims; and the impact of the G.M. and Chrysler bankruptcies on auto parts suppliers.

The full Committee on the Judiciary held a hearing on "Ramifications of Auto Industry Bankruptcies" on May 21, 2009. The witnesses were: Professor Lynn LoPucki, UCLA Law School; Damon Lester, President, National Association of Minority Auto Dealers; Randy Henderson, Owner, Webster Chrysler Jeep Inc, appearing on behalf of National Automobile Dealers Association; Andrew Grossman, Senior Legal Policy Analyst, Center for Legal and Judicial Studies, Heritage Foundation; Clarence Ditlow, President, Center for Auto Safety; Ralph Nader, Consumer Advocate; Joan Claybrook President Emeritus, Public Citizen; Bruce Fein, Principal, The Lichfield Group; and Professor David Arthur Skeel, University of Pennsylvania Law School.

The Subcommittee on Commercial and Administrative Law held a hearing on "Ramifications of Auto Industry Bankruptcies, Part

II" on Tuesday, July 21, 2009. The sole witness at the hearing was Ron Bloom, Senior Advisor, U.S. Department of the Treasury.

The Subcommittee on Commercial and Administrative Law held a hearing on "Ramifications of Auto Industry Bankruptcies, Part III" on Wednesday, July 22, 2009. Witnesses on the first panel of that hearing included Louann Van Der Wiele, Vice President and Associate General Counsel, Chrysler Group LLC; Kevyn D. Orr, Jones Day, bankruptcy counsel for Chrysler LLC; Michael J. Robinson, Vice-President and General Counsel of North America, General Motors Company; and Harvey Miller, Weil Gotshal, bankruptcy counsel for General Motors Corporation. Witnesses on the second panel included Professor Douglas Baird, University of Chicago Law School; Daniel J. Ikenson, Associate Director, Center for Trade Policy Studies, CATO Institute; Richard Mourdock, Indiana State Treasurer; Jeremy Warriner, claimant against Chrysler LLC; John J. Fitzgerald, President, Fitzgerald Auto Malls; Jim Tarbox, President, Tarbox Motors, Inc.; Greg Williams, formerly of Huntington Chevrolet; and Robert G. Knapp, Knapp Chevrolet.

*Legal Services Corporation*

*Summary.*—The Judiciary Committee has oversight jurisdiction over the Legal Services Corporation. Established in 1974, the Legal Services Corporation (LSC) is a private, nonprofit, federally funded corporation that helps provide legal assistance to low-income individuals and families in civil matters by distributing congressionally appropriated federal funds in the form of grants to local legal services providers.<sup>123</sup> These providers offer legal assistance to low-income clients in all 50 states, the District of Columbia, and the United States territories. Although Congress has not authorized Federal funds for LSC since FY1980, Congress continues to appropriate LSC funds annually. Legal aid advocates contend that the funding is inadequate to meet the growing need for legal assistance to the poor and contains onerous restrictions. Many of the restrictions exist due to the controversial nature of LSC and its mission. Further, recent critical audits and reports have kept LSC and its grantees in the spotlight.

*Hearings.*—On October 27, 2009, the CAL Subcommittee held a hearing on the Legal Services Corporation.<sup>124</sup> The hearing consisted of two witness panels. The first panel included Helaine Barnett, the President of the Legal Services Corporation and Michael D. McKay, Vice Chairman of the Board of the Legal Services Corporation. The second witness panel included: H. Thomas Wells, Jr., Immediate Past President of the American Bar Association and a partner at Maynard, Cooper & Gale, P.C.; Harrison McIver, Executive Director and CEO of Memphis Area Legal Services, Inc.; Don Saunders, Director of the Civil Legal Services Division at the National Legal Aid and Defender Association; and Susan Ragland, Director, Financial Management and Assurance Team, Government Accountability Office. The hearing allowed the Members to receive testimony from LSC regarding the criticisms of its activities and in-

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<sup>123</sup> Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378, 42 U.S.C. § 2996 et seq.

<sup>124</sup> The Legal Services Corporation: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. (2009).

ternal controls, and its recently released report on the unmet civil legal needs of low-income persons, and from witnesses who advocate increased funding for LSC and eliminating the restrictions placed on the spending of LSC grantee programs. The witnesses also discussed legislation to re-authorize LSC.

*The Federal Arbitration Act*

*Summary.*—The Judiciary Committee has jurisdiction over the Federal Arbitration Act, Title 9 of the United States Code. On February 12, 1925 Congress codified the use of arbitration through the Federal Arbitration Act.<sup>125</sup> Title 9 was adopted as a means to put arbitration agreements in commercial and admiralty contracts<sup>126</sup> on the same footing as other contracts, and as a way to avoid the costly and time consuming litigation process.<sup>127</sup> Arbitration law establishes alternative dispute resolution procedures for certain types of disputes<sup>128</sup> with an eye towards keeping those disputes out of court, thereby facilitating efficient adjudication.<sup>129</sup> The Supreme Court has interpreted the Act to supersede all state laws that conflict with the spirit of the Act.<sup>130</sup> In order to facilitate settlements by arbitration, Title 9 provides a strong presumption that courts will enforce determinations arrived at under this process.<sup>131</sup> Though avenues for judicial review of arbitration determinations exist and have been utilized by parties, the title itself has rarely been amended. The Supreme Court has upheld arbitration clauses in a wide array of contracts by recognizing Congress' expansive powers under the Commerce Clause.<sup>132</sup>

Although arbitration was initially conceived as a privately-run, voluntary process for resolving disputes, mainly between businesses, written and oral testimony from Congressional hearings during the 110th Congress indicated that the use of arbitration had expanded in the last twenty years. Many businesses are now requiring arbitration of disputes in their consumer, employment, and franchise relationships. Ironically, during the passage of the Federal Arbitration Act, Congress did not intend to allow binding arbitration agreements on individuals if the contracts were between

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<sup>125</sup> 9 U.S.C. 1 et seq. For an analysis of the legislative history of the Federal Arbitration Act, see Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U.L. Rev. 99, 101–114 (Fall 2006).

<sup>126</sup> As Representative Graham noted in the House floor debate in 1924, “[t]his bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when voluntarily placed in the document by the parties to it.” 68 Cong. Rec. 1931 (1924).

<sup>127</sup> See H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).

<sup>128</sup> Legislative history reveals that Congress intended the Federal Arbitration Act to cover disputes between merchants of approximately equal strength, Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary, 68th Cong. 10 (1924), but not involving disputes with workers, Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 9, 14 (1923), or disputes where the arbitration agreement could be considered an adhesion contract, Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary, 68th Cong. 15 (1924).

<sup>129</sup> Matthew Parrott, *Is Compulsory Court-Annexed Medical Malpractice Arbitration Constitutional? How the Debate Reflects a Trend Towards Compulsion in Alternative Dispute Resolution*, 75 Fordham L. Rev. 2685, 2692 (Apr. 2007).

<sup>130</sup> *Preston v. Ferrer*, 128 S. Ct. 978, 987 (2008) (“When parties agree to arbitrate all questions arising under a contract, the [Federal Arbitration Act] supersedes state laws . . .”).

<sup>131</sup> See 68 Cong. Rec. 1931 (1924).

<sup>132</sup> See, e.g., *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

parties of unequal bargaining power.<sup>133</sup> The secret nature of arbitration, the ability of the drafter to dictate the terms of the arbitration process, and the apparent loss of civil protections when compared to a court proceeding have created controversy among consumer and employee advocates and small business owners.

Because arbitration avoids the public court system in favor of a private industry of arbitration groups, individuals lose some of the benefits and rights associated with traditional litigation. These benefits and rights include lower initial financial hurdles, pretrial discovery, formal civil procedure rules, proximity to the resolution forum, access to counsel, class action options, and fairness. Arbitration clauses may even negate the protection of some federal statutes. Several recent developments necessitated the CAL Subcommittee to hold hearings generally on arbitration.

*Legislative History.*—On May 5, 2009, the CAL Subcommittee held a hearing entitled “The Federal Arbitration Act: Is the Credit Card Industry Using the Act to Quash Legal Claims?”<sup>134</sup> The witnesses who testified at the hearing included: Michael Donovan, a principal of Donovan Searles, LLC; Professor Richard Frankel, Drexel University Law School; Professor Christopher R. Drahoszal, the University of Kansas School of Law; and David Arkush, Director of Congress Watch. The hearing provided CAL Subcommittee members the opportunity to hear testimony on mandatory binding arbitration clauses in credit card contracts.

On September 15, 2009, the CAL Subcommittee held a hearing entitled “Mandatory Binding Arbitration: Is It Fair and Voluntary?”<sup>135</sup> The hearing consisted of two witness panels. The first panel included Representative Linda Sánchez (CA-39) and Representative Hank Johnson (GA-4), who each discussed their respective legislation amending the Federal Arbitration Act.<sup>136</sup> The second witness panel included: Alison Hirschel, a professor at the University of Michigan Law School and speaking on behalf of NCCNHR: The National Consumer Voice for Long-Term Care; Cliff Palefsky, a principal with McGuinn, Hillsman & Palefsky, P.C., who spoke on behalf of the National Employment Lawyers Association; Stuart Rossman, an attorney with the National Consumer Law Center; and Stephen Ware, a professor at the University of Kansas School of Law. The hearing provided CAL Subcommittee members the opportunity to hear testimony on mandatory binding arbitration clauses generally and specifically about each introduced bill on arbitration.

#### *State Taxation Affecting Interstate Commerce*

*Summary.*—The Judiciary Committee has jurisdiction over state taxation affecting interstate commerce. The CAL Subcommittee

<sup>133</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J. dissenting) (citing Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary, 67th Cong., 9–11 (1923)).

<sup>134</sup> The Federal Arbitration Act: Is the Credit Card Industry Using the Act to Quash Legal Claims: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. (2009).

<sup>135</sup> Mandatory Binding Arbitration: Is It Fair and Voluntary: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. (2009).

<sup>136</sup> On February 26, 2009, Representative Linda T. Sánchez introduced H.R. 1237, the “Fairness in Nursing Home Arbitration Act of 2009”. On February 12, 2009, Representative Hank Johnson introduced H.R. 1020, the “Arbitration Fairness Act of 2009”.

held a series of hearings to discuss the major principles underlying several of the legislative proposals before Congress and the Committee. These principles include nexus and apportionment, and the impact of each on State and local government revenues. Specifically, States currently levy a tax on income earned or on a transaction occurring in part within its borders. States may levy and the taxpayer is liable only if there exists a nexus, or connection, between the State and the taxpayer. Several individuals and businesses have approached Congress to contend that some states have imposed taxes without sufficient nexus over the individuals or businesses. Some states have urged Congress to grant the States the authority to require remote sellers, with whom the States do not have sufficient nexus, to collect and remit taxes for certain transactions. Many legislative proposals, introduced or discussed in response to taxpayers' or States' concerns, would limit or expand the ability of states to levy a tax or a fee by establishing or solidifying what constitutes sufficient nexus.

Once a state establishes nexus over the income, property, or activity of the taxpayer, the taxpayer is liable to pay the tax. But how do states determine what portion of the total value of a multi-state taxpayer's property, income, and receipts that each state is entitled to tax and the taxpayer is liable to remit? Currently, states attribute the amount of property, income, and receipts for tax purposes based on different methods. Some contend that these methods burden interstate commerce.

*Legislative History.*—On February 4, 2010, the CAL Subcommittee held a hearing entitled “State Taxation: The Role of Congress in Defining Nexus.”<sup>137</sup> The witnesses who testified at the hearing included: Professor Walter Hellerstein, University of Georgia Law School; Joseph Crosby, Chief Operating Officer and Senior Director of Policy for the Council on State Taxation; and Commissioner R. Bruce Johnson, Utah Tax Commission. The hearing provided CAL Subcommittee members the opportunity to review the intricacies of nexus and its impact on state taxation. The hearing also provided CAL Subcommittee members the opportunity to examine the pending legislation and legislative proposals before the CAL Subcommittee concerning state taxation.

On April 15, 2010, the CAL Subcommittee held a hearing entitled “State Taxation: The Impact of Congressional Legislation on State and Local Government Revenues.”<sup>138</sup> The hearing consisted of two witness panels. The first panel included Vermont Governor James Douglas and Judge B. Glen Whitney, County Judge of Tarrant County, Texas, and President-Elect of the National Association of Counties. The second witness panel included: Robert Ward, Deputy Director of the Nelson A. Rockefeller Institute of Government; Joseph Henchman, Tax Counsel and Director of State Projects for the Tax Foundation; Kerri Korpi, Director of Research and Collective Bargaining Services at the American Federation of State, County and Municipal Employees; and Scott Pattison, Exec-

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<sup>137</sup> State Taxation: The Role of Congress in Defining Nexus: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. (2010).

<sup>138</sup> State Taxation: The Impact of Congressional Legislation on State and Local Government Revenues: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. (2010).

utive Director of the National Association of State Budget Officers. The hearing provided CAL Subcommittee members the opportunity to receive testimony concerning the current financial situation of state and local governments. The hearing also provided a platform to discuss the impact of federal legislative proposals affecting state taxation and revenue.

On May 6, 2010, the CAL Subcommittee held a hearing entitled “State Taxation: The Role of Congress in Developing Apportionment Standards.”<sup>139</sup> The witnesses who testified at the hearing included: Professor John Swain, University of Arizona College of Law; Daniel De Jong, Tax Counsel for Tax Executives Institute; and Jim Eads, Executive Director of the Federation of Tax Administrators. The hearing provided CAL Subcommittee members the opportunity to review the intricacies of the division of tax bases for multi-state enterprises and how the methods impact interstate commerce and state taxation.

*Voice over Internet Protocol*

*Summary.*—Voice over Internet Protocol (VoIP) is both a communication technology and service which allows users to communicate with others across the country or internationally over the Internet inexpensively and virtually simultaneous. The pricing and ease of use have led to the rapid growth of VoIP. In fact, from 2004 to October 2008, the number of VoIP subscribers within the United States increased from fewer than 1 million to over 18.5 million. However, this expansion and predicted explosion in use have overwhelmed state and local taxing authorities and VoIP service providers because there exists no clear and Constitutional taxing model. Further, because VoIP offers advantages over traditional analog voice services, some estimate that VoIP could completely supplant traditional voice services in less than 15 years.<sup>140</sup>

*History.*—On March 31, 2009, the CAL Subcommittee held a hearing entitled “VoIP: Who Has Jurisdiction to Tax It?”<sup>141</sup> Witnesses who testified at the hearing included: John Barnes, Director of Product Management and Development for Verizon; Robert Cole, Tax Research Manager for Sprint Nextel; Wisconsin Representative Phil Montgomery, Chair of the National Council of State Legislators Committee on Communications, Financial Services & Interstate Commerce; and James R. Eads, Jr., Executive Director of the Federation of Tax Administrators. The hearing afforded the Members of the CAL Subcommittee an opportunity to review the issues concerning State and local taxation of VoIP and to discuss potential legislation.

*The Administrative Conference of the United States (ACUS)*

*Summary.*—The Administrative Conference of the United States (ACUS) is an independent, non-partisan agency devoted to analyzing the administrative law process and providing guidance to

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<sup>139</sup> State Taxation: The Role of Congress in Developing Apportionment Standards: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. (2010).

<sup>140</sup> Jim Nason, VoIP: New Technology Versus Legacy Tax Policy, (February 2005), available at <http://www.tmcnet.com/voip/0205/VoIP-New-Technology-Versus-Legacy-Tax-Policy.htm>.

<sup>141</sup> VoIP: Who Has Jurisdiction to Tax It?: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. (2009).

Congress. ACUS began operations with the appointment and confirmation of its first Chairman in 1968. ACUS ceased operations on October 31, 1995, due to termination of funding by Congress, but the statutory provisions establishing ACUS were not repealed. Subsequently, Congress reauthorized ACUS in 2004, but no funds were appropriated. Congress reauthorized ACUS again in 2008, and in 2009 authorized \$3.2 million for each of fiscal years 2009 through 2011 for ACUS. ACUS was officially re-established in March 2010, when the Senate confirmed President Obama's nominee as Chairman, Paul Verkuil.

*Legislative History.*—On May 20, 2010, after Chairman Verkuil's nomination was confirmed by the Senate, the Subcommittee on Commercial and Administrative Law ("CAL") held a hearing on the Administrative Conference of the United States. The hearing consisted of two panels. The first panel included two witnesses: The Honorable Stephen G. Breyer, Associate Justice, U.S. Supreme Court, Washington, DC; and, The Honorable Antonin G. Scalia, Associate Justice, U.S. Supreme Court, Washington, DC. The second panel included testimony from four witnesses: Mr. Paul R. Verkuil, Chairman, Administrative Conference of the United States; Ms. Sally Katzen, Executive Managing Director, Podesta Group; Mr. Jeffrey S. Lubbers, Professor of Practice in Administrative Law, American University Washington College of Law; and, Curtis W. Copeland, Ph.D., Specialist in American National Government, Congressional Research Service.

No further action on ACUS was taken in the 111th Congress.

#### *Office of Information and Regulatory Affairs (OIRA)*

*Summary.*—The Office of Information and Regulatory Affairs (OIRA) is a Federal office established by Congress in the 1980 Paperwork Reduction Act, and is part of the Office of Management and Budget, within the Executive Office of the President. Under the Paperwork Reduction Act, OIRA reviews all collections of information by the Federal Government. OIRA also develops and oversees the implementation of government-wide policies in several areas, including information quality and statistical standards. In addition, OIRA reviews draft regulations under Executive Order 12866.

The Office of the Administrator within OIRA was created by Congress as part of the establishment of OIRA in the Paperwork Reduction Act of 1980. The Senate confirmed President Obama's nomination for Administrator, Cass R. Sunstein, on September 10, 2009.

*Legislative History.*—On July 27, 2010, the Subcommittee on Commercial and Administrative Law (CAL) held a hearing on Federal Rulemaking and the Regulatory Process. The hearing consisted of two panels. The first panel included Cass R. Sunstein, Administrator of the Office of Information and Regulatory Affairs (OIRA), Executive Office of the President, Office of Management and Budget, Washington, DC. The second panel included four witnesses: Sally Katzen, Senior Advisor/Consultant, Podesta Group, and former Administrator of the Office of Information and Regulatory Affairs ("OIRA"), Washington, DC; Gary D. Bass, Ph.D., Executive Director, OMB Watch, Washington, DC; Richard A. Wil-

liams, Ph.D., Managing Director, Regulatory Studies Program and Government Accountability Project, Mercatus Center at George Mason University, Arlington, VA; and, Curtis W. Copeland, Ph.D., Specialist in American National Government—Government and Finance Division, Congressional Research Service, Washington, DC. No further action was taken on OIRA in the 111th Congress.

## SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES<sup>1</sup>

JERROLD NADLER, New York, *Chairman*

MELVIN L. WATT, North Carolina	F. JAMES SENSENBRENNER, JR., Wisconsin
ROBERT C. "BOBBY" SCOTT, Virginia	TOM ROONEY, Florida
WILLIAM D. DELAHUNT, Massachusetts	STEVE KING, Iowa
HENRY C. "HANK" JOHNSON, JR., Georgia	TRENT FRANKS, Arizona
TAMMY BALDWIN, Wisconsin	LOUIE GOHMERT, Texas
JOHN CONYERS, JR., Michigan	JIM JORDAN, Ohio
STEVE COHEN, Tennessee	
SHEILA JACKSON LEE, Texas	
JUDY CHU, California	

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<sup>1</sup>Subcommittee chairmanship and assignments approved January 22, 2009.

### *Tabulation of subcommittee legislation and activity*

Legislation referred to the Subcommittee .....	174
Legislation on which hearings were held .....	6
Legislation reported favorably to the full Committee .....	2
Legislation reported adversely to the full Committee .....	0
Legislation reported without recommendation to the full Committee .....	0
Legislation reported as original measure to the full Committee .....	0
Legislation discharged from the Subcommittee .....	2
Legislation pending before the full Committee .....	1
Legislation reported to the House .....	2
Legislation discharged from the Committee .....	2
Legislation pending in the House .....	1
Legislation failed passage by the House .....	1
Legislation passed by the House (including suspensions) .....	20
Legislation pending in the Senate .....	0
Legislation vetoed by the President (not overridden) .....	0
Legislation enacted into Public Law .....	1
Days of legislative hearings .....	5
Days of oversight hearings .....	23

### LEGISLATIVE ACTIVITIES

#### *H.R. 157, the "District of Columbia House Voting Rights Act of 2009"*

*Summary.*—H.R. 157, the “District of Columbia House Voting Rights Act of 2009,” would treat the District of Columbia as a single Congressional District for the purpose of granting voting representation in the U.S. House of Representatives. The legislation would increase the size of the House of Representatives by two seats, proving one voting seat for the District of Columbia and one other state, which would be Utah, the state next in line to receive a seat based on the 2000 Census. Following the 2012 Census, one of the additional seats would be allocated based on that Census, and one would be retained by the District of Columbia.

*Legislative History.*—H.R. 157 was introduced by Delegate Eleanor Holmes Norton on January 6, 2009, and referred to the Committee on the Judiciary. On January 27, 2009, the Subcommittee

on the Constitution, Civil Rights and Civil Liberties held a hearing on H.R. 157 the “District of Columbia House Voting Rights Act of 2009.” In examining this legislative approach to securing voting representation in the U.S. House of Representatives for residents of the District of Columbia, witnesses provided testimony on the constitutionality of this approach. Some witnesses also discussed the experiences of residents of the District of Columbia, who do not have voting representation in Congress, but who are treated like U.S. citizens in every other regard, such as taxation and military service.

The hearing consisted of two witness panels. Testifying on the first panel were House Majority Leader Steny Hoyer, former Representative Tom Davis, Representative Jason Chaffetz, and Representative Louie Gohmert. Testifying on the second panel were Wade Henderson, President and CEO of the Leadership Conference on Civil Rights; Captain Yolanda Lee, of the District of Columbia Army National Guard; Professor Viet Dinh, Professor of Law at the Georgetown University Law Center, former U.S. Assistant Attorney General for Legal Policy at the U.S. Department of Justice from 2001 to 2003; and Professor Jonathan Turley, J.B. and Maurice Shapiro Professor of Public Interest Law at the George Washington University Law School.

On February 25, 2009, the Judiciary Committee met to consider H.R. 157. the Committee approved an amendment in the nature of a substitute offered by Mr. Nadler and Mr. Conyers by a vote of 24 to 5. The Committee also considered the following amendments: An amendment offered by Mr. Smith, to the amendment in the nature of a substitute offered by Mr. Nadler and Mr. Conyers, providing for intervention and standing by Members of Congress in any action challenging the constitutionality of H.R. 157. The amendment failed by a vote of 15 to 15. An amendment offered by Mr. Sensenbrenner to the amendment in the nature of a substitute, requiring Utah to redistrict into four single-member districts. The amendment failed by a vote of 9 to 19. A motion to table the appeal of the ruling of the chair that an amendment offered by Mr. Chaffetz to amend the amendment in the nature of a substitute, repealing the Office of the District of Columbia Delegate, is non-germane. The motion to table was agreed to by a vote of 17 to 11. An amendment offered by Mr. Issa to the amendment in the nature of a substitute, increasing the U.S. House of Representatives to 436, providing a seat only for the District of Columbia, and eliminating the additional seat for Utah. The amendment failed by a vote of 12 to 20. An amendment offered by Mr. Chaffetz to the amendment in the nature of a substitute, providing that H.R. 157 cannot be construed to suggest that the District of Columbia should have Senate representation. The amendment failed by a vote of 12 to 18. The Committee reported H.R. 157 favorably, as amended, by a vote of 20 to 12. H. Rept. 111-22. The bill was placed on the Union Calendar, Calendar No. 8.

*H.R. 847, the “James Zadroga 9/11 Health and Compensation Act of 2009”*

*Summary.*—This legislation would establish both a health care and health monitoring program for first responders and other indi-

viduals suffering serious health problems caused by exposure to toxic materials in the wake of the terrorist attacks of September 11, 2001. It would also reopen the Victim Compensation Fund (VCF) established after the attacks, to provide compensation to, and to resolve outstanding legal claims of, those individuals suffering the latent effects of that exposure. These individuals were unable to file for relief from the first VCF solely because their injuries had not become manifest before the Fund went out of existence. The VCF portion of the bill is within the jurisdiction of the Judiciary Committee.

*Legislative History.*—H.R. 847 was introduced on February 4, 2009, and was referred to the Committees on Energy and Commerce and Judiciary. On March 31, 2009, the Subcommittee held a hearing jointly with the Subcommittee on Immigration, Citizenship, Refugees, and Border Security on H.R. 847, the “James Zadroga 9/11 Health and Compensation Act of 2009” (the Zadroga Act).

Testifying were Kenneth Feinberg, Former Special Master, Victim Compensation Fund; Barbara Burnette, Detective, New York Police Department; Christine LaSala, Chief Executive Officer, World Trade Center Captive Insurance Fund; James Melius, MD, Administrator, N.Y.S. Laborers’ Health and Safety Trust Fund; Michael Cardozo, Corporation Counsel, City of New York; Ted Frank, American Enterprise Institute; Rich Wood, President, Plaza Construction Corporation.

The witnesses discussed the health impact of the attacks and its aftermath, the exposure to the toxic materials, the assurances received by governmental officials concerning the safety of the working environment, the legal status of the pending cases, and the economic impact on construction contractors who now have significant legal exposure as a result of having responded to the World Trade Center site, first as a rescue mission, then as a recovery operation. Mr. Feinberg discussed his experience with the first VCF, and discussed possible strategies for addressing the current situation.

On July 29, 2010, it was ordered reported, as amended, by the Committee on Energy and Commerce, and by the Committee on the Judiciary. H.Rpt. 111-560.

It was considered by the House on July 29, 2010. A motion to suspend the rules and pass failed on a vote of 255-159. The House subsequently considered the legislation on September 29, 2010. It passed on a vote of 268-160. Cloture on the motion to proceed to the bill was not invoked in Senate by Yea-Nay Vote of 57-42.

#### *H.R. 984, the “State Secret Protection Act of 2009”*

*Summary.*—H.R. 984, the State Secret Protection Act of 2009, codifies the common law state secret privilege and provides uniform standards and procedures for courts to apply when considering governmental claims of state secret privilege in civil litigation. H.R. 984 responds to concerns that the courts have failed to apply consistent standards and have been reluctant to test government claims of secrecy, often failing to examine the evidence that the government seeks to withhold or deferring to government assertions of harm and, as a result, dismissing cases prematurely and unfairly. Modeled on the Freedom of Information Act and Classified

Information Procedures Act (CIPA)—legislation passed by Congress in 1980 to govern court handling of secret information in criminal cases—and adjusted for civil litigation, H.R. 984 protects legitimate secrets from harmful disclosure while preventing abuse and maximizing the ability of litigants to achieve justice in the courts.

*Legislative History.*—Rep. Nadler (D-NY) introduced H.R. 984, the State Secret Protection Act of 2009, on February 11, 2009. On June 4, 2009, the Subcommittee on Constitution, Civil Rights, and Civil Liberties held a hearing on H.R. 984, at which the following witnesses testified: Honorable Patricia Wald, retired Chief Judge, U.S. Court of Appeals for the District of Columbia; Honorable Asa Hutchinson, Senior Partner, AH Law Group and former member of Congress (1997–2001), DEA Administrator (2001–2003), and DHS Undersecretary (2003–2005); Ben Wizner, Security Project Staff Attorney, American Civil Liberties Union; Andrew Grossman, Senior Legal Policy Analyst, The Heritage Foundation. Letters in support of H.R. 984 were submitted by Hon. William S. Sessions, retired Chief Judge of the U.S. District court for the Western District of Texas and former Director of the FBI; Lou Fisher, Specialist in Constitutional Law, Law Library of the Library of Congress; The Constitution Project; Human Rights First; American Association of Law Libraries et al.; the American Civil Liberties Union; and Public Citizen.

Taken as a whole, witness testimony and additional materials submitted for this hearing established that:

(1) Congress has the constitutional authority to codify the state secrets privilege and should exercise this authority in a way that ensures judicial review of the privilege that is both independent and meaningful.

(2) Judges are well-qualified to handle and review sensitive national security information and have done so in other contexts, including under the Freedom of Information Act (FOIA), the Classified Information Procedures Act (CIPA), and the Foreign Intelligence Surveillance Act (FISA).

(3) Currently, there is little uniformity in how courts handle state secret privilege claims, and court dismissal of cases at the pleadings stage based on the prospective assertion from the Government that litigation inevitably will require disclosure of state secrets raises valid concern that such dismissals are not necessary or just.

(4) H.R. 984 incorporates useful techniques that would prevent harmful disclosure of valid secrets while allowing cases to go forward whenever possible, including requiring courts to consider appointment of independent experts or special masters, requiring pre-hearing conferences to narrow the disputed issues and ensure that any necessary protective orders are in place, allowing the parties to conduct nonprivileged discovery, and requiring courts to consider whether substitutes are possible for privileged information.

(5) H.R. 984 sets an appropriate standard of judicial review by requiring an independent assessment of the Government's claim and directing courts to weigh testimony of Government experts as they do other expert testimony. This necessarily requires consideration of the Government's unique expertise in national security or diplomatic affairs and its likely superior access to factual informa-

tion relevant to its claim as well as its potential bias or conflict of interest, as appropriate or necessary based on the facts of the particular case.<sup>142</sup>

On June 11, 2009, the Subcommittee on Constitution, Civil Rights, and Civil Liberties reported the bill favorably, as amended, by a voice vote. On November 5, 2009, the Judiciary Committee ordered H.R. 984 favorably reported, as amended, by a roll call vote of 18 to 12.

*H.R. 1843, the “John Hope Franklin Tulsa-Greenwood Race Riot Claims Accountability Act of 2009”*

*Summary.*—H.R. 1843 was introduced on April 1, 2009, by Rep. John Conyers. The legislation provides that any Greenwood, Oklahoma, claimant (survivors of the Tulsa, Oklahoma, Race Riot of 1921 or their descendants) who has not previously obtained a determination on the merits of a Greenwood claim may, in a civil action commenced within five years after the date of enactment, obtain that determination. On April 2, 2009, the Subcommittee on the Constitution, Civil Rights, and Civil Liberties held markup of the legislation. The bill passed the subcommittee by voice vote, without amendment, and was referred to the full Committee for action.

The Greenwood neighborhood of Tulsa, Oklahoma, was one of the nation’s most prosperous African-American communities entering the decade of the Nineteen Twenties. Serving over 8000 residents, the community boasted a commercial district known nationally as the “Negro Wall Street.” In May 1921, the community was burned to the ground and up to 300 of its residents were killed by a racist mob. In the wake of the violence, the State and local governments quashed claims for redress and effectively erased the incident from official memory. The suits were ultimately dismissed as time barred in *Alexander v. State of Oklahoma* 382 F.3d 1206 (11th Cir. 2004). This legislation is named in honor of the late Dr. John Hope Franklin, the noted historian, who was a first-hand witness to the destructive impact that the riot had on the African-American community of Tulsa.

*Legislative History.*—H.R. 1995, “Tulsa-Greenwood Race Riot Claims Accountability Act of 2007,” was introduced by House Judiciary Committee Chairman John Conyers, Jr. on April 23, 2007. On April 24, 2007, the Subcommittee on the Constitution, Civil Rights and Civil Liberties held a hearing on H.R. 1995. Testimony was received from the following witnesses: John Hope Franklin Ph.D., James B. Duke Professor Emeritus of History, Duke University School of Law; Alfred L. Brophy Ph.D., Professor of Law, University of Alabama School of Law; Olivia Hooker Ph.D., Professor of

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<sup>142</sup>See, e.g., Legislative Hearing 111th Congress, tr. at 28 (statement of Hon. Patricia M. Wald) (“H.R. 984 provides that the judge make his independent evaluation of the harm in a manner that weights the testimony of Government experts like those of other experts. Judges are confronted every day with expert testimony of all kinds and are accustomed to evaluating it on the basis of the expert’s background, firsthand knowledge of the subject, and inherent credibility, as well as the consistency and persuasiveness of his testimony”); id., tr. at 32-3 (statement of Hon. Asa Hutchinson) (“I do not believe it is appropriate, as the companion Senate bill does, to include language requiring that executive branch assertions of the privilege be given ‘substantial weight.’ The standard of review in H.R. 984 provides proper respect for executive branch experts, whereas a ‘substantial weight’ standard would unfairly tip the scales in favor of executive branch claims before the judge’s evaluation occurs, and would undermine the thoroughness of the judge’s own review.”)

Psychology (retired), Fordham University and Professor Charles Ogletree, Jesse Climenko Professor of Law, Harvard Law School.

*H.R. 3335, the “Democracy Restoration Act of 2009”*

*Summary.*—On March 16, 2010, the Subcommittee on the Constitution, Civil Rights, and Civil Liberties held a hearing on the “Democracy Restoration Act of 2009” (H.R. 3335). An estimated 5.3 million American citizens are not permitted to vote because of a felony conviction, with the impact of voting prohibitions falling disproportionately on the minority community. As many as 4 million of these people have completed their sentences and lead normal, mainstream lives but remain unable to vote due to a past felony conviction. This legislation is designed to clarify and, in some cases, expand the voting rights of people with felony convictions.

The hearing explored the history and impact of felony disenfranchisement on state and Federal voting systems and the legal basis for action by the Federal government. The following witnesses offered testimony on the legislation: Hilary O. Shelton, Director of the NAACP’s Washington Bureau; Roger Clegg, President and General Counsel of the Center for Equal Opportunity; Burt Neuborn, Inez Milholland Professor of Civil Liberties at NYU School of Law; Hans A. von Spakovsky, Senior Legal Fellow at The Heritage Foundation; Ion Sancho: Supervisor of Elections for Leon County, Florida; Carl Wicklund; Executive Director of the American Probation and Parole Association; and Andres Idarraga: a third year student at Yale Law School, and a person who was disenfranchised due to a prior felony conviction.

*Prior Congressional Consideration.*—On October 21, 1999, the Subcommittee on the Constitution held a hearing on the H.R. 906, the “Civic Participation and Rehabilitation Act,” the predecessor legislation to the “Democracy Restoration Act.”

*H.R. 3721, the “Protecting Older Workers Against Discrimination Act”*

*Summary.*—On June 10, 2010, the Subcommittee held a hearing to examine the Supreme Court’s decisions in *Gross v. FBL Financial Services, Inc.*, where the Court ruled that a plaintiff cannot bring admixed-motive claim under the Age Discrimination in Employment Act (ADEA), and to consider H.R. 3721, the bill introduced by Representative George Miller in response to *Gross*. Testimony was received from: Jocelyn Samuels, Senior Counselor, Civil Rights Division, Department of Justice; Jack Gross, plaintiff in *Gross v. FBL Financial Services, Inc.*, Des Moines, Iowa; Eric Dreiband, Partner, Jones Day, Washington, D.C.; and Helen Norton, Professor, University of Colorado Law School, Boulder, CO.

In a 5–4 decision authored by Justice Thomas, the Supreme Court ruled in *Gross v. FBL Financial Services, Inc.* that a plaintiff cannot bring a mixed-motive claim under the ADEA and, instead, must always allege and prove that age was a “but for” cause of a challenged employment decision. In refusing to apply the statutory framework and precedent from Title VII of the Civil Rights Act of 1964, which prohibits employment decisions motivated in whole or in part by a protected characteristic, the *Gross* majority departed

from the widely accepted presumption that Title VII's framework and standards apply to related federal statutes.

In October 2009, Representative George Miller, Chairman of the House Education and Labor Committee introduced H.R. 3721, the *Protecting Older Workers Against Discrimination Act* in response to *Gross*. H.R. 3721 seeks to ensure uniformity by amending the ADEA, and other federal laws, to make clear that Title VII's standards and framework apply and that unlawful discrimination is established when it is shown that a protected characteristic was a determinative ("but for") factor or was a motivating factor in an adverse employment decision, even if other factors also motivated that decision.

At the June 10, 2010 hearing, Ms. Samuels testified that, by rejecting "its prior construction of identical language in Title VII," the Supreme Court raised the burden of proof for ADEA plaintiffs and "effectively reduced the protections available to older workers." Ms. Samuels testified that lower courts already had begun to apply the *Gross* decision beyond the ADEA to claims under the Americans with Disabilities Act of 1990 (ADA), Section 1983 of the Civil Rights Act of 1866, the Family and Medical Leave Act and other laws, and that "*Gross* has and will continue to create confusion and unpredictability in the law." Ms. Samuels supported legislation like H.R. 3721 to "create unity in the law, renew the ability of older workers and others to effectively challenge discrimination against them, and move us closer to realizing the law's promise of equal employment opportunity."

Plaintiff Jack Gross testified that he filed an age discrimination complaint after he was demoted despite 13 consecutive years of performance reviews in the top 3 to 5 percent of his company. A jury ruled in his favor, finding that Mr. Gross had shown that age was a motivating factor in the decision to demote him and that his employer did not prove that it would have demoted him regardless of his age. After the Court of Appeals for the 8th Circuit overturned that verdict—ruling that Mr. Gross needed direct evidence of discrimination—Mr. Gross appealed to the Supreme Court. Rather than ruling on the issue presented, whether or not a plaintiff needs direct evidence of discrimination to obtain a mixed-motive jury instruction, the Supreme Court decided instead that shifting the burden of proof in age discrimination is never appropriate. Describing the Supreme Court's decision as a "bait and switch," Mr. Gross urged Congress to pass H.R. 3721 to overturn the *Gross* decision.

Mr. Dreiband agreed that the Supreme Court decision removed the availability of mixed-motive claims for ADEA plaintiffs, but testified that this was a benefit to older workers as it deprived employers of asserting and proving the "same decision" defense (i.e., that the employer would have made the same decision regardless of the plaintiff's age), which allows a successful employer to avoid money damages. Professor Norton disagreed with Mr. Dreiband's position that the removal of mixed-motive claims benefits plaintiff-employees, pointing to Mr. Gross's case as one example of a plaintiff who had been harmed—by having his jury verdict overturned—by the Court's decision. Professor Norton further testified that H.R. 3721 would restore the longstanding rule for proving unlawful dis-

crimination developed under Title VII, and that previously had governed claims under other civil rights laws like the ADEA.

*H.R. 5751, the “Lobbying Disclosure Enhancement Act”*

*Summary.*—H.R. 5751 was introduced by Representative Mary Jo Kilroy to amend the Lobbying Disclosure Act of 1995 to require registrants to pay an annual fee of \$50, to impose a penalty of \$500 for failure to file timely reports required by that Act, to provide for the use of the funds from such fees and penalties for reviewing and auditing filings by registrants, and for other purposes.

*Legislative History.*—Representative Mary Jo Kilroy introduced H.R. 5751 on July 7, 2010 and it was referred to the Committee on the Judiciary. On July 28, 2010 Representative Robert “Bobby” Scott moved to suspend the rules and pass the bill as amended and the resolution passed the U.S. House of Representatives by voice vote. On July 29, 2010 the bill was received by the U.S. Senate. On August 5, 2010 the bill was referred to the Senate Committee on the Judiciary.

*H.J. Res. 21, A Constitutional Amendment Concerning Senate Vacancies*

*Summary.*—H.J. Res. 21 would amend the U.S. Constitution to require that Senate vacancies be filled only by elections, and not by gubernatorial appointments. Under the XVIIIth Amendment to the Constitution, states may elect to hold elections or to empower the executive of the state to make temporary appointments until the next general election.

*Legislative History.*—H.J. Res. 21 was introduced on February 11, 2009 and referred to the Committee on the Judiciary.

On March 11, 2009, the Subcommittee held a joint hearing with the Senate Judiciary Subcommittee on the Constitution to examine proposed constitutional amendment, and its Senate companion, S.J. Res. 7.

Testifying at the hearing were Senator Mark Begich; Representative David Dreier; Representative Aaron Schock; Vikram D. Amar, Associate Dean for Academic Affairs and Professor of Law, University of California, Davis; Robert Edgar, President and CEO, Common Cause; Pamela S. Karlan, Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School; Kevin J. Kennedy, Director and General Counsel, Wisconsin Government Accountability Board; Thomas H. Neale, Specialist in American National Government, Congressional Research Service; David Segal, Analyst, FairVote and Rhode Island State Representative; Matthew Spalding, Ph.D, Director, B. Kenneth Simon Center for American Studies, The Heritage Foundation.

*H. Res. 73, Observing the birthday of Martin Luther King, Jr., and encouraging the people of the United States to observe the birthday of Martin Luther King, Jr., and the life and legacy of Dr. Martin Luther King, Jr., and for other purposes*

*Summary.*—H. Res. 73 was introduced by Representative John Lewis to observe the birthday of Martin Luther King, Jr., and encourage the people of the United States to observe the birthday of Martin Luther King, Jr. In the face of hatred and violence, Dr.

King preached a doctrine of nonviolence and civil disobedience to combat segregation, discrimination, and racial injustice, and believed that people have the moral capacity to care for other people. In 1968, Representative John Conyers introduced legislation to establish the birthday of Martin Luther King, Jr. as a Federal holiday. In 1983, Congress passed and President Ronald Reagan signed legislation creating the birthday of Martin Luther King, Jr. holiday.

*Legislative History.*—Representative John Lewis introduced H. Res. 73 on January 16, 2009 and it was referred to the Committee on the Judiciary. On January 21, 2009, Representative John Conyers, Jr. moved to suspend the rules and the bill passed the U.S. House of Representatives by voice vote.

*H. Res. 134, Recognizing the 50th Anniversary of Dr. Martin Luther King, Jr.'s visit to India, and the positive influence that the teachings of Mahatma Gandhi had on Dr. King's work during the Civil Rights Movement*

*Summary.*—H. Res. 134 was introduced by Representative John Lewis to recognize the 50th Anniversary of Dr. Martin Luther King, Jr.'s visit to India, and the positive influence that the teachings of Mahatma Gandhi had on Dr. King's work during the Civil Rights Movement. Dr. King, his wife Coretta Scott King, and Lawrence Reddick, then-chairman of the history department at Alabama State College, arrived in Bombay, India, on February 10, 1959 and stayed until March 10, 1959. Dr. King was warmly welcomed by members of Indian society throughout his visit, and met with Prime Minister Jawaharlal Nehru, land reform leader Vinoba Bhave, and other influential Indian leaders to discuss issues of poverty, economic policy, and race relations. The trip to India had a profound impact on Dr. King, and inspired him to use nonviolence as an instrument of social change to end segregation and racial discrimination in America throughout the rest of his work during the Civil Rights Movement.

*Legislative History.*—Representative John Lewis introduced H. Res. 134 on February 4, 2009 and it was referred to the Committee on the Judiciary. On February 10, 2009, Representative Henry “Hank” Johnson moved to suspend the rules and the bill passed the U.S. House of Representatives by a roll call vote of 406–0.

*H. Res. 150, Expressing the sense of the House of Representatives that A. Philip Randolph should be recognized for his lifelong leadership and work to end discrimination and secure equal employment and labor opportunities for all Americans*

*Summary.*—H. Res. 150 was introduced by Representative Charles Rangel to express the sense of the House of Representatives that A. Philip Randolph should be recognized for his lifelong leadership and work to end discrimination and secure equal employment and labor opportunities for all Americans. A. Philip Randolph was the leader of the successful movement to organize the Pullman Company which led to the formation of the Brotherhood of Sleeping Car Porters, an organization that advanced the claims of African-American railway workers to dignity, respect, and a decent livelihood. He was one of the central figures speaking out for

African-American rights during the 1930s and 1940s and focused on labor and employment issues. Mr. Randolph was one of the leading forces behind the March on Washington for Jobs and Freedom and worked with many old friends and foes of his earlier labor struggles to ensure the success of the event, which took place on August 28, 1963, drew a crowd of over 250,000 people, and was the occasion of a meeting with President Kennedy and Dr. Martin Luther King, Jr. A. Philip Randolph died in 1979 as an elder statesman of the civil rights movement, a much admired figure and role model for the young people of this Nation.

*Legislative History.*—Representative Charles Rangel introduced H. Res. 150 on February 10, 2009 and it was referred to the Committee on the Judiciary and the Committee on Education and Labor, where it was further referred to the Subcommittee on Workforce Protection. On December 15, 2009, Representative John Conyers, Jr. moved to suspend the rules and the bill passed the U.S. House of Representatives by a roll call vote of 395–23.

*H. Res. 505, Condemning the murder of Dr. George Tiller, who was shot to death at his church on May 31, 2009*

*Summary.*—H. Res. 505 was introduced by Representative Louise McIntosh Slaughter to condemn the murder of Dr. George Tiller, who was shot to death at his church. Dr. Tiller was murdered in Wichita, Kansas, on May 31, 2009 at his place of worship, a place intended for peace and refuge that in a moment became a place for violence and murder. The resolution stated that places of worship should be sanctuaries, but have increasingly borne witness to reprehensible acts of violence, with 38 people in the United States killed in their place of worship in the past 10 years and 30 people wounded in those same incidents. Violence is deplorable, and never an acceptable avenue for expressing opposing viewpoints and H. Res. 505 commits to the American principle that tolerance must always be superior to intolerance, and that violence is never an appropriate response to a difference in beliefs.

*Legislative History.*—On June 4, 2009, Representative Louise McIntosh Slaughter introduced H. Res. 505 and it was referred to the Committee on the Judiciary. On June 9, 2009, Representative Jerrold Nadler moved to suspend the rules and the bill passed the U.S. House of Representatives by a roll call vote of 423–0.

*H. Res. 530, Commending the purpose of the third annual Civil Rights Baseball Game and recognizing the historical significance of the location of the game in Cincinnati, Ohio*

*Summary.*—H. Res. 530 was introduced by Representative Steve Driehaus to commend the purpose of the third annual Civil Rights Baseball Game and recognize the historical significance of the location of the game in Cincinnati, Ohio. Baseball was at the forefront of the civil rights movement and was integrated before either the Armed Forces or the public schools. The Major League Baseball Civil Rights Game was created to honor those who fought both on and off the field for the equal treatment of all people. Civil Rights Baseball Game was held in Cincinnati, Ohio, at the Great American Ballpark on June 20, 2009 which is historically significant because Cincinnati was an integral stop along the Underground Rail-

road as one of the first free ‘stations’ slaves would encounter when escaping north.

*Legislative History.*—On June 11, 2009, Representative Steve Driehaus introduced H. Res. 530 and it was referred to the Committee on the Judiciary. On June 15, 2009, Representative Robert “Bobby” Scott moved to suspend the rules and the bill passed the U.S. House of Representatives by voice vote.

*H. Res. 901, Recognizing November 14, 2009, as the 49th anniversary of the first day of integrated schools in New Orleans, Louisiana*

*Summary.*—Representative Gwen Moore introduced H. Res. 901 to recognize November 14, 2009, as the 49th anniversary of the first day of integrated schools in New Orleans, Louisiana. Six years after the *Brown v. Board of Education* (347 U.S. 483) decision, on November 14, 1960, Ruby Bridges, at the age of 6, became the first African-American student to attend the all-white William Frantz Elementary School in New Orleans, Louisiana. Ruby Bridges had the courage to attend the William Frantz Elementary School every day during the 1960–61 school year despite ongoing riots and protests in New Orleans, having to be escorted to school by Federal marshals, and having no other students in her classroom. H. Res. 901 commends Ruby Bridges for her bravery and courage 49 years ago, and for her lifetime commitment to raising awareness of diversity through improved educational opportunities for all children.

*Legislative History.*—On November 6, 2009, Representative Gwen Moore introduced H. Res. 901 and it was referred to the Committee on the Judiciary and the Committee on Education and Labor. On January 4, 2010 the Committee on Education and Labor referred the bill to the Subcommittee on Early Childhood, Elementary, and Secondary Education and the Committee on the Judiciary referred it to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. On February 2, 2010 Representative Marcia Fudge moved to suspend the rules agree to the resolution, as amended. On February 3, 2010, the bill was considered as unfinished business and on motion to suspend the rules the bill passed the U.S. House of Representatives by a roll call vote of 416–0.

*H. Res. 1010, Celebrating the life and work of Dr. Martin Luther King, Jr. during the 30th anniversary of the Stevie Wonder song tribute to Dr. King, “Happy Birthday,” and for other purposes*

*Summary.*—H. Res. 1010 was introduced by Representative John Conyers, Jr. to celebrate the life and work of Dr. Martin Luther King, Jr. during the 30th anniversary of the Stevie Wonder song tribute to Dr. King, “Happy Birthday.” The campaign to secure a Federal holiday in honor of Dr. Martin Luther King, Jr. lasted 15 years. The 1980 Stevie Wonder song tribute to Dr. King, “Happy Birthday,” solidified the campaign’s success. The first Dr. Martin Luther King, Jr. Federal holiday was observed on January 20, 1986, and celebrated with a concert headlined by Stevie Wonder, who has, in the years since, continued his commitment to promoting peace and equality, for which he has been recognized with

a Lifetime Achievement Award from the National Civil Rights Museum in Memphis, Tennessee.

*Legislative History.*—Representative John Conyers, Jr. introduced H. Res. 1010 on January 13, 2010 and it was referred to the Committee on Judiciary. On January 20, 2010 Representative John Conyers, Jr. moved to suspend the rules and the bill passed the U.S. House of Representatives by voice vote.

*H. Res. 1271, Honoring the life and achievements of Rev. Benjamin Lawson Hooks*

*Summary.*—Representative John Conyers, Jr. introduced H. Res. 1271 to honor the life and achievements of Rev. Benjamin Lawson Hooks. Dr. Hooks studied prelaw at LeMoyne College in Memphis and continued his studies at Howard University in Washington, DC, and at DePaul University Law School in Chicago, Illinois. After college, he served in the United States Army during World War II and had the job of guarding Italian prisoners who were able to eat in restaurants that were off limits to him, an experience that he found humiliating and that deepened his determination to do something about bigotry in the South. In 1954, Dr. Hooks served on a roundtable with Thurgood Marshall and other Southern African-American attorneys to formulate a possible litigation strategy days before the Supreme Court decision in *Brown v. Board of Education* of Topeka was handed down. In 1965, he was appointed by Tennessee Governor Frank G. Clement to serve as a criminal judge in Shelby County, becoming the first African-American criminal court judge in the State of Tennessee. Later in his life, Rev. Hooks also served as the Executive Director and CEO of the National Association for the Advancement of Colored People and under his leadership, the NAACP fought for affirmative action, led efforts to end apartheid in South Africa, and addressed racism in sports. The House of Representatives honored the life and achievements of Dr. Benjamin Lawson Hooks, for his commitment to justice on the bench in Memphis, Tennessee, for his strong work with the National Association for the Advancement of Colored People to formulate strategies for eliminating barriers to civil rights, and for his leadership in promoting equal opportunity for all.

*Legislative History.*—Representative John Conyers, Jr. introduced H. Res. 1271 on April 20, 2010 and it was referred to the Committee on the Judiciary. On April 20, 2010 Representative Steve Cohen moved to suspend the rules and the bill passed the U.S. House of Representatives by a roll call vote of 407–0.

*H. Res. 1281, Celebrating the life and achievements of Dr. Dorothy Irene Height and recognizing her life-long dedication and leadership in the struggle for human rights and equality for all people until her death at age 98 on April 20, 2010*

*Summary.*—Representative Marcia Fudge introduced H. Res. 1281 to celebrate the life and achievements of Dr. Dorothy Irene Height and recognizing her life-long dedication and leadership in the struggle for human rights and equality for all people. Dr. Height led many national organizations, including 33 years of service on the staff of the National Board of the Young Women's Christian Association, director of the National YWCA School for Profes-

sional Workers, and became the first director of the Center for Racial Justice, served as president of the National Council of Negro Women for four decades, as president of Delta Sigma Theta Sorority, and continued to provide guidance as chair and president emerita of NCNW until her death on April 20, 2010.

*Legislative History.*—On April 21, 2010 Representative Marcia Fudge introduced H. Res. 1281 and it was referred to the Committee on the Judiciary. On April 21, 2010, Representative John Conyers, Jr. moved to suspend the rules and the bill passed the U.S. House of Representatives by voice vote.

*H. Res. 1375, Recognizing the 90th anniversary of the 19th Amendment*

*Summary.*—Representative Jim Cooper introduced H. Res. 1375 to recognize the 90th anniversary of the 19th Amendment. Women were denied the right to vote in many states for 144 years after the Declaration of Independence was signed. In 1919, the 66th Congress of the United States passed a resolution proposing an amendment to the Constitution extending the right of suffrage to women. On August 18, 1920, the Tennessee House of Representatives voted for ratification by a one-vote margin, passing the amendment in Nashville, Tennessee, becoming the 36th and final of the three-fourths of States needed to ratify the amendment, entering it into the Constitution.

*Legislative History.*—On May 19, 2010 Representative Jim Cooper introduced H. Res. 1375 and it was referred to the Committee on the Judiciary. On July 26, 2010 the bill was further referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. On September 15, 2010, Mr. Cohen moved to suspend the rules and the bill passed the U.S. House of Representatives by voice vote.

*H. Res. 1470, Honoring the life, achievements, and distinguished career of Chief Justice William S. Richardson*

*Summary.*—Representative Charles Djou introduced H. Res. 1470 to honor the life, achievements, and distinguished career of Chief Justice William S. Richardson. H. Res. 1470 emphasizes that, among his judicial accomplishments, Chief Justice William S. Richardson changed the face of higher education in Hawaii by opening avenues for the Islands' most disadvantaged groups and by building a more equitable society for the people of Hawaii.

*Legislative History.*—On June 23, 2010 Representative Charles Djou introduced H. Res. 1470 and it was referred to the Committee on the Judiciary. On July 20, 2010 Representative Robert “Bobby” Scott moved to suspend the rules and the bill passed the U.S. House of Representatives by voice vote.

*H. Res. 1504, Recognizing and honoring the 20th anniversary of the enactment of the Americans with Disabilities Act of 1990*

*Summary.*—Representative Steny Hoyer introduced H. Res. 1504 to recognize and honor the 20th anniversary of the enactment of the Americans with Disabilities Act of 1990. Prior to the passage of the Americans with Disabilities Act, people with disabilities faced significantly lower employment rates, lower graduation rates,

and higher rates of poverty than people without disabilities, and were too often denied the opportunity to fully participate in society due to intolerance and unfair stereotypes. H. Res. 1504 recognizes and honors the 20th anniversary of the enactment of the Americans with Disabilities Act of 1990 and salutes all people whose efforts contributed to the enactment of the Americans with Disabilities Act. H. Res. 1504 encourages all Americans to celebrate the advance of freedom and the opening of opportunity made possible by the enactment of the Americans with Disabilities Act and pledges the Congress to continue to work on a bipartisan basis to identify and address the remaining barriers that undermine the Nation's goals of equality of opportunity, independent living, economic self-sufficiency, and full participation for Americans with disabilities.

*Legislative History.*—On July 1, 2010, Representative Steny Hoyer introduced H. Res. 1504 and it was referred to the Committee on the Judiciary, the Committee on Education and Labor, the Committee on Transportation and Infrastructure, and the Committee on Energy and Commerce. On July 2, 2010 the Committee on Transportation and Infrastructure referred it to the Subcommittee on Highways and Transit and the Subcommittee on Railroads, Pipelines, and Hazardous Materials. On July 26, 2010, the Committee on the Judiciary referred it to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. On July 26, 2010, Representative Jared Polis moved to suspend the rules and the bill passed the U.S. House of Representatives by a roll call vote of 377–0.

*H. Res. 1566, Recognizing the 50th anniversary of the Student Non-violent Coordinating Committee (SNCC) and the pioneering college students whose determination and nonviolent resistance led to the desegregation of lunch counters and places of public accommodation over a 5-year period*

*Summary.*—Representative John Lewis introduced H. Res. 1566 to recognize the 50th anniversary of the Student Nonviolent Coordinating Committee (SNCC) and the pioneering college students whose determination and nonviolent resistance led to the desegregation of lunch counters and places of public accommodation over a 5-year period. The enthusiasm of the students and the support they garnered for their pacifism in the face of hatred, led to the beginning of integration within the United States and the enactment of the Voting Rights Act of 1965. H. Res. 1566 recognizes the 50th anniversary of the founding of the Student Nonviolent Coordinating Committee and commemorates the significance and importance of the SNCC and its role in organizing the national sit-in movement and the role that they played in the desegregation of United States society and for creating the political climate necessary to pass legislation to expand civil rights and voting rights for all people in the United States

*Legislative History.*—On July 28, 2010, Representative John Lewis introduced H. Res. 1566 and it was referred to the Committee on the Judiciary. On July 30, 2010, Representative Steve Cohen moved to suspend the rules and the bill passed the U.S. House of Representatives by a roll call vote of 410–0.

*H. Res. 1713, Recognizing the 50th anniversary of Ruby Bridges desegregating a previously all-White public elementary school*

*Summary.*—Representative John Lewis introduced H. Res. 1713 to recognize the 50th anniversary of Ruby Bridges desegregating a previously all-White public elementary school. Six years after the Brown decision, on November 14, 1960, Ruby Bridges, at the age of six, was the first African-American child to integrate the previously all-White William Frantz Elementary School. She was the only student in her class for an entire year, taught by the only remaining teacher, Mrs. Barbara Henry, after the other teachers and students withdrew from the school in a gesture of disapproval of desegregation. Ruby Bridges was among the first in a line of civil rights pioneers that paved the way for the eventual desegregation of all public schools in the United States.

*Legislative History.*—On November 15, 2010, Representative John Lewis introduced H. Res. 1713 and it was referred to the Committee on the Judiciary. On November 15, 2010, representative John Conyers, Jr. moved to suspend the rules and the bill passed the U.S. House of Representatives by a roll call vote of 376–0.

*H. Con. Res. 35, Honoring and praising the National Association for the Advancement of Colored People on the occasion of its 100th anniversary*

*Summary.*—H. Con. Res. 35 was introduced by Representative Al Green to commemorate the 100th anniversary of the founding of the National Association for the Advancement of Colored People (NAACP). The NAACP is the nation’s oldest and largest civil rights organization. The NAACP was founded on February 12, 1909 by Ida Wells-Barnett, W.E.B. DuBois, Henry Moscowitz, Mary White Ovington, Oswald Garrison Villiard, and William English Walling. Since its inception, the NAACP has united students, laborers, professionals, scholars, officials, and others of all races to advance its vision of “a society in which all individuals have equal rights and there is no racial hatred or racial discrimination.”

*Legislative History.*—Representative Al Green introduced H. Con. Res. 35 on January 28, 2009 and it was referred to the Committee on the Judiciary. On February 10, 2009 Representative Henry “Hank” Johnson moved to suspend the rules and agree to the resolution. On February 12, 2009 the resolution passed the U.S. House of Representatives by a roll call vote of 424–0. On February 13, 2009 the bill was received in the U.S. Senate, considered, and agreed to without amendment and with a preamble by Unanimous Consent.

*H. Con. Res. 242, Honoring and praising the National Association for the Advancement of Colored People on the occasion of its 101st anniversary*

*Summary.*—H. Con. Res. 242 was introduced by Representative Al Green to commemorate the 101st anniversary of the founding of the National Association for the Advancement of Colored People (NAACP). The NAACP is the nation’s oldest and largest civil rights organization. The NAACP was founded on February 12, 1909 by Ida Wells-Barnett, W.E.B. DuBois, Henry Moscowitz, Mary White Ovington, Oswald Garrison Villiard, and William English Walling.

Since its inception, the NAACP has united students, laborers, professionals, scholars, officials, and others of all races to advance its vision of “a society in which all individuals have equal rights and there is no racial hatred or racial discrimination.”

*Legislative History.*—Representative Al Green introduced H. Con. Res. 242 on February 25, 2010 and it was referred to the Committee on the Judiciary. On June 16, 2010 Representative Steve Cohen moved to suspend the rules and the resolution passed the U.S. House of Representatives by a roll call vote of 421–0. On June 17, 2009 the bill was received in the U.S. Senate. On June 18, 2010, the U.S. Senate agreed to the resolution without amendment and with a preamble by Unanimous Consent.

*H. Con. Res. 249, Commemorating the 45th anniversary of Bloody Sunday and the role that it played in ensuring the passage of the Voting Rights Act of 1965*

*Summary.*—H. Con. Res. 249 was introduced by Representative John Lewis to commemorate the 45th anniversary of Bloody Sunday and the role that it played in ensuring the passage of the Voting Rights Act of 1965. The historic struggle for equal voting rights led nonviolent civil rights marchers to gather on the Edmund Pettus Bridge in Selma, Alabama, on March 7, 1965, a day that would come to be known as “Bloody Sunday.” John Lewis and the late Hosea Williams led these marchers across the Edmund Pettus Bridge in Selma, Alabama, where they were attacked with billy clubs and tear gas by State and local lawmen. Eight days after Bloody Sunday, President Lyndon B. Johnson called for a comprehensive and effective voting rights bill as a necessary response by Congress and the President to the interference and violence, in violation of the 14th and 15th Amendments, encountered by African-American citizens when attempting to protect and exercise the right to vote. A bipartisan Congress approved the Voting Rights Act of 1965 and on August 6, 1965, President Lyndon B. Johnson signed this landmark legislation into law.

*Legislative History.*—Representative John Lewis introduced H. Con. Res. 249 on March 4, 2010 and it was referred to the Committee on the Judiciary. On March 10, 2010, Representative Steve Cohen moved to suspend the rules and the bill passed the U.S. House of Representatives by a roll call vote of 409–0. On March 16, 2010, the bill was received in the U.S. Senate which agreed to the resolution without amendment and with a preamble by Unanimous Consent.

*S. Con. Res. 29, A concurrent resolution expressing the sense of the Congress that John Arthur “Jack” Johnson should receive a posthumous pardon for the racially motivated conviction in 1913 that diminished the athletic, cultural, and historic significance of Jack Johnson and unduly tarnished his reputation*

*Summary.*—Senator John McCain introduced S. Con. Res. 29 to express the sense of Congress that John Arthur “Jack” Johnson should receive a posthumous pardon for the racially motivated conviction in 1913 that diminished the athletic, cultural, and historic significance of Jack Johnson and unduly tarnished his reputation. Jack Johnson was a professional boxer and traveled throughout the

United States, fighting White and African-American heavyweights. He was a flamboyant, defiant, and controversial figure who challenged racial biases. In 1908, Jack Johnson defeated reigning White title-holder Tommy Burns to become the first African-American to hold the title of Heavyweight Champion of the World. In October 1912, Jack Johnson became involved with a White woman whose mother disapproved of their relationship and sought action from the Department of Justice, claiming that Jack Johnson had abducted her daughter. He was arrested by Federal marshals on October 18, 1912, for transporting the woman across State lines for an “immoral purpose” in violation of the Mann Act. Charges against Jack Johnson were dropped when the woman refused to cooperate with Federal authorities, and then married him, but Federal authorities persisted and summoned a White woman named Belle Schreiber, who testified that Jack Johnson had transported her across State lines for the purpose of “prostitution and debauchery.” In 1913, he was convicted of violating the Mann Act and sentenced to 1 year and 1 day in Federal prison. S. Con. Res. 29 expresses the sense of Congress that Jack Johnson should receive a posthumous pardon to expunge a racially motivated abuse of the prosecutorial authority of the Federal Government from the annals of criminal justice in the United States and in recognition of the athletic and cultural contributions of Jack Johnson to society.

*Legislative History.*—On June 16, 2009, Senator John McCain introduced S. Con. Res. 29 and it was referred to the U.S. Senate Judiciary Committee. On June 24, 2009, the U.S. Senate Judiciary Committee discharged the bill by Unanimous Consent and the bill was agreed to in the U.S. Senate without amendment and with a preamble by Unanimous Consent. On June 25, 2009, the bill was received in the U.S. House of Representatives and it was referred to the Committee on the Judiciary. On July 23, 2009 the bill was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. On July 29, 2009, Representative Henry “Hank” Johnson asked unanimous consent to discharge the bill from committee and for the bill to be considered. On July 29, 2009 the bill passed the U.S. House of Representatives by voice vote.

#### OVERSIGHT ACTIVITIES

##### *Lessons Learned from the 2008 Election*

*Summary.*—On March 19, 2009, the Subcommittee on the Constitution, Civil Rights, and Civil Liberties convened a hearing on “Lessons Learned From the 2008 Election.” The hearing focused on the administration of elections in 2008 and the election system failures that need to be addressed in order to ensure that all eligible voters have a meaningful opportunity to participate in the political process. This hearing provided an opportunity for Members to examine the best practices and the shortcomings of the past election and to discuss policy recommendations for addressing unresolved issues for future elections. The hearing witnesses were Barbara Arnwine, Executive Director, Lawyers Committee for Civil Rights Under Law; Matthew Segal, Executive Director, Student Association for Voter Empowerment; James Tucker, Consulting Attorney, Native American Rights Fund; Hilary Shelton, Director, Wash-

ington Bureau of the NAACP; James Terry, Chief Public Advocate, Consumers Rights League; Glenn D. Magpantay, Staff Attorney, Asian American Legal Defense Fund; and Tova Wang, Vice President for Research, Common Cause.

*Related Legislation.*—On January 6, 2009, Judiciary Chairman John Conyers introduced H.R. 97, the “Deceptive Practices and Voter Intimidation Prevention Act of 2009”, which would afford voters greater protections against deceptive practices and intimidation in voting. On January 6, 2009, Judiciary Committee Chairman John Conyers introduced H.R. 103, the “Caging Prohibition Act of 2009,” which would afford a voter greater protections when his or her right to vote has been challenged. On January 6, 2009, Judiciary Committee Chairman John Conyers introduced H.R. 105, the “Voting Opportunity and Technology Enhancement Rights of 2009,” which would provide for substantial election reform on issues ranging from absentee ballots to provisional ballots, and from voter caging to deceptive practices.

*Hearing on: the Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws. (Serial No. 111-19)*

On April, 2, 2009, the Subcommittee held a hearing jointly with the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law on the Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws.

The following witnesses testified: Julio Cesar Mora, Avondale, AZ; Antonio Ramirez, Frederick, Maryland Community Advocate; Deborah Weissman, Reef C. Ivey II Distinguished Professor of Law, Director of Clinical Programs, University of North Carolina at Chapel Hill School of Law; Ray Tranchant, Operations Director, Advanced Technology Center, Virginia Beach, VA, Adjunct Professor at Cambridge College, Cambridge, MA, Chesapeake Campus, and Bryant and Stratton College; David Harris, Professor of Law, University of Pittsburgh School of Law; Hubert Williams, President, Police Foundation; George Gascon, Chief, Mesa Arizona Police Department; Kris Kobach, Professor of Law, University of Missouri—Kansas City School of Law.

The hearing focused on the public safety and civil rights concerns that arise when state and local law enforcement get involved in immigration enforcement, most commonly through an agreement with the U.S. Immigration and Customs Enforcement (ICE) under 287(g) of the Immigration and Nationality Act. The subcommittees received testimony concerning incidents of racial profiling and the erosion of trust between the police and local communities that can occur when states and localities attempt to enforce immigration laws without appropriate and necessary safeguards.

Witnesses also described how some localities with 287(g) agreements are conducting large-scale “sweeps” in which hundreds of law enforcement officers and/or deputized “posses” enter predominantly Latino neighborhoods to interrogate, issue citations, and/or

arrest people, set up roadblocks and check the identification of individuals.<sup>143</sup>

*Legal Issues Surrounding the Military Commissions System*

*Summary.*—On July 8, 2009, the Subcommittee held the first of two hearings focusing on the adequacy of military commissions and the effectiveness and necessity of possible reforms. Testimony was received from: the Honorable Adam B. Schiff; Lt. Col. Darrel Vandeveld, former prosecutor, Guantanamo Bay Military Commissions; Deborah Pearlstein, Associate Research Scholar, Princeton University; Thomas Joscelyn, Senior Fellow and Executive Director, Center for Law and Counterterrorism, Foundation for Defense of Democracies; and Denny LeBoeuf, Director, John Adams Project, ACLU.

Shortly after taking office, President Obama announced his intention to close the Guantanamo Bay facility and temporarily halted use of military commissions to try detainees currently held at the facility pending the outcome of his Administration's review and an examination of the adequacy of the military commission process itself. In his remarks on national security a few months later, the President confirmed that, whenever possible, the Administration would use the federal courts to prosecute Guantanamo detainees who have violated criminal laws, but also indicated that military commissions remain an appropriate and necessary venue for the prosecution of others. The President acknowledged that the existing military commission system fails to provide a legitimate legal framework for convictions, but expressed his belief that, with sufficient reform, a military commission system could do so. The Subcommittee's July 8, 2009 hearing provided an opportunity to explore concerns regarding the need for and legal adequacy of the existing military commission system and to consider the range of reforms that might be necessary.

Representative Adam Schiff testified that "the commission system has proved so flawed and its due process so inadequate and discredited that in the case of the detainees at Guantanamo, it should be completely junked." Representative Schiff further explained how H.R. 1315, the "Terrorist Detainees Procedures Act of 2009," which he had introduced that year, provided an alternative to the existing military commission system that would establish a mechanism for designating detainees as "unlawful combatants" and make use of the existing military justice and courts martial system to prosecute such detainees.

Lt. Col. Vandeveld and Ms. Leboeuf agreed that the military commissions system was fatally flawed and should be abandoned rather than reformed. Lt. Col. Vandeveld testified that he asked for reassignment from his post as a military prosecutor at Guantanamo because—after discovering a "confession obtained through torture" and the withholding of exculpatory evidence from the defense—he determined that he "could not ethically or legally prosecute the defendant within the military commission system at

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<sup>143</sup> Hearing on the Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws, before the H. Judiciary Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law and the Subcomm. on the Constitution, Civil Rights, 105th Cong. 11 (2009) (Testimony of Julio Cesar Mora).

Guantanamo.” Lt. Col. Vandeveld cited three specific concerns that he felt would not be adequately addressed through reform of the existing military commission system: (1) admissibility of evidence obtained through torture or coercion; (2) the gathering and handling of information, including classified or sensitive information withheld from the defense; and (3) institutional deficiencies, including inexperienced judges and insufficiently funded defense teams.

Echoing these concerns, Ms. Leboeuf cautioned that military commission trials would never be deemed fair or competent and that they “cannot produce reliable verdicts. Perhaps, worst of all, no judgments under military commission will ever truly be final.” While expressing “doubt that the use of a new military commission system going forward is a wise or necessary course of policy,” Ms. Pearlstein took the position that such a system would be legally adequate if certain reforms were made, including: (1) assuring that statements made under torture are inadmissible and that commission rules reflect the standards for voluntariness required for admissibility in criminal court; and (2) ensuring an adequate review process that considers questions of fact as well as law. Mr. Joscelyn testified that “the commissions have been far from perfect,” and that “it will take some work to make the commissions function properly,” but offered no opinion on possible reforms but, instead, testified that—whether the Administration chose to try terrorists in the courts or military commissions—it should make sure to protect the intelligence-gathering function of detention.

*Hearing on Continuity of Congress in the Wake of a Catastrophic Attack (Serial No. 111-17)*

*Summary.*—On July 23, 2009, the Subcommittee held a hearing on the Continuity of Congress in the Wake of a Catastrophic Attack. The hearing examined the impact of an attack that would kill or incapacitate a significant number of Representatives and Senators, and the options under the Constitution for reconstituting the institution and ensuring the continuation of the legislative branch in a time of crisis.

Witnesses at the hearing were Rep. Brian Baird; Rep. Dana Rohrabacher; John C. Fortier, Research Fellow, American Enterprise Institute; R. Eric Petersen, Analyst in American National Government, Congressional Research Service; Harold Relyea, Former Analyst, Congressional Research Service.

*Hearing on Proposals for Reform of the Military Commission System (Serial No. 111-26)*

*Summary.*—On July 30, 2009, the Subcommittee held its second hearing focusing on the military commission system, which provided a further opportunity to consider the specific reforms passed by the Senate as part of the National Defense Authorization Act for Fiscal Year 2010, and to explore additional changes that might be warranted or necessary. Testimony was received from: David Kris, Assistant Attorney General, Department of Justice; Jeh Charles Johnson, General Counsel, Department of Defense; Maj. David J.R. Frakt, USAFR, Lead Defense Counsel, Office of Military Commissions; Col. Peter R. Masciola, USAFG, Chief Defense Counsel, Office of Military Commissions; Steven A. Engel, Dechert LLP; Eu-

gene R. Fidell, Senior Research Scholar in Law and Florence Rogatz Lecturer in Law, Yale Law School.

On July 23, 2009 the Senate passed S. 1390, the “National Defense Authorization Act for Fiscal Year 2010” (NDAA FY 2010) with a section amending the Military Commission Act of 2006. Assistant Attorney General David Kris and Department of Defense General Counsel Jeh Johnson testified in support of the proposed Senate reforms but also suggested others. For example, while Assistant AG Kris and Mr. Johnson noted with approval the Senate’s proposal to ban admission of statements obtained by cruel, inhuman, or degrading treatment, Assistant AG Kris testified that the Administration believed that the bill needed to adopt a voluntariness standard for the admission of other statements of the accused. This standard should take into account “challenges and realities of the battlefield and armed conflict” and that, without such a standard, “there is a serious likelihood that courts would hold that admission of involuntary statements of the accused in military commission proceedings is unconstitutional.” Assistant AG Kris also recommended that Congress: (1) remove the offense of material support for terrorism because this “is not a traditional law of war offense, thereby threatening to reverse hard-won convictions and leading to questions about the [military commission] system’s legitimacy,” and (2) include a sunset provision.

Col. Mascioli testified of the need to ensure learned counsel with experience in capital cases for any death-penalty eligible cases, and suggested several specific reforms to ensure adequate and equitable discovery and resources for the defense. Major Frakt similarly provided several specific recommendations for reform and also identified offenses, including material support of terrorism and criminal conspiracy, that he believed do not qualify as “law of war” offenses and, therefore, not be triable in any military commission system. Mr. Engel, who served in the Office of Legal Counsel during the Bush Administration and worked on the military commission system established under the Military Commission Act of 2006, agreed with the Administration’s proposal for adopting a voluntariness standard and urged that this standard set out sufficient guidance “to ensure its proper application in the wartime context.” He disagreed, however, with the Administration recommendation to remove material support for terrorism as a triable offense. Mr. Fidell, president of the National Institute of Military Justice, also agreed that voluntariness was the proper standard for admissibility of detainee statements and endorsed the Senate changes to provisions ensuring appellate review of military commission decisions.

*Hearing on the USA PATRIOT Act (Serial No. 111-35)*

*Summary.*—On September 22, 2009, the Subcommittee held a hearing on the USA PATRIOT Act, focusing on three provisions that were set to expire at the end of 2009. These provisions included the so-called “roving” Foreign Intelligence Surveillance Act (FISA) wiretaps,<sup>144</sup> FISA Section 215 business record orders,<sup>145</sup> and the so-called FISA “lone wolf” provision of the Intelligence Re-

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<sup>144</sup> Pub. L. 107-56, 206.

<sup>145</sup> Pub. L. 107-56, 215.

form and Terrorism Protection Act (IRTPA).<sup>146</sup> The hearing provided the Subcommittee the opportunity to question and explore the efficacy of these expiring provisions and begin to determine whether or not they should be reauthorized and/or modified. Five witnesses testified at this hearing: Todd Hinnen, Deputy Assistant Attorney General, National Security Division, United States Department of Justice; Suzanne Spaulding, Esq., former Staff Director, House Permanent Select Committee on Intelligence; The Honorable Thomas B. Evans, Jr., former Member of Congress (R-DE); Kenneth L. Wainstein, former Assistant Attorney General, National Security Division, United States Department of Justice and; Michael German, Policy Counsel, American Civil Liberties Union.

Section 206 of the PATRIOT Act amended FISA to permit multipoint or “roving” wiretaps, which permit the government to include multiple surveillance sites associated with a facility authorized in an order of the Foreign Intelligence Surveillance Court (FISC) if it can show that the target was taking steps to thwart surveillance. FISA roving authority allows the government to follow a target that switches communication facilities without having to return to court and obtain a new order, thus avoiding the risk of losing valuable foreign intelligence information during the time required to obtain and serve a new court order. While there was general support for the need to renew FISA roving authority, various experts including Suzanne Spaulding raised concerns that FISA roving warrants could increase the prospect the government may intercept communications between individuals who are not FISA targets. This potential exists, according to Ms. Spaulding, because of the generally “less rigorous” statutory standards for FISA roving warrants than those governing issuance of roving wiretap warrants in criminal investigations under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986.

Section 6001(a) of the Intelligence Reform and Terrorism Protection Act (IRTPA), commonly referred to as the “Lone Wolf” provision, broadened the definition of individuals who could be FISA targets. It permits surveillance of non-U.S. persons preparing to engage in or engaging in international terrorism, without requiring evidence linking those persons to an identifiable foreign power or terrorist organization. This provision was created in response to the FBI’s attempt to obtain a FISA order to search the laptop of Zacarias Moussaoui in October, 2001. The FBI believed it had insufficient information to demonstrate that Moussaoui was an agent of a foreign power, as required by FISA at the time, although the term “foreign power” included international terrorist groups. Critics of the Lone Wolf provision argued generally that it undermines constitutional justification for the entire FISA statute: that the extraordinary FISA powers used by our government are constitutional only because they are used against our most serious adversaries, foreign governments and organized foreign powers. Accordingly, these witnesses asserted that expanding the reach of the statute to individuals acting alone puts the whole FISA regime at risk. Todd Hinnen, Deputy Assistant Attorney General of the Jus-

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<sup>146</sup> Pub. L. 108-456 6001(a).

Justice Department's National Security Division, testified that the Lone Wolf provision has never been used, but that the Justice Department believes it is essential to have the tool available for the rare situation in which it might become necessary.

Section 215 of the USA PATRIOT Act allows the government to obtain a FISA order requiring private parties to produce "tangible things" such as business records that are relevant to foreign intelligence, counterterrorism, or counterintelligence investigations. In support of reauthorization, the Justice Department represented that, based on its operational experience, there will continue to be instances in which FBI investigators need to obtain transactional information that does not fall within scope of authorities relating to National Security Letters (NSLs), and where they must operate in an environment that precludes the use of less secure criminal authorities. Critics of this provision generally objected to its permissive "relevance to an authorized investigation" standard. This broad standard is seen as, among other things, having a chilling effect on the exercise of First Amendment Rights when applied to libraries and/or businesses that sell books and periodicals.

*The Impact of Recent Supreme Court Decisions on Civil Rights Jurisprudence*

*Summary.*—On October 8, 2009, the Subcommittee on the Constitution, Civil Rights, and Civil Liberties held an oversight hearing on the Impact of Recent Supreme Court Decisions on Civil Rights Jurisprudence. A careful review of the Supreme Court's most recent opinions show steady movement toward rolling back the Warren and Burger Court era precedents that conservatives have long viewed as the significant overreaching of Congress and the Judiciary. While the Court did not overrule any major constitutional precedents, it left many areas of civil rights jurisprudence in a confused state. Years of settled law on issues involving race, religion, speech, abortion, and the standing to bring suits have all been unsettled by recent Supreme Court rulings. The effect of these decisions has resulted in an incremental narrowing of many individual rights and governmental powers granted under the Constitution.

This hearing was intended to provide an opportunity for members of the Subcommittee to explore the current state of civil rights laws in light of recent Supreme Court decisions. The following witnesses offered testimony: Armand Derfner, Partner, Derfner Altman & Wilborn; Aderson B. Francois, Associate Professor of Law, Howard University School of Law; Debo P. Adegbile, Director of Litigation, NAACP Legal Defense and Educational Fund, Inc. and Ms. Dahlia Lithwick, Senior Editor, Slate Magazine.

*Access to Justice Denied: An Oversight Hearing on Ashcroft v. Iqbal*

*Summary.*—On Tuesday, October 27, 2009, the Subcommittee on the Constitution, Civil Rights, and Civil Liberties convened a hearing entitled "Access to Justice Denied: An Oversight Hearing on *Ashcroft v. Iqbal*." The purpose of this hearing was to examine the U.S. Supreme Court's recent decision in *Ashcroft v. Iqbal* and its impact on civil litigation. The Court's May 18, 2009, decision in *Iqbal* substantially altered longstanding notice pleading standards

to require courts to determine the “plausibility” of allegations in pleadings in advance of any discovery. The hearing witnesses were Arthur Miller, University Professor, New York University School of Law; John Vail, Vice President and Senior Counsel, Center for Constitutional Litigation; Debo Adegbile, Director of Litigation, NAACP Legal Defense and Educational Fund; and Gregory Katsas, Partner, Jones Day.

*Related Legislation.*—On November 19, 2009, Subcommittee Chairman Jerrold Nadler introduced H.R. 4115, the “Open Access to Courts Act of 2009.” The legislation would restore the notice pleading standard to that articulated by the U.S. Supreme Court in *Conley v. Gibson* 355 U.S. 41 (1957).

*Oversight Hearing on the Civil Rights Division of the Department of Justice*

*Summary.*—On December 3, 2009, the Subcommittee on the Constitution, Civil Rights, and Civil Liberties held an oversight hearing on the Civil Rights Division of the Department of Justice. The Civil Rights Division is the primary federal entity responsible for enforcing federal statutes prohibiting discrimination on the grounds of race, sex, disability, religion, and national origin. Established in 1957, the Division has grown in size and scope over the decades, and has been instrumental in many of our nation’s battles to advance civil rights. Reports from the Citizens Commission on Civil Rights and the Leadership Conference on Civil Rights in 2006–07 suggested concerns about Division enforcement priorities and actions in such areas as voting, employment, and housing. Reports and allegations of politicized hiring and other improprieties in the Division also occurred during this period, culminating in a July 2, 2008 report by the DOJ Office of Inspector General and Office of Professional Responsibility entitled *An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division*.

On June 14, 2007, based upon concerns raised by Committee oversight hearings and nonpartisan reports, Chairman Conyers and Chairman Nadler asked the Government Accountability Office (GAO) to undertake a report concerning the enforcement priorities, data collection, and case management information system of the Division. This hearing provided an opportunity for members of the Subcommittee to raise questions in response to the recently completed two reports in response to that request, and to ask the newly-confirmed head of the Civil Rights Division about his response to the reports and his plans for the future of the Division. The following witnesses offered testimony: Hon. Thomas E. Perez, Assistant Attorney General, U.S. Department of Justice, Civil Rights Division; Eileen Regen Larence, Director, Homeland Security and Justice Issues, U.S. Government Accountability Office; Grace Chung Becker, former Acting Assistant Attorney General, Civil Rights Division and Joseph Rich, Director, Fair Housing Project, Lawyers’ Committee for Civil Rights Under Law.

*The Impact of Federal Habeas Corpus Limitations on Death Penalty Appeals*

*Summary.*—On December 8, 2009, the Subcommittee on the Constitution, Civil Rights, and Civil Liberties held an oversight hearing on the Impact of Federal Habeas Corpus Limitations on Death Penalty Appeals. Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 in response to the concern that the then-existing habeas process provided death row inmates an excessive number of opportunities to postpone their sentence. As expected, this streamlined procedure had the effect of expediting the pace of executions and increasing their number. Since the passage of the legislation, however, there have been concerns about the equity of the process in the context of the death penalty. Although more than a decade has elapsed since its enactment, there has been a dearth of research examining the processing of cases under the Act's provisions.

This hearing was intended to provide an opportunity for the Subcommittee to explore the impact of Federal habeas limitations on death penalty appeals and analyze proposals designed to address any perceived injustice caused by existing legal standards. The following witnesses offered testimony: Stephen Hanlon, American Bar Association Death Penalty Moratorium Project; Justice Gerald Kogan, former Chief Justice, Florida Supreme Court (1987–1998); Michael O'Hare, Supervisory Assistant State's Attorney, Connecticut State's Attorney Office; Prof. John H. Bloom, Cornell Law School.

*Related Legislation.*—The Effective Death Penalty Appeals Act (H.R. 3986) was introduced on November 3, 2009, by Rep. Hank Johnson. The bill was designed to create a procedural remedy for a person on death row to petition for appeal on the basis of newly discovered evidence of innocence.

*Hearing on the First Amendment and Campaign Finance Reform After Citizens United (Serial No. 111-71)*

*Summary.*—On February 3, 2010, the Subcommittee held a hearing on the Supreme Court's decision in *Citizens United v. Federal Election Commission*.<sup>147</sup> The following witnesses presented testimony: Laurence H. Tribe, Carl M. Loeb University Professor, Harvard Law School; Monica Y. Youn, Counsel and Director of the Campaign Finance Reform Project, Brennan Center for Justice, New York University School of Law; Sean Parnell, President, Center for Competitive Politics; Donald J. Simon, Partner, Sonosky, Chambers, Sachse, Endreson & Perry, LLP.

In *Citizens United*, the Supreme Court struck down limitations on direct spending by corporations and unions on campaign-related communications, specifically, advertisements occurring during a certain period of time before an election that advocate voting for or against a named candidate, which are called “electioneering communications,” imposed by the Bipartisan Campaign Reform Act of 2002, known as the McCain-Feingold Act.<sup>148</sup> The Court overruled

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<sup>147</sup> 130 S.Ct. 876 (2010).

<sup>148</sup> Pub. L. No. 107-155.

its prior decision *Austin v. Michigan Chamber of Commerce*,<sup>149</sup> which had upheld regulations on corporate speech based on the principle that corporations are different than individuals and that such restrictions were necessary to maintain the integrity of the electoral process. On that basis, the Court overruled the parts of its prior decision *McConnell v. Federal Election Commission*<sup>150</sup> that relied on *Austin*'s premise that corporations receive a lesser degree of free speech protection than individuals do.

Witnesses discussed the impact of the *Citizens United* decision, and options available to Congress to address issues raised by the decision.

*Related Legislation.*—Rep. Chris Van Hollen introduced H.R. 5175, the “Democracy is Strengthened by Casting Light on Spending in Elections Act” on April 29, 2010. It passed the House on June 24, 2010 by a vote of 219–206, and was placed on the Senate Calendar. It received no further action in the Senate.

*Hearing on Protecting the American Dream: A Look at the Fair Housing Act (Serial No. 111–88)*

*Summary.*—On March 11, 2010, Subcommittee Chairman Jerrold Nadler convened the first in a series of hearings on the Fair Housing Act entitled *Protecting the American Dream: A Look at the Fair Housing Act*. This hearing examined Fair Housing Act education, investigation, and enforcement, both past and present, particularly in the context of the current housing crisis. The hearing witnesses were National Fair Housing Alliance President Shanna Smith, Lawyers’ Committee for Civil Rights Under Law Executive Director Barbara Arnwine, John Relman of the firm Relman & Dane, National Gay & Lesbian Task Force Action Fund Executive Director Rea Carey, Howard University School of Law Associate Dean Okianer Christian Dark, and Baruch College Professor Kenneth Marcus.

*Oversight “Report by the Office of the Inspector General of the Department of Justice on the Federal Bureau of Investigation’s Use of Exigent Letters and Other Informal Requests for Telephone Records”*

*Summary.*—On April 14, 2010, the Subcommittee held a hearing to examine the report by the Office of the Inspector General of the Department of Justice (OIG) on the Federal Bureau of Investigation’s use of exigent letters and other informal requests for telephone records.<sup>151</sup> Testifying at the hearing were the Glenn Fine, Inspector General, U.S. Department of Justice; and Valerie Caproni, General Counsel, Federal Bureau of Investigation.

The OIG report was initiated in response to two earlier OIG reports in March 2007 and March 2008 which “focused on the misuses of national security letters [which] noted the FBI’s practice of issuing exigent letters, instead of national security letters or other

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<sup>149</sup> 494 U.S. 652 (1990).

<sup>150</sup> 540 U.S. 93, 203–209 (2003) (upholding limits on electioneering communications in a facial challenge).

<sup>151</sup> Oversight and Review Section, Office of the Inspector General, U.S. Department of Justice, A Review of the Federal Bureau of Investigation’s Use of Exigent Letters and Other Informal Requests for Telephone Records (January 2010) <http://www.ca3.uscourts.gov/opinarch/101440p.pdf> (Last Visited Jan. 15, 2010).

legal process, to obtain telephone records from three communications service providers.”<sup>152</sup> Mr. Fine discussed the findings of the report which traced the development of exigent letters, reviewed the manner in which applicable laws and procedures were violated in their use, and steps the FBI had taken to address OIG concerns. Valerie Caproni further discussed the response by the FBI to the OIG’s reports.

*Hearing on Achieving the Promises of the Americans with Disabilities Act in the Digital Age—Current Issues, Challenges, and Opportunities*

*Summary.*—On April 22, 2010, the Subcommittee held a hearing to explore advances in technology and accessibility design that have taken place since passage of the Americans with Disabilities Act of 1990 (ADA), and to gain a greater understanding of how the ADA is achieving its promise of equal opportunity and full participation for people with disabilities with regard to new and advancing technologies. Testimony was received from: the Honorable Samuel R. Bagenstos, Principal Deputy Assistant Attorney General, U.S. Department of Justice; Mark D. Richert, Esq., Director, Public Policy, American Foundation for the Blind; Judy Brewer, Director, Web Accessibility Initiative, World Wide Web Consortium; Steven I. Jacobs, President, Ideal Group, Inc.; Daniel F. Goldstein, Brown, Goldstein & Levy, LLP.

Testifying that “access to the Internet and emerging technologies is not simply a technical matter, it’s a fundamental issue of civil rights,” Principal Deputy Assistant AG Bagenstos confirmed the Department of Justice’s longstanding position that websites operated by private or public entities are covered by the ADA and must be fully accessible to individuals with disabilities. He also described recent DOJ settlements with various universities to ensure that new technologies used as part of the curricula, such as electronic book readers, would be accessible to students with disabilities, and indicated that the DOJ plans to issue updated regulations and guidance addressing accessibility issues for new and emerging technologies.

Mr. Richert and Mr. Goldstein testified that the ADA, through Titles II and III, applies to the Internet and other emerging technologies and requires that such technologies are equally accessible to persons with disabilities. Mr. Richert urged the DOJ to “clarify that accessibility obligations under the ADA also extend to high-tech equipment,” and urged Congress to pass H.R. 3101, the Twenty-first Century Communications and Video Accessibility Act to ensure that mobile and other Internet-equipped devices and video technologies are accessible to people with disabilities. Mr. Goldstein further testified that “[i]n the field of technology, the ADA has been instrumental in making some Web sites, workplace software applications, ATMs, point of sale machines, cell phones, and e-book reading devices accessible to people with disabilities. However, as we stand here today, we are not even halfway there . . . .” Focusing

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<sup>152</sup> Report by the Office of the Inspector General of the Department of Justice on the Federal Bureau of Investigation’s Use of Exigent Letters and Other Informal Requests for Telephone Records, Hearing before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 11 (2010) (Testimony of Glenn Fine).

on the technical aspects of accessibility, Ms. Brewer and Mr. Jacobs testified regarding available accessibility resources and guidelines. Ms. Brewer, director of the Web Accessibility Initiative at the World Wide Web Consortium who testified before the Subcommittee on this issue ten years earlier, explained that “in the intervening years, we’ve shown that businesses can flourish while producing accessible Web sites and services.”

*Hearing on Protecting the American Dream Part II: Combating Predatory Lending Under the Fair Housing Act (Serial No. 111-95)*

*Summary.*—On April 29, 2010, the Subcommittee held a hearing on “Protecting the American Dream Part II: Combating Predatory Lending Under the Fair Housing Act.” The hearing examined predatory and discriminatory lending practices, as well as existing and proposed enforcement mechanisms. Assistant Attorney General for the Civil Rights Division Thomas Perez discussed the Department of Justice’s new fair lending unit in the Civil Rights Division’s Housing and Civil Enforcement Section. Memphis Mayor A.C. Wharton, Jr. discussed the impact of predatory lending on the City of Memphis. Predatory lending victim, Gillian Miller, discussed her experience. Consumer attorney Gary Klein, and Center for Equal Opportunity President Roger Clegg also testified.

*Hearing on Electronic Communication Privacy Act Reform (Serial No. 111-98)*

*Summary.*—On May 5, 2010, the Subcommittee held a hearing on Electronic Communications Privacy Act (ECPA)<sup>153</sup> Reform. ECPA is a series of statutes governing law enforcement access to various types of wire and electronic communications, and to transactional records associated with these communications. The purpose of the hearing was to consider reforms to ECPA potentially necessitated by advances in technology and the resulting availability of remarkable new technology-based services. Such technological advances include cloud computing, social networking and location-based services. Four witnesses testified at this hearing: Jim Dempsey, Vice President for Public Policy, Center of Democracy and Technology; Albert Gidari, partner at Perkins Coie LLP; and Annmarie Levins, Associate General Counsel, Microsoft Corporation and; Orin Kerr, Professor, George Washington University Law School.

Originally enacted in 1986, ECPA was intended to reestablish the balance of interests between privacy and law enforcement, which Congress found had been upset—to the detriment of privacy—by the development of wireless communications and computer technologies, and by attendant changes to the structure of the telecommunications industry. In addition to the goal of balancing privacy interests with the needs of law enforcement, recognizing that consumers may not trust new technologies if privacy interests were not appropriately protected, Congress also intended

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<sup>153</sup> Pub. L. No. 99-508, 100 Stat. 1848 (codified in Title 18 U.S.C. including 2510-21, 2701-10, 3121-26).

ECPA to advance and encourage the development of new technologies and services by strengthening consumer privacy.

The Subcommittee's hearing explored several areas where ECPA may need updating because technology growth has "outpaced the law." Subcommittee members were educated about these new technologies and how ECPA's application to them is creating confusion for magistrate judges, private industry and law enforcement. Witnesses representing the views of privacy advocacy groups and private industry explained how, for example, a single e-mail can be subject to different legal standards in its lifecycle depending on how old it is, where it is stored, and whether or not it has been opened. Equally problematic for industry, privacy and law enforcement stakeholders is ECPA's lack of clarity regarding historical and prospective location information generated by cell phones and other hand-held devices. Witnesses explained how magistrate judges in the same district disagree on the legal standard for government access to location information. This hearing was the first in a series of three educational hearings held by the Subcommittee to study key technology and legal issues associated with ECPA reform.

*Racial Profiling and the Use of Suspect Classifications in Law Enforcement Policy (Serial No. 111-131)*

*Summary.*—On June 17, 2010, the Subcommittee on the Constitution, Civil Rights, and Civil Liberties held a hearing on Racial Profiling and the Use of Suspect Classifications in Law Enforcement Policy. In response to concerns about the issue of racial profiling, the Department of Justice under the past two presidents, along with members of Congress, have introduced a series of executive orders and legislative proposals designed to address the practice. This hearing was intended to provide an opportunity for the Subcommittee to explore the impact of racial profiling and of the use of suspect classifications in law enforcement policy, with the aim of improving the current administrative and legislative proposals. The hearing witnesses included, Hilary O. Shelton, NAACP Washington Bureau; Chief Christopher Burbank, Salt Lake City Police Department; Brian L. Withrow, Ph.D., Associate Professor of Criminal Justice, Texas State University; Professor Deborah Ramirez, Northeastern University Law School; Amardeep Singh, Sikh Coalition; David Harris, Professor of Law, Pittsburgh University School of Law; Farhana Khera, President and Executive Director, Muslim Advocates.

*Related Legislation.*—Representative John Conyers, Jr. introduced H.R. 5748, the "End Racial Profiling Act of 2010," (ERPA) on July 15, 2010, and the bill was referred to the Committee on the Judiciary. ERPA was also introduced as H.R. 4611 and S. 2481 in the 110th Congress. ERPA prohibits the use of racial profiling in law enforcement, and mandates policy changes and the undertaking of studies, overseen by the Attorney General, to ensure racial profiling does not take place. The bill creates a civil cause of action as the remedy for those who have experienced racial profiling. ERPA was also introduced in the Senate during the 109th Congress as S. 2138.

The Border Security Search Accountability Act of 2009, introduced as H.R. 1726, sets the guidelines for electronic device searches at U.S. border crossings, and requires the submission of reports that detail the presence or absence of racial profiling in such searches. The Act was also introduced in 2008 as H.R. 6869. The Surface Transportation Act of 2009, H.R. 3617, passed the House with a provision for a grant to prevent racial profiling on federal roads and interstate highways. The “No More Tulias: Drug Enforcement Evidentiary Standards Improvement Act of 2009,” H.R. 68, sought to eliminate Byrne grants to state anti-drug task forces that engaged in racial profiling. It was previously introduced in 2007 as H.R. 253, and in 2005 as H.R. 2620.

*Hearing on ECPA Reform and the Revolution in Location-Based Technologies and Services (Serial No. 111-109)*

*Summary.*—On June 24, 2010, the Subcommittee held a hearing on ECPA reform focusing specifically on location-based technologies and services. This hearing was the second in a series of educational hearings held by the Subcommittee to study key technology and legal issues associated with ECPA reform. Five witnesses testified at this hearing: Professor Matt Blaze, Associate Professor of Computer and Information Science, University of Pennsylvania, Philadelphia, PA; Mike Amarosa, Senior Vice President for Public Affairs, TruePosition; Hon. Stephen Wm. Smith, United States Magistrate Judge, Southern District of Texas; Marc J. Zwillinger, Zwillinger Genetski LLP; and Richard Littlehale, Assistant Special Agent-in-Charge of the Tennessee Bureau of Investigation, Technical Services Unit.

With the advent of “smart phones” and other sophisticated handheld devices, more and more data is generated and available concerning the “location” of cell phones and their users. The hearing began with Professor Blaze educating the Subcommittee on location technologies—specifically how different technologies interface with cell phones and locate their positions with varying degrees of specificity and precision in various types of environments, both indoors and out. Professor Blaze explained how, even if a network only records cell tower data (as opposed to GPS), the precision of that data will vary widely for any given customer over the course of a day and, for a typical user over time, some of that data will likely have locational precision similar to that of GPS. Indeed, in urban areas where providers are using microcell technology, the level of precision for cell tower location data can include individual floors and rooms within buildings.

Marc Zwillinger explained how the government currently applies ECPA to obtain both historical and prospective location-based data. For prospective cell tower data, the government is currently seeking “hybrid” orders from magistrate judges that combine pen register trap and traces orders with 18 U.S.C. 2703(d) orders. Magistrate Judge Smith testified how, because ECPA is unclear as to the standard Congress intended for prospective cell site data, many magistrate judges (including himself) are requiring search warrants for all prospective cell site data. Some magistrates are also requiring search warrants for historical cell site data. Magistrate Judge Smith and other witnesses urged the Subcommittee to re-

form ECPA by, among other things, creating clear standards for law enforcement access to location-based data.

*Hearing on Americans with Disabilities Act at 20—Celebrating Our Progress, Affirming Our Commitment (Serial No. 111-110)*

*Summary.*—On July 22, 2010, the Subcommittee held a hearing to commemorate the 20th anniversary of passage of the Americans with Disabilities Act of 1990 and to provide an opportunity to reflect on the progress that has been made by virtue of the ADA and to explore ways to fulfill the full promise of the ADA. Testimony was received from: the Honorable Steny Hoyer, Representative in Congress from the State of Maryland; the Honorable James R. Langevin, a Representative in Congress from the State of Rhode Island; the Honorable Thomas E. Perez, Assistant Attorney General, Civil Rights Division, United States Department of Justice; the Honorable Richard Thornburgh, former Governor of Pennsylvania, Attorney General of the United States under Presidents Ronald Reagan and George H.W. Bush, and Under Secretary General of the United Nations; Cheryl Sensenbrenner, Immediate Past Board Chair, American Association of People with Disabilities; Lt. Col. Gregory D. Gadson, Director, U.S. Army Wounded Warrior Program; Jonathan M. Young, Chairman, National Council on Disability; and Casandra Cox, Member, Policy Committee, Coalition of Institutionalized Aged and Disabled.

Hailed by many as the most significant and comprehensive civil rights legislation since the Civil Rights Act of 1964, the Americans with Disabilities Act was enacted with overwhelming bipartisan support. In signing the ADA into law, President Bush characterized the law as an “emancipation proclamation for people with disabilities” and called for “the shameful wall of exclusion [of people with disabilities from mainstream American life to] finally come tumbling down.” The basic framework and language of the ADA places an affirmative obligation on employers, governmental entities, and places of public accommodations to ensure that people with disabilities have an equal chance to participate in mainstream American life. Through its requirements of reasonable accommodation and modification, the ADA requires that steps be taken to remove barriers that prevent full participation by people with disabilities, unless doing so causes undue burden or hardship.

At the July 22, 2010 hearing, the witnesses noted the tremendous progress made as a result of the ADA with, for example, Representative Langevin testifying that the ADA “codified the collective ideal that no one should suffer discrimination because of a disability. It shattered barriers, opening schools, sidewalks, public transportation, public accommodations and workplaces to millions of individuals.” While applauding progress made to date, the witnesses also focused on challenges that remained. Several witnesses, including Representatives Hoyer and Langevin, Mr. Thornburgh, and Ms. Sensenbrenner testified regarding the continued difficulties that people with disability face in finding and keeping jobs and emphasized the need to focus on increasing employment opportunities and greater accessibility in the areas of transportation and emerging technology.

Assistant AG Perez testified about the continued, unnecessary institutionalization of people with disabilities and highlighted recent DOJ work to ensure that states meet their obligation, under the Supreme Court's decision in *Olmstead v. L.C.*, to ensure that individuals are placed in the most integrated and least restrictive environment possible. Ms. Cox, a former resident of an adult home, testified that "living in an adult home was one of the most dehumanizing experiences that I have gone through in my life." Ms. Cox testified about the lack of support provided to those seeking to leave the adult home setting and how, having been fortunate enough to be chosen to participate in a small statewide initiative to move residents from adult homes, she is now thriving in a supported housing community. Citing to *DAI v. Patterson*, a recent court ruling requiring New York state to move residents from adult homes to less restrictive settings, Ms. Cox noted that the case represented "a perfect application of the ADA as it was meant to protect those who need it most. [The ADA] certainly has given me back my life."

Mr. Villalobos, who was paralyzed as the result of a car accident in 1993 when he was just eight years old, testified about how ADA-required accommodations were essential to his continued participation in educational and other opportunities and emphasized the importance "for policy makers to be proactive about inclusion of all people with disabilities."

*Protecting the American Dream Part III: Advancing and Improving the Fair Housing Act on the 5-Year Anniversary of Hurricane Katrina (Serial No. 111-145)*

*Summary.*—The third fair housing hearing, entitled *Protecting the American Dream Part III: Advancing and Improving the Fair Housing Act on the 5-Year Anniversary of Hurricane Katrina*, occurred on July 29, 2010, and examined fair housing issues in the context of Hurricane Katrina, both in the immediate aftermath of the Hurricane and today. The hearing witnesses were Greater New Orleans Fair Housing Action Center Executive Director James Perry, Mississippi Center for Justice Senior Attorney Reilly Morse, Tulane University Law School Professor Stacy Seicshnaydre, and Mercatus Center Gulf Coast Recovery Project Managing Director Daniel Rothschild.

*Related Legislation.*—Subcommittee Chair Jerrold Nadler introduced two bills. H.R. 4820, the "Fair and Inclusive Housing Rights Act of 2010," on March 11, 2010, which would amend the Fair Housing Act to prohibit discrimination on the basis of sexual orientation and gender identity. On December 8, 2010, Subcommittee Chair Jerrold Nadler introduced H.R. 6500, the "Housing Opportunities Made Equal (HOME) Act," which amends the Fair Housing Act to prohibit discrimination in the sale or rental of housing, the financing of housing, and in brokerage services on the basis of sexual orientation, gender identity, source of income, and marital status; to make clear that discriminatory actions prohibited under the Fair Housing Act are unlawful during both pre- and post-acquisition of housing; to make the failure to affirmatively further fair housing a discriminatory housing practice, which allows such a practice to be remedied through a private right of action; to im-

prove the definition of “familial status” so that it more accurately reflects contemporary family arrangements; to provide the Department of Justice with the same authority that the Department of Housing and Urban Development has to compel production of documents from an entity during an investigation, prior to the commencement of formal litigation; to require that reasonable accommodations be made for a person with a disability seeking housing financing; and to deem that a design and construction violation continues until it has been remedied.

*Hearing on ECPA Reform and the Revolution in Cloud Computing  
(Serial No. 111-149)*

*Summary.*—On September 23, 2010, the Subcommittee held a hearing on ECPA reform focusing on cloud computing and how the growth of cloud computing technologies and services may require reforms to ECPA to ensure that, among other things, standards governing law enforcement access to e-mail and other electronic content are applied consistently under the law, regardless of where such content is stored. This hearing was the third in a series of educational hearings held by the Subcommittee to study key technology and legal issues associated with ECPA reform. Representatives from five major cloud computing companies testified on the first panel of witnesses: Google (Richard Salgado, Senior Counsel, Law Enforcement and Information Security); Microsoft (Mike Hintze, Associate General Counsel); Salesforce (David Schellhase, Executive Vice President and General Counsel); Rackspace (Perry Robinson, Associate General Counsel) and; Amazon (Paul Misener, Vice President for Global Public Policy). Edward Felten, Professor of Computer Science and Public Affairs and Director of the Center for Information Technology Policy, Princeton University, also testified on the first panel. Witnesses for the second panel included: Kevin Werbach, Associate Professor of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania; Fred H. Cate, Professor of Law and Director of Center for Applied Cybersecurity Research, Indiana University Maurer School of Law; Marc J. Zwillinger, Zwillinger Genetski LLP.; Thomas B. Hurbanek, Senior Investigator, Computer Crime Unit, New York State Police and; Kurt F. Schmid, Executive Director, Chicago High Intensity Drug Trafficking Area Program.

Cloud computing is a general term for an Internet-based service that remotely “hosts” or stores data and allows the user to access her data from multiple types of devices and locations. Professor Edward W. Felten educated the Subcommittee about the many types of services that are provided “in the cloud.” Common examples he cited included e-mail, document management, investment tracking, photo-sharing, project management and hard-drive backup. Services provided via the cloud often substitute for traditional packaged software. Rather than buying a software product and installing it on a computer, consumers can subscribe to a service that provides similar functionality via the cloud. Businesses also benefit from outsourcing their information management. A business can put its back-office (i.e., payroll, sales, inventory, etc.) and customer-facing computing infrastructures “in the cloud” by contracting with a serv-

ice provider to lease access to resources in the provider's data center.

Witnesses observed that Congress, when enacting ECPA in 1986, may not have anticipated our current world where storage of content on third-party cloud servers would be so cost efficient that neither individuals nor businesses need ever delete an e-mail or other electronic records or documents. Professor Cate and Marc Zwillinger explained, however, that Internet companies are struggling to apply the existing and somewhat outdated categories of information protected by ECPA to their products and services. Moreover, the resulting application of ECPA to cloud based services creates disparities in privacy protections for information stored "in the cloud" verses information stored on local servers or computers. Whereas a "probable cause" search warrant is generally required for law enforcement to access content stored on an individual's computer or local network, content stored in the cloud can be obtained through the use of an 18 U.S.C. § 2703(d) order (requiring less than a probable cause showing) or a mere administrative or grand jury subpoena (requiring no court approval). Because of disparate and lower standards governing law enforcement access to content in the cloud, industry witnesses from SalesForce and Rackspace explained that their foreign customers often have concerns about undue government access to information stored in the cloud. For U.S. cloud computing companies to expand to the fullest extent possible, potential customers of U.S. cloud companies want assurances that the U.S. government will not get access to their data without deliberate due process. Industry witnesses from SalesForce and Rackspace, as well as Google, Microsoft and Amazon all urged the Subcommittee to reform ECPA to provide a neutral, uniform standard for law enforcement access to content, no matter where it is stored.

Professor Werbach supported this industry argument by reminding the Subcommittee that government action to promote trust in electronic commerce and legislation creating safe harbors for digital intermediaries played an important role in the growth of the Internet over the past fifteen years. He also argued there can be little doubt that the Internet has been a major boon to innovation, investment, freedom, and other national goals. Professor Werbach therefore urged Congress to consider how to ensure that outdated legislative and regulatory regimes do not undermine those benefits in the coming years.

*Hearing on Faith-Based Initiatives: Recommendations of the President's Advisory Council on Faith-Based and Community Partnerships and Other Current Issues (Serial No. 111-156)*

*Summary.*—On November 18, 2010, the Subcommittee held a hearing to examine the recommendations for improving and strengthening social service partnerships between the government and nongovernmental organizations that were issued in March 2010 by President Obama's Advisory Council on Faith-Based and Neighborhood Partnerships (Advisory Council), as well as other legal or policy issues related to government partnerships with faith-based organizations. Testimony was received from: Melissa Rogers, Director, Center for Religion and Public Affairs, Wake For-

est University Divinity School; Douglas Laycock, Armistead M. Dobie Professor of Law, Horace W. Goldsmith Research Professor of Law, Professor of Religious Studies, University of Virginia School of Law; and Barry W. Lynn, Executive Director, Americans United for Separation of Church and State.

The federal government often partners with nongovernmental organizations to provide a broad array of social services. When these nongovernmental partners are faith-based organizations, care must be taken to ensure that constitutional commitments guaranteeing equal protection of the laws and the free exercise of religion and forbidding government establishment of religion are met. Questions of whether and how government partnerships comply with these requirements, along with the adequacy of safeguards to monitor and ensure government compliance, have been the subject of considerable debate and concern.

By executive order issued shortly after he took office, President Obama established the Advisory Council to, among other things, make recommendations for improving and strengthening social service partnerships between the government and non-governmental organizations. In its March 2010 report, the Advisory Council's Taskforce on Reform of the Office of Faith-Based and Neighborhood Partnerships made several recommendations regarding church-state issues, including a recommendation for enhanced guidance on permissible versus prohibited use of federal funds, improved monitoring of constitutional and other legal requirements accompanying federal funds, and greater safeguards for the religious liberty rights of the beneficiaries of federally funded programs. Consideration of the legal and policy issues related to religion-based employment decisions—including whether and when a faith-based organization can base employment decisions on matters of religious faith in jobs paid for with taxpayer dollars—was not within the Council's mandate, and there was no recommendation on this issue. On November 17, 2010, the day before the hearing, President Obama issued an executive order, *Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations*, that addressed many of the Advisory Council's recommendations.

At the Subcommittee hearing on November 18, 2010, Professor Rogers highlighted six elements of the executive order: (1) requiring that beneficiaries have the right to an alternative provider if they object to their providers religious character and that beneficiaries are advised of this in writing; (2) clarifying prohibitions on the use of direct government aid for explicitly religious activities, “meaning activities that contain overt religious content, like prayer, worship, and proselytizing,” and requiring additional guidance on this and the need for entities to separate privately-funded religious services from programs subsidized by federal funds; (3) requiring monitoring of government-funded programs to ensure that church-state rules are being followed; (4) requiring agencies to post guidance and lists of entities receiving funds online; (5) requiring that awards of federal funds be made free from political interference (or the appearance of such interference), and based on merit and not on religious affiliation or lack thereof; (6) creating an interagency working group to create uniform regulations and guid-

ance around these and other issues. Professor Rogers also testified that the executive order “doesn’t call for churches to form separate corporations if they wish to receive direct government aid, and that is a change that 13 council members, including me, advocated as a way of insulating churches from government oversight.”

With regard to religion-based employment decisions by faith-based groups in government-funded jobs, an issue that was not considered by the Advisory Council, Professor Rogers said “[i]n my view, it is wrong to allow any religious group, including my own, to place a religious test on a job that is funded by government grant. Because current rules and policies permit this in some instances, I believe this matter must be addressed.” Professor Rogers testified that the DOJ Office of Legal Counsel opinion, interpreting the Religious Freedom Restoration Act (RFRA) to exempt a faith-based organization from complying with a Congressionally-mandated nondiscrimination provision in a federal grant program, should be reconsidered and withdrawn.

Testifying that President Obama’s executive order embodied several core “charitable choice” rules—that there should be “no discrimination between religious and secular providers, no surrender of religious identity for the religious providers, no discrimination on the basis of religion against the recipients of the services, no coercion to participate in religious activities, the guarantee of an alternative secular provider to any recipient who asks for one, audit of the government money only as long as it was segregated from the religious provider’s money, no use of government funds to support the religious activities”—Professor Laycock testified that the remaining question in dispute is whether religious providers may take religion into account when making employment decisions. Taking the opposite view from Professor Rogers and Reverend Lynn, Professor Laycock testified that requiring religious organizations to “surrender [their] right to hire people who support [their] mission” interfered with First Amendment rights of assembly and free exercise.

Noting that 73% of Americans surveyed are opposed to religious discrimination in federally funded jobs, Reverend Lynn testified that religious organizations should follow the same nondiscrimination requirements as others when receiving federal funds. “[T]he free exercise of religion is not burdened when a group voluntarily accepts government funds knowing that it contains constraints on certain religiously-motivated conduct like hiring only your own followers. The First Amendment to the United States Constitution is not an excuse to refuse to play by American rules when you are playing with Americans’ dollars.”

*Hearing on National Security and Civil Liberties (Serial No. 111-159)*

*Summary.*—On Thursday, December 9, 2010, the Subcommittee held a hearing to examine the relationship between national security and civil liberties, and to assess the extent to which executive branch national security actions have affected freedom and civil liberties in the United States. Witnesses included: Ambassador Thomas R. Pickering; Laura W. Murphy of the American Civil Liberties Union; Jamil N. Jaffer of Kellogg, Huber, Hansen, Todd, Evans &

Figel, P.L.L.C.; Michael W. Lewis of the Ohio Northern University Claude W. Pettit College of Law; investigative reporter Jeremy Scahill; Mary Ellen O'Connell of the University of Notre Dame Law School; and Bruce E. Fein of the Litchfield Group. Testimony addressed the legal and constitutional issues raised by executive branch policies in the area of detention, interrogation, targeted killings, and related matters.



## SUBCOMMITTEE ON COURTS AND COMPETITION POLICY<sup>1</sup>

HENRY C. "HANK" JOHNSON, JR., Georgia, *Chairman*

JOHN CONYERS, JR., Michigan	HOWARD COBLE, North Carolina
RICK BOUCHER, Virginia	JASON CHAFFETZ, Utah
CHARLES A. GONZALEZ, Texas	F. JAMES SENSENBRENNER, JR.,
SHEILA JACKSON LEE, Texas	Wisconsin
MELVIN L. WATT, North Carolina	BOB GOODLATTE, Virginia
MIKE QUIGLEY, Illinois	DARRELL E. ISSA, California
DANIEL MAFFEI, New York	GREGG HARPER, Mississippi
JARED POLIS, Colorado	

<sup>1</sup>Subcommittee chairmanship and assignments approved January 22, 2009.

### *Tabulation of subcommittee legislation and activity*

Public: .....	72
Legislation referred to the Subcommittee .....	72
Legislation on which hearings were held .....	5
Legislation reported favorably to the full Committee .....	3
Legislation reported adversely to the full Committee .....	0
Legislation reported without recommendation to the full Committee .....	0
Legislation reported as original measure to the full Committee .....	0
Legislation discharged from the Subcommittee .....	2
Legislation pending before the full Committee .....	0
Legislation reported to the House .....	4
Legislation discharged from the Committee .....	0
Legislation pending in the House .....	4
Legislation passed by the House .....	4
Legislation pending in the Senate .....	2
Legislation vetoed by the President (not overridden) .....	1
Legislation enacted into Public Law .....	0
Legislation enacted into Public Law as part of other legislation .....	0
Days of legislative hearings .....	5
Days of oversight hearings .....	16

### JURISDICTION OF THE SUBCOMMITTEE

The Subcommittee on Courts and Competition Policy has jurisdiction over: antitrust law, monopolies, and restraints of trade, administration of U.S. Courts, Federal Rules of Evidence, Civil and Appellate Procedure, judicial ethics, other appropriate matters as referred by the Chairman, and relevant oversight.

### LEGISLATIVE ACTIVITIES

#### *H.R. 233, the "Railroad Antitrust Enforcement Act of 2009"*

*Summary.*—Introduced by Representative Tammy Baldwin, H.R. 233, Amends the Clayton Act (the Act) to make federal antitrust laws applicable to all common carriers subject to the Surface Transportation Board (STB), regardless of whether the carrier filed a rail carrier rate or whether a complaint challenging a rate is filed. Subjects to antitrust review agreements among rail carriers to pool or divide traffic, services, or earnings. Authorizes the Federal Trade Commission (FTC) to enforce certain provisions of the

Act against STB-approved agreements or combinations, including those related to rates.

*Legislative History.*—Introduced on January 7, 2009, H.R. 233 was referred to the Committee on the Judiciary, On February 9, 2009, H.R. 233 was referred to the Subcommittee on Courts and Competition Policy. On May 19, 2009, the Subcommittee held a legislative hearing. The following witnesses appeared and submitted a written statement for the record: The Honorable Rodney Alexander, Member of Congress, 5th district of Louisiana , M. Howard Morse, Chair, Exemptions and Immunities Committee, American Bar Association Sector of Antitrust Law, J. Michael Hemmer, Vice Chairman, Policy and Advocacy Committee, Association of American Railroads, Terry Huval, Director, Lafayette Utilities System, and Dr. Mark Cooper, Director of Research, Consumer Federation of America. On July 30, 2009, the Subcommittee met in open session and ordered favorably reported H.R. 233, amended by voice vote. On June 1, 2009, related bill S. 146 Motion to proceed withdrawn by unanimous consent in Senate. (S. Rept. 111-9)

*H.R. 569, the “Equal Justice for Our Military Act of 2010”*

*Summary.*—Introduced by Representative Susan Davis, H.R. 569, amends titles 28 and 10, United States Code, to allow for review by writ of certiorari of certain cases denied relief or review by the U.S. Court of Appeals for the Armed Forces.

*Legislative History.*—Introduced on January 15, 2009, H.R. 569 was referred to the House Committee on the Judiciary. On May, 29, 2009, H.R. 569, was referred to the Subcommittee on Courts and Competition. On June 11, 2009, the Subcommittee held a legislative hearing H.R. 569, the Equal Justice for Our Military Act of 2010 pursuant to notice. The following witnesses appeared and submitted statements for the record: The Honorable Susan Davis, Member of Congress, 53rd District, State of California; Dwight H. Sullivan, Civilian Appellate Defense Counsel, United States Air Force Appellate Defense Division, Major General (Ret.) John D. Altenburg Jr., of Counsel, Greenberg Traurig, LLP. On July 30, 2009, the Subcommittee held a markup to consider H.R. 569 and reported the bill favorable to Full Committee by voice vote. On January 27, 2010, the Full Committee considered and ordered reported favorably (amended) by voice vote. H. Rept. 111-547. (Senate version) S. 357. No further action.

*H.R. 628, To establishes a pilot program in certain United States district courts to encourage enhancement of expertise in patent cases among district court judges.*

*Summary.*—Introduced by Representative Darrell E. Issa, H.R. 628 establishes a pilot program in certain United States district courts to encourage enhancement of expertise in patent cases among district court judges.

*Legislative History.*—Introduced on January 22, 2009, H.R. 628 was referred to the House Committee on the Judiciary. On March 17, 2009, Representative Henry “Hank” C. Johnson, Jr. moved to suspend the rules on the floor and pass the bill under suspension of the rules. The House proceeded with forty minutes of debate on H.R. 628. At the conclusion of debate, the Chair put the question

on the motion to suspend the rules. Representative Issa objected to the vote on the grounds that a quorum was not present. Further proceedings on the motion were postponed. The point of no quorum was withdrawn. On motion to suspend the rules. The House passed H.R. 628 and agreed to the bill by recorded vote (409–7). On March 18, 2009, H.R. 628 was referred to the Senate Committee on the Judiciary. On December 13, 2010, H.R. 628 was passed by the Senate with amendment by Unanimous Consent. On December 17, 2010, as amended by the Senate, the House passed the bill, H.R. 628, by a vote of (371–1).

*H.R. 1626, the “Statutory Time-Periods Technical Amendments Act of 2009”*

*Summary.*—Introduced by Representative Henry “Hank” C. Johnson, Jr., to make technical amendments to laws containing time periods affecting judicial proceedings.

*Legislative History.*—Introduced on March 19, 2009, H.R. 1626, was referred to the Committee on the Judiciary, to the Committee on Energy and Commerce, and in addition, to the Subcommittee on Health for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned. On April 22, 2009, Representative Anthony Weiner moved to suspend the rules and pass the bill. H.R. 1626, was agreed to by voice vote. On April 27, 2009, H.R. 1626, passed the Senate without amendment by Unanimous Consent. On May 7, 2009, H.R. 1626 became Public Law 111–16.

*H.R. 3190, the “Discount Pricing Consumer Protection Act of 2009”*

*Summary.*—Introduced by Representative Henry C. “Hank” C. Johnson, Jr., H.R. 3190, restores the rule that agreements between manufacturers and retailers, distributors, or wholesalers to set the price below which the manufacturer’s product or service cannot be sold violates the Sherman Act.

*Legislative History.*—Introduced on July 13, 2009, H.R. 3190, was referred to the Committee. On July 29, 2009, H.R. 3190, was referred to the Subcommittee on Courts and Competition Policy. On July 30, 2009, the Subcommittee met in open session and ordered the bill favorably reported by voice vote. On January 13, 2010, the Committee considered and ordered reported the bill by voice vote. No further action. S. 148, the “Discount Pricing Consumer Protection Act” (Senate Rept. 111–227) introduced by Senator Kohl, January 6, 2009.

*H.R. 3596, the “Health Insurance Industry Antitrust Enforcement Act of 2009”*

*Summary.*—Introduced by Representative John Conyers, Jr., H.R. 3596, ensures that health insurance issuers and medical malpractice insurance issuers cannot engage in price fixing, bid rigging, or market allocations to the detriment of competition and consumers.

*Legislative History.*—Introduced on September 17, 2009, H.R. 3596, was referred to the Committee on the Judiciary. On October 2, 2009, H.R. 3596 was referred to the Subcommittee on Courts and Competition Policy. On October 8, 2009, the Subcommittee

held a legislative hearing. The following witnesses appeared and submitted written statements for the record: James D. Hurley, Member, Medical Professional Liability Subcommittee, American Academy of Actuaries, Dr. Peter J. Mandell, Former President, California Orthopaedic Association, and Ilene Knable Gotts, Chair, Section of Antitrust Law, American Bar Association. On October 21, 2009, the Committee met in open session, and ordered the bill reported amended by roll call vote of 20–9. (H. Rept. 111–322) The bill was incorporated into H.R. 3962, the Affordable Health Care for America Act, which passed the House on November 7, 2009, by a vote of 220–215. S. 1681

*H.R. 3632, the “Federal Judiciary Administrative Improvements Act of 2009”*

*Summary.*—Introduced by Representative Henry “Hank” C. Johnson, Jr., to provide improvements for the operations of the Federal courts.

*Legislative History.*—Introduced on September 23, 2009, H.R. 3632, was referred to the House Committee on the Judiciary. On October 19, 2009, H.R. was referred to the Subcommittee on Courts and Competition Policy. On October 28, 2009, Representative Steve Cohen, moved to suspend under the rule and pass H.R. 3632 on the House floor. The House agreed and passed H.R. 3632 by voice vote. The Senate companion bill, S. 1782, the Federal Judiciary Administrative Improvement Act of 2010, was introduced by Senator Sheldon Whitehouse on October 14, 2009. On March 16, 2010, the Senate Committee on the Judiciary discharged S. 1782 by Unanimous Consent. S. 1782 was amended by Senator Kaufman for Senator Whitehouse in the nature of a substitute. On March 16, 2010 S. 1782 passed the Senate with an amendment by Unanimous Consent. On May 18, 2010, Representative Henry “Hank” C. Johnson, Jr., moved to suspend the rules and pass S. 1782. The House proceeded with forty minutes of debate on S. 1782. On motion to suspend the rules and pass the bill, S. 1782 was agreed to by voice vote. On May 27, 2010, S. 1782 became Public Law No: 111–174.

*H.R. 4113, the “Federal Courts Jurisdiction and Venue Clarification Act of 2010”*

*Summary.*—Introduced by Representative Lamar Smith, H.R. 4113, amends Title 28, U.S.C. to clarify the jurisdiction of the Federal Courts.

*Legislative History.*—Introduced on November 19, 2009, H.R. 4113 was referred to the House Committee on the Judiciary. On January 4, 2010, H.R. 4113 was referred to the Subcommittee on Courts and Competition Policy. On September 28, 2009, Representative Bobby Scott, moved to suspend the rules on the House floor and pass the bill as amended. The bill, H.R. 4113, passed, as amended, by voice vote. No Senate action taken.

*H.R. 4115, the “Open Access to Courts Act of 2009”*

*Summary.*—Introduced by Representative Jerrold Nadler, H.R. 4115, prohibits a U.S. district court from dismissing a complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to

relief or on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.

*Legislative History.*—Introduced on November 19, 2009, H.R. 4115 was referred to the House Committee on the Judiciary. On December 11, 2009, H.R. 4115 was referred to the Subcommittee on Courts and Competition Policy. On December 16, 2009, the Subcommittee on Courts and Competition Policy held a legislative hearing on H.R. 4115 pursuant to notice. The following witnesses appeared and submitted statements for the record: The Honorable Jerrold Nadler, Member of Congress, 8th district of New York, Eric Schnapper, Professor of Law, University of Washington, School of Law, Gregory G. Katsas, Former Assistant General, Civil Division, U.S. Department of Justice, Jonathan L. Rubin, Patton Boggs, Joshua P. Davis, Professor, Center for Law and Ethics, University of San Francisco, School of Law. No further action.

*H.R. 5034, the “Comprehensive Alcohol Regulatory Effectiveness Act of 2010”*

*Summary.*—Introduced by Representative Bill Delahunt, to support state based alcohol regulation, to clarify evidentiary rules for alcohol matters, and to ensure the collection of all alcohol taxes.

*Legislative History.*—Introduced on April 15, 2010, H.R. 5034 was referred to the House Committee on the Judiciary. On June 15, 2010, H.R. 5034 was referred to the Subcommittee on Courts and Competition Policy. On September 22, 2010, the Subcommittee on Courts and Competition discharged. On September 29, 2010, the Full Committee held a legislative hearing on H.R. 5034. The following witnesses appeared and submitted statement for the record: Panel I, Representative Mike Thompson, 1st district of California, Representative Peter DeFazio, 4th district of Oregon, Representative Bruce Braley, 1st district of Iowa, Representative Edolphus Towns, 10th district of New York, Representative George Radanovich, 19th district of California, and Representative Gary Miller, 42nd district of California. Panel II, the Honorable Mark L. Shurtleff, Attorney General for the State of Utah, Richard Doyle, Chairman and CEO, Harpoon Brewery, Nida Samona, Chairperson, Michigan Liquor Control Commission, Stephen M. Diamond, Professor of Law, University of Miami, Einer Richard Elhauge, Petrie Professor of Law, Harvard Law School, Tracy K. Genesen, Partner, Kirkland & Ellis, LLP, and Michele Simon, Research and Policy Director, Marin Institute.

*H.R. 5281, The “Removal Clarification Act of 2010”*

*Summary.*—Introduced by Representative Henry C. “Hank” C. Johnson, Jr. amends title 28, United States code, with respect to removal to U.S. district court from a state court of: (1) any civil action against the United States or a federal agency or officer, or specified others; or (2) a criminal prosecution commenced in a state court against any of them.

*Legislative History.*—Introduced on May 12, 2010, H.R. 5281 was referred to the Committee on the Judiciary. On May 21, 2010, H.R. 5281 was referred to the Subcommittee on Courts and Competition

Policy. On May 25, 2010, the Subcommittee held a legislative hearing pursuant to notice. The following witnesses appeared and submitted statements for the record: Beth S. Brinkmann, Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice, Irvin B. Nathan, General Counsel, Office of the General Counsel, U.S. House of Representatives, Lonny Hoffman, George Butler Research Professor of Law, University of Houston Law Center, and Arthur D. Hellman, Professor of Law, University of Pittsburgh School of Law. The Subcommittee on Courts and Competition Policy discharged. On July 27, 2010, the House considered H.R. 5281 under suspension of the rules and passed the bill, as amended by voice vote. On December 3, 2010, the Senate passed H.R. 5281 with an amendment and sent the bill back to the House. On December 8, 2010, the House passed H.R. 5281, as amended by the Senate with the DREAM Act as a House amendment.

#### OVERSIGHT HEARINGS

Pursuant to its obligations under Rule X of the House Rules, the Committee submitted the following subject matters as part of its oversight plan for the 111th Congress.

##### *The Federal Judicial System*

The Subcommittee has responsibility for oversight of the Judicial Conference of the United States; the Administrative Office of the U.S. Courts; the Federal Rules Enabling Act and the Advisory Committees on Civil Rules, Appellate Rules and Rules of Evidence, as well as judicial ethics and discipline.

In the 111th Congress, the Subcommittee also examined the state of judicial recusals after *Caperton v. A.T. Massey*. On December 10, 2009, the Subcommittee held an oversight hearing on judicial recusals. The witnesses were: Judge M. Margaret McKeown, United States Courts of Appeals, Ninth Circuit District; Charles G. Geyh, Associate Dean of Research, John F. Kimberling Professor of Law, Indiana University, Maurer School of Law; Richard E. Flamm, Author of Judicial Disqualification: Recusal and Disqualification of Judges; Conflicts of Interest and Law Firm Disqualification; Eugene Volokh, Gary T. Schwartz, Professor of Law, University of California, Norman L. Reimer, Executive Director, National Association of Criminal Defense Lawyers; and Arthur D. Hellman, Professor of Law, University of Pittsburgh, Sally Ann Semenko Endowed Chair. In response to this hearing, Chairman Johnson commissioned a study by the Congressional Research Service to evaluate judicial recusal law in each state.

The Subcommittee also considered a Government Accountability Office (“GAO”) report on federal courthouse construction and its effects on courts and access to justice. On September 29th, the Subcommittee held a hearing to examine the implications of the report and the need for courthouses to be adequately funded. The witnesses were: The Honorable Jim Cooper, Member of Congress, 5th District of Tennessee; Mark L. Goldstein, Director, Physical Infrastructure, U.S. Government Accountability Office; The Honorable Michael A. Ponsor, U.S. District Judge, District of Massachusetts and Chairman of the Judicial Conference’s Committee on Space and Facilities; Robert A. Peck, Commissioner of Public Buildings,

U.S. General Services Administration; The Honorable Robert J. Conrad, Jr., Chief U.S. District Judge, Western District of North Carolina; and Judith Resnik, Arthur Liman Professor of Law, Yale Law School.

The Subcommittee also considered a number of legislative items to ensure the proper functioning of the courts. These included annual evaluation of the Rules Package, passage of time computation legislation to harmonize the federal rules with amendments to the federal time-computation rules intended to provide predictability and uniformity to the current process of calculating court deadline, and passage of the “Judicial Survivors Protection Act of 2009” to authorize a six-month open enrollment period for a federal judicial official to opt into the Judicial Survivors’ Annuities System.

The Subcommittee held a hearing on the “Open Access to Courts Act of 2009” which establishes a pleading standard following the Supreme Court’s decision in *Ashcroft v. Iqbal*. The Subcommittee also held a hearing on and marked up the “Removal Clarification Act of 2010” which will allow federal officers to properly remove to federal court when they are sued for actions undertaken in their official capacity.

#### *Antitrust Law*

The Subcommittee on Courts and Competition has jurisdiction over competition policy and all laws relevant to antitrust. In addition, the Subcommittee has jurisdiction over the federal agencies empowered to enforce those laws, the Antitrust Division of the U.S. Department of Justice as well and the Bureau of Competition of the Federal Trade Commission.

Chairman Johnson initiated a series of hearings entitled, “An Antitrust System for the 21st Century.” The purpose of this series of hearings was to examine the findings and recommendations made by the Congressionally-mandated, bipartisan Antitrust Modernization Commission, in 2007. The Commission had been tasked by Congress with evaluating the nation’s antitrust laws and offering recommendations for updating them.

As part of this series, the Subcommittee held hearings examining whether there were entities in the banking industry that were “too big to fail,” and if so, if their existence marked a failure of antitrust enforcement; the continuing need for the McCarran-Ferguson antitrust exemption for insurance companies; the impact of the *Credit Suisse* and *Trinko* decisions on antitrust enforcement in regulated industries.”

The Subcommittee held hearings regarding consolidation in a number of industries, in the wake of prominent mergers in those industries. Some of the industries reviewed by the Committee included ticketing and concert promotion; online search; combined television and broadband providers; and newspaper.

With respect to legislation, the Subcommittee held hearings examining the antitrust implications of major financial and health care reform legislation as it was debated by both Houses. Voted out of subcommittee were separate pieces of legislation that would have removed the antitrust exemption for health insurance companies; would have removed the antitrust exemption for railroad companies; and would have overturned a 2004 Supreme Court decision,

the net result of which would have been that threshold price agreements between manufacturers and retailers would once more be illegal. Passed into law was a 10-year reauthorization of the Anti-trust Criminal Penalty Enhancement and Reform Act, a statute designed to help uncover global price-fixing cartels.

In addition, the Subcommittee exercised oversight over disproportionate enforcement of the antitrust laws against physicians; the implications of the Supreme Court's decision in *American Needle v. NFL*; and the enforcement records of the federal antitrust agencies.

*List of Oversight Hearings*

Competition in the Ticketing and Promotion Industry, February 26, 2009 (Serial No. 111-62)

“Too Big To Fail?: The Role of Antitrust Law in Government-Funded Consolidation in the Banking Industry, March 17, 2009 (Serial No. 111-33)

A New Age for Newspapers: Diversity of Voices, Competition and the Internet, April 21, 2009 (Serial No. 111-38)

‘Bye Bye Bargains?’ “Retail Price Fixing, the Leegin Decision, and Its Impact on Consumer Prices”, April 28, 2009 (Serial No. 111-37)

Pay to Delay: Are Patent Settlements That Delay Generic Drug Market Entry Anticompetitive?, June 3, 2009 (Serial No. 111-105)

Biologics and Biosimilars: Balancing Incentives for Innovation, June 14, 2009 (Serial No. 111-73)

Expansion of Top Level Domains and its Effects on Competition, September 23, 2009 (Serial No. 111-70)

Too Big to Fail: The Role for Bankruptcy and Antitrust Law in Financial Regulation Reform, Part II, November 17, 2009 (Serial No. 111-106)

Examining the State of Judicial Recusals after *Caperton v. A.T. Massey*, December 10, 2009 (Serial No. 111-118)

The Antitrust Implications of *American Needle v. NFL*, January 20, 2010 (Serial No. 111-126)

Legal Issues Concerning State Alcohol Regulation, March 18, 2010 (Serial No. 111-125)

Design Patents and Auto Replacement, March 22, 2010 (Serial No. 111-112)

The United States Patent and Trademark Office, May 5, 2010 (Serial No. 111-)

Is There Life After Trinko and Credit Suisse?: The Role of Antitrust in Regulated Industries”, June 15, 2010 (Serial No. 111-119)

Impact of China’s Antitrust Law and other Competition Policies on U.S. Companies, July 13, 2010 (Serial No. 111-117)

The Federal Trade Commission’s Bureau of Competition and the Department of Justice’s Antitrust Division, July 27, 2010 (Serial No. 111-133)

Competition in the Evolving Digital Marketplace, September 16, 2010 (Serial No. 111-)

Courtroom Use: Access to Justice, Judicial Administration, and Courtroom Security, September 29, 2010 (Serial No. 111-153)

Antitrust Laws and Their Effects on Healthcare Providers, Insurers and Patients, December 1, 2010 (Serial No. 111-)

*Hearing on “Competition in the Ticketing and Promotion Industry”*  
(Serial No. 111-62)

The hearing was held to examine the state of competition in the ticketing and promotion industry and to determine the effects of a merger between Live Nation and Ticketmaster on the industry. The hearing explored the procompetitive benefits and the anti-competitive effects of the proposed merger, including the effects upon competition as well as any efficiencies to be gained. Ticketmaster is a ticketing and marketing company that provides ticket sales, ticket resale services and ticket marketing and distribution services in domestic and global markets. Ticketmaster acts as the sales agent of more than 80% of the major arenas and stadiums in the United States, in what is referred to in the industry as the “primary,” or initial direct sale, ticket market. The company also participates in artist management through its acquisition of a majority share of Front Line Management. Front Line is one of the world’s leading artist management companies with nearly 200 clients and more than 80 executive managers. It manages a wide range of talent including Aerosmith, Christina Aguilera, Jimmy Buffett, the Eagles, Chicago and Guns N’ Roses. Ticketmaster acquired its majority share in Frontline in 2008 shortly before the expiration of its contract with Live Nation.

The size of the deal and the merging companies automatically triggers review by one of the federal antitrust agencies under the Hart-Scott-Rodino amendments to the Clayton Act. The overarching goal of antitrust law enforcement is to promote competition. The reviewing agency identified the product markets in which the companies competed, and considered a number of factors, provided in detail below, in determining whether the procompetitive benefits of the merger outweighed its anticompetitive effects.

The following witnesses appeared and submitted a written statement for the record: The Honorable Bill Pascrell, Jr., Member of Congress, 8th District of New Jersey, Michael Rapino, President & Chief Executive Officer, Live Nation Worldwide, Incorporated, Irving Azoff, Chief Executive Officer, Ticketmaster Entertainment, Incorporated, Robert W. Doyle, Jr., Partner, Doyle, Barlow & Mazard, PLLC, Peter A. Luukko, President & Chief Operating Officer, Comcast-Spectacor, Luke Froeb, William C. and Margaret W. Oehmig Associate Professor of Management, Owen Graduate School of Management, Vanderbilt University, Ed Mierzwinski, Consumer Program Director, U.S. PIRG, the Federation of Public Interest Research Groups,

Adam B. Jaffe, Professor of Economics and Dean of Arts and Sciences, Brandeis University, Suzanne Michel, Chief Intellectual Property Counsel and Deputy Assistant Director for Policy Coordination, Federal Trade Commission, Mark Myers, Co-Chair of the National Academy of Sciences Report Patent System for 21st Century, and Daniel B. Ravicher, Executive Director, Public Patent Foundation.

*Hearing on ‘Too Big To Fail?’: The Role of Antitrust Law in Government-Funded Consolidation in the Banking Industry (Serial No. 111-33)*

The hearing examined whether the nation’s recent economic downturn was worsened by the policies regarding the antitrust laws and the lessons that we should learn to prevent or limit systemic risk of “too big to fail” institutions. We explored the cause, antitrust enforcement to date, perceived problems, and possible remedies. The federal government investment of hundreds of billions of dollars into financial institutions. Some of these investments have been made directly into financial institutions that were colloquially termed “too big to fail.” Others were distributed to financial institutions through the Troubled Asset Relief Program (“TARP”). Although the stated goal of the TARP funding was to increase liquidity in the credit markets and stimulate lending, some of the funds were used by recipient banks to acquire competing banks that, in some cases, were denied TARP funding. These events raised two interrelated issues. First, are there institutions that are “too big to fail,” and should antitrust law have prevented them from becoming embedded in the economy to such an extent that government intervention was required to prevent a failure? More than 5400 bank mergers occurred between 1990 and 2005. Those mergers included 74 “mega-mergers” where the buyer and seller each had more than \$10 billion in assets.

The following witnesses appeared and submitted a written statement for the record: Albert A. Foer, President, American Antitrust Institute, (AAI), C.R. “Rusty” Cloutier, President & Chief Executive Officer, MidSouth Bank, N.A., William Askew, Senior Policy Advisor, Financial Services Roundtable, Deborah A. Garza, Former Assistant Attorney General, Division of Antitrust, U.S. Department of Justice, Mark N. Cooper, Director of Research, Consumer Federation of America, Adam B. Jaffe, Professor of Economics and Dean of Arts and Sciences, Brandeis University, Suzanne Michel, Chief Intellectual Property Counsel and Deputy Assistant Director for Policy Coordination, Federal Trade Commission, Mark Myers, Co-Chair of the National Academy of Sciences Report Patent System for 21st Century, and Daniel B. Ravicher, Executive Director, Public Patent Foundation.

*Hearing on “A New Age for Newspapers: Diversity of Voices, Competition and the Internet” (Serial No. 111-38)*

The hearing addressed changes in the industry and continually decreasing revenues, newspapers have taken a number of steps to stay in business including consolidation, reduction in workforce, cutting back on quantity and quality of content, cutting back on frequency of content, and filing for bankruptcy protection. Others have been forced to close their doors forever. The hard times that print journalism is facing is illustrated by a list compiled by *Time Magazine* that ranks the country’s ten most endangered papers from our nation’s major cities; Specifically, the list included publications from Boston, Chicago, Detroit, Fort Worth, New York, Miami, Minneapolis, Philadelphia and San Francisco.

The following witnesses appeared and submitted a written statement for the record: Carl Shapiro, Deputy Assistant Attorney Gen-

eral for Economics, Antitrust Division, U.S. Department of Justice, Brian Tierney, Chief Executive Officer, Philadelphia Media Holdings, John Nichols, American Journalist, Bernie Lunzer, President, The Newspaper Guild, Ben Scott, Policy Director, Free Press, C. Edwin Baker, Nicholas F. Galicchio Professor, University of Pennsylvania, and Dan Gainor, Vice President, Business and Media Institute, Media Research Center.

*Hearing on 'Bye Bye Bargains?' "Retail Price Fixing, the Leegin Decision, and Its Impact on Consumer Prices" (Serial No. 111-37)*

The purpose of this hearing was to examine the effect of the Supreme Court's July 2007 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* on the competitiveness of retail prices. *Leegin* overturned the bright-line *per se* prohibition against minimum retail price agreements between manufacturers and retailers and instead now subjects all such agreements to a more evidence-intensive "rule of reason" analysis. The impact of this shift may be to eliminate sales and discounts in retail pricing. As a result, the decision has had the effect, in some instances, of eliminating competition among retailers selling the same manufacturer's product so-called "intrabrand competition." Should more manufacturers begin to fix a minimum price for their products, intrabrand competition could be drastically reduced, limiting the ability of retailers to vigorously undercut each other, the ability of consumers to price-shop, and the ability of retailers to move merchandise through sales, close-outs, and bargain bins. In his dissent in *Leegin*, Justice Breyer estimated that even if only 10 percent of manufacturers engaged in minimum retail price fixing, the annual retail bills for the average family of four would increase by between \$750 and \$1,000.

The following witnesses appeared and submitted a written statement for the record: Pamela Jones Harbour, Commissioner, Federal Trade Commission, Thomas G. Hungar, Partner, Gibson, Dunn & Crutcher, LLP, Tod Cohen, Vice President, Deputy General Counsel for Government Relations eBay Incorporated, and Richard Brunell, Director of Legal Advocacy, American Antitrust Institute.

*Hearing on Pay to Delay: Are Patent Settlements That Delay Generic Drug Market Entry Anticompetitive? (Serial No. 111-105)*

The hearing provided an opportunity to hear testimony related to whether or not settlements of patent infringement/invalidation lawsuits between pharmaceutical companies that sell "brand" drugs and generic drug manufacturers that are attempting to enter the market with a less expensive generic equivalent drug are anti-competitive and do harm to consumers, or are an efficient way to avoid litigation expenses and ultimately benefit consumers.

The following witnesses appeared and submitted a written statement for the record: Richard Feinstein, Director of the Bureau of Competition, Federal Trade Commission, Heather Bresch, Executive Vice President, Chief Operating Officer, Mylan Incorporated, William P. Kennedy, Chief Executive Officer, Orlando, Nephron Pharmaceuticals Corporation, Guy Donatiello, Vice President, Intellectual Property, Endo Pharmaceuticals, and William Vaughan,

Senior Health Policy Analyst, Consumer Union, and Bret M. Dickey, Senior Vice President, Compass Lexecon.

*Hearing on “Biologics and Biosimilars: Balancing Incentives for Innovation” (Serial No. 111-73)*

The hearing examined proposals to establish an expedited regulatory pathway for generic versions of biological pharmaceutical products similar to the pathway for generic drugs established in the Hatch-Waxman Act, how such a pathway can benefit consumers, and what intellectual property protections are necessary to ensure such a pathway does not harm research and development investment in the biotechnology industry.

The following witnesses gave testimony and submitted a written statement for the record: Panel I, The Honorable Anna G. Eshoo, Member of Congress, 14th Congressional District, State of California. Panel II, Bruce A. Leicher, Senior Vice President and General Counsel, Momenta Pharmaceuticals, Incorporated; Jeffrey P. Kushan, on behalf of the Biotechnology Industry Organization; Alex M. Brill, Research Fellow, American Enterprise Institute; Jack W. Lasersohn, General Partner, Verticle Group, on behalf of National Venture Capital Association; Larry McNeely, Healthcare Reform Advocate, United States Public Interest Research Groups; and Teresa Stanek Rea, President, American Intellectual Property Law Association.

*Hearing on “Expansion of Top Level Domains and its Effects on Competition” (Serial No. 110-70)*

This hearing focused on the impact that the proposed expansion of generic Top Level Domain Names could have on consumer use and confidence in the Internet, whether companies will be forced to make huge investments in new domain names in order to prevent trademark infringing abuse by cybersquatters, and what will be the nature of the relationship between the United States government and the Internet Corporation for Assigned Names and Numbers (ICANN) following expiration of the current agreement between the U.S. and ICANN.

The following witnesses gave testimony and submitted a written statement for the record: Doug Brent, Chief Operating Officer, Internet Corporation for Assigned Names and Numbers (ICANN); Richard Heath, President, International Trademark Association; Paul Stahura, Chief Executive Officer, President, eNOM; and Steve DelBianco, Executive Director, NetChoice.

*Hearing on “Too Big to Fail: The Role for Bankruptcy and Antitrust Law in Financial Regulation Reform, Part II” (Serial No. 111-106)*

The purpose of the hearing was to provide an opportunity for Members to examine those portions of President Obama Administration’s financial regulatory reform package that were within the Judiciary Committee’s jurisdiction, with a particular focus on the antitrust, courts, and bankruptcy implications of the Administration’s proposal for enhanced resolution authority. The Administration had argued that a lack of proper regulation of large non-bank financial institutions that were highly interconnected with other

actors in the Nation's financial system (*i.e.*, those institutions that were said to be "too big to fail"), coupled with an inability of the Bankruptcy Code to handle properly the insolvency of such institutions, contributed to the recent financial crisis and will continue to constrain the government's capacity to address future crises. Accordingly, the hearing focused on the Administration's proposals for an appropriate regulatory regime for large interconnected non-bank financial institutions as well as resolution authority to handle any future insolvencies of such institutions. The hearing allowed Members to consider whether the exemptions from antitrust oversight sought by the government under resolution authority would have a harmful effect on consumers by failing to properly safeguard competition in the market and inadvertently creating a new generation of "too big to fail" institutions. Members also had the opportunity to examine certain courts and bankruptcy concerns that the resolution authority proposal raises.

The following witnesses submitted a written statement for the record: Christopher L. Sagers, Associate Professor of Law, Cleveland-Marshall College of Law, Edwin E. Smith, Bingham McCutchen, LLP, on behalf of the National Bankruptcy Conference, Michael A. Rosenthal, Gibson, Dunn & Crutcher, LLP, and Charles Calomiris, Henry Kaufman Professor of Financial Institutions, Columbia Business School.

*Hearing on "Examining the State of Judicial Recusals after Caperton v. A.T. Massey" (Serial No. 111-118)*

This hearing explored: (1) the current state of judicial recusals in the federal and state court systems in light of *Caperton*; (2) whether reform to judicial recusal laws is ripe for review; and (3) the pros and cons of potential substantive and procedural reform to judicial recusal laws. An impartial judicial system is essential to effective law and order and overall public confidence in the judiciary. To ensure confidence, current federal laws impart an objective standard requiring judges to recuse themselves from a case where there exists an appearance of bias, or more severely, where actual bias exists. Judicial recusal laws are imperative to ensuring the public's Constitutional right to due process of law by demanding that judges remain neutral arbiters, free from influence or self-dealing. The question presented in light of recent case law, was whether the current federal judicial recusal laws do enough to ensure an impartial judiciary in which the public can place their trust. In June 2009, the United States Supreme Court decided *Caperton v. A.T. Massey*, a case which set a ceiling on campaign contributions for elected state judges. *Caperton* is the most recent case in a string of judicial recusal cases that bring the judicial recusal issue to the forefront and attention of media, academics and the public. Other recent cases include *Cheney v. U.S. District Court for the District of Columbia* and *U.S. v. Siegelman*. Responding to these decisions, there are those who suggest changing substantive and procedural aspects of federal judicial recusal laws so as to promote greater transparency to the public and within the judicial branch. Suggested substantive changes seek to resolve circuit splits on issues of timeliness and the definition of "reasonable observer." Suggested procedural changes include: a system to prevent

judges from deciding their own disqualification motions; mandatory disclosure rules revealing reasons for both recusal and denied disqualification motions; procedures for factual investigation into judicial conflicts; and a prescribed judicial replacement system for judges who do recuse. Proponents of such changes are primarily concerned with judicial recusals at the federal appellate and U.S. Supreme Court levels, as appealing disqualification motions is very difficult, if not nearly impossible at this stage.

The following witnesses submitted a written statement for the record: Judge M. Margaret McKeown, United States Courts of Appeals, Ninth Circuit District, Charles G. Geyh, Associate Dean of Research, John F. Kimberling Professor of Law, Indiana University, Maurer School of Law, Richard E. Flamm, Author of *Judicial Disqualification: Recusal and Disqualification of Judges; Conflicts of Interest and Law Firm Disqualification*, Eugene Volokh, Gary T. Schwartz, Professor of Law, University of California, Norman L. Reimer, Executive Director, National Association of Criminal Defense Lawyers and Arthur D. Hellman, Professor of Law, University of Pittsburgh, Sally Ann Semenko Endowed, Chair.

*Hearing on "The Antitrust Implications of American Needle v. NFL"*  
(Serial No. 111-126)

The purpose of this hearing was to examine the competitive implications of the National Football League's (NFL) position in the case of *American Needle v. National Football League* that was heard by the U.S. Supreme Court on January 13, 2010. In *American Needle*, the National Football League sought a declaration of its single-entity status by the Supreme Court. Single entities, under *Copperweld et seq.*, are afforded special protections under antitrust law. Single entities are deemed incapable of forming illegal conspiracies with their wholly-owned subsidiaries or their own employees, because the entities act with a unity of interest. As such, wholly-owned subsidiaries and employees are not treated as separate "persons." As a result, single entities are effectively immunized from suit by the antitrust enforcement agencies and private plaintiffs with respect to charges of illegal contracts and conspiracies under antitrust law.

The case generated considerable speculation as to the implications of a pro-NFL decision. Supporters of the NFL's position argued that a pro-NFL decision in *American Needle* would be limited in effect, simply securing the NFL's ability to conduct the business of the league, staving off frivolous litigation, and providing clarity regarding the legal status of the NFL to courts of appeal that are unsettled on the issue. Detractors of the NFL's position cautioned that a pro-NFL decision could have a calamitous impact upon the personnel and fans of the NFL, allowing the league to eliminate the free agency system and impose a salary structure upon players, or transfer franchises to other locations more easily, among other actions.

The following witnesses submitted a written statement for the record: Gary Gertzog, Senior Vice President, National Football League, Kevin Mawae, President, National Football League Players Association, William L. Daly, III, Deputy Commissioner, National Hockey League, and Stephen F. Ross, Lewis H. Vovakis Distin-

guished Faculty Scholar, Professor of Law and Director of Sports Law, Policy and Research, Pennsylvania State University.

*Hearing on “Legal Issues Concerning State Alcohol Regulation” (Serial No. 111-125)*

The purpose of the hearing was to examine whether the intent of Congress with the passage of select laws relating to state alcohol regulation and the Twenty-First Amendment has been thwarted by recent legal developments, and whether competition laws should apply to the alcoholic beverage industry or whether the nature of the product makes that industry a special case that should be afforded protection from the antitrust laws. In response to a 2005 Supreme Court decision, *Granholm v. Heald*, some state regulations of alcohol have been struck down or challenged as violating the Constitution’s Commerce Clause. Proponents of these challenges claim that these regulations discriminate against out-of-state producers of alcohol in order to protect in-state businesses, resulting in fewer choices and higher prices for consumers. Opponents claim that the regulations are protected by the Twenty-First Amendment, which gives states wide latitude to enact legislation regulating the importation and sale of alcoholic beverages. They also argue that these regulations are necessary to promote temperance, drinking age laws, and proper tax collection. Since *Granholm*, there have been at least twenty lawsuits challenging state regulations on these grounds. State regulation of alcohol has also been subject to challenges under the federal antitrust laws. State actions which violate Section 1 of the Sherman Act and do not qualify for immunity under “state action” doctrine are struck down under the Supremacy Clause. As with the Commerce Clause, critics argue that the Twenty-First Amendment should protect all state regulation of alcohol from antitrust challenge. Proponents point to recent court decisions which have held that the Sherman Act applies to state regulation of alcohol.

The following witnesses appeared and submitted a written statement for the record: Panel I, the Honorable Bobby L. Rush, Member of Congress, 1st Congressional District, State of Illinois, the Honorable Mike Thompson, Member of Congress, 1st District, State of California, Representative Steve Cohen, Member of Congress, 9th District, State of Tennessee, and Representative George Radanovich, Member of Congress, 19th District, State of California. Panel II, James C. Ho, Solicitor General of Texas, Office of the Solicitor General, Ms. Nida Samona, Chairperson, Michigan Liquor Control Commission, Mr. Stephen Hindy, Chairman and President, Brooklyn Brewery, Ms. Pamela S. Erickson, Chief Executive Officer, Public Action Management, and Professor Darren Bush, Associate Professor of Law, University of Houston Law Center.

*Hearing on “Domestic and International Trademark Implications of HAVANA CLUB and Section 211 of the Omnibus Appropriations Act of 1999” (Serial No. 111-69)*

This hearing examined Section 211 of the Omnibus Appropriations Act of 1999, which prevents recognition of ownership rights in trademarks nationalized and confiscated by the Cuban government, the World Trade Organization (WTO) decision that found the

law to be in violation of WTO Agreement on Trade Related Aspects of Intellectual Property, and proposals to bring the U.S. into compliance with its treaty obligations.

The following witnesses gave testimony and submitted written statements for the record: Mark Z. Orr, Vice President of North American Affairs, Pernod Ricard USA, Inc.; Bruce A. Lehman, Former Assistant Secretary of Commerce and Expert Counsel for Bacardi, USA; Mark T. Esper, Ph.D., Executive Vice President, Global Intellectual Property Center, U.S. Chamber of Commerce; William A. Reinsch, President, National Foreign Trade Council; and John K. Veroneau, Partner, Covington & Burling, LLP.

*Hearing on “Design Patents and Auto Replacement Parts” (Serial No. 111-112)*

This hearing examined the use of design patent protection for auto parts, whether an exception to this protection is needed for replacement auto parts, and what impact such an exception might have on the United States intellectual property system and United States treaty obligations related to intellectual property.

The following witnesses gave testimony and submitted written statements for the record: Jack Gillis, Director of Public Affairs, Consumer Federation of America; Damian Porcari, Licensing and Enforcement, Ford Global Technologies, LLC; Robert C. Passmore, Senior Director, Personal Lines, Property Casualty Insurers Association of America; and Perry Saidman, Saidman Design Law Group.

*Hearing on “The United States Patent and Trademark Office” (Serial No. 111-135)*

This hearing took a close look at initiatives by the United States Patent and Trademark Office (USPTO) to reduce the patent application backlog, improve examiner production and satisfaction, and strengthen the organization’s information technology infrastructure. The hearing also focused on the role that inconsistent funding of the USPTO plays in its operational challenges.

The following witnesses gave testimony and submitted a written statement for the record: Honorable David Kappos, Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office; Robert Budens, President, Patent Office Professional Association; James Johnson, Counsel, Sutherland Asbill & Brennan LLP and Board Member of the Trademark Public Advisory Committee; and Damon Matteo, Vice President and Chief Intellectual Property Officer, Palo Alto Research Center and Chair of the Patent Public Advisory Committee.

*Hearing on “Is There Life After Trinko and Credit Suisse?: The Role of Antitrust in Regulated Industries” (Serial No. 111-119)*

The purpose of this hearing was to examine the ramifications of the Supreme Court’s decisions in *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP* and *Credit Suisse Securities, LLC et al. v. Billing, et al.*, which sharply limited the reach of the antitrust laws in the telecom and securities industries. Since the decisions were issued, legal experts have debated whether the holdings are fact-specific and apply only to the telecom and securities

industries, or more broadly to all regulated industries. Supporters of the broad interpretation argue that a limitation on antitrust is necessary to ensure that companies operating in regulated industries are not subject to potentially conflicting obligations arising from the antitrust laws and their industry-specific regulatory schemes. Critics of this view argue that, absent an industry-specific exemption, Congress intended for industries to be subject to antitrust oversight, and that regulation is not an adequate substitute for antitrust. Critics further note that, in those rare cases where agency regulation imposes requirements that conflict with antitrust obligations, existing law allows the courts to find an implied immunity from antitrust. These critics go on to contend that irrespective of the merits of the actual results in the *Trinko* and *Credit Suisse* cases, the opinions should not be read as dramatically reworking the law governing the application of antitrust to regulated industry. *Trinko* and *Credit Suisse* also raised questions about the role of courts and juries in overseeing commercial business. Justice Scalia's *Trinko* opinion argues that generalist courts and citizen jurors are not equipped to decide complex antitrust matters and might make errors that would be unreasonably costly to business.

Many commentators rejected this view, arguing that judges and juries routinely handle difficult issues and that court-based antitrust enforcement is needed to rein in anticompetitive practices that regulators may not focus on or consider central to their mission. A third issue was whether companies now have fewer obligations to aid their competitors. Generally under the antitrust laws, businesses enjoy the right to "refuse to deal" with any other person or company. In other words, a company can decide whether or not to engage in commercial dealings with another party. A judicially-created doctrine known as "essential facilities" doctrine placed some boundaries on this right, arguing that there are certain private services and networks that are so important—or "essential"—that the owner/operators of these services and networks have some limits on their right to discriminate among those with whom they choose to do business. Although essential facilities doctrine was judicially created, it has never been recognized by the Supreme Court, a point again made in *Trinko*. A fourth issue was the effect of the decisions on the vitality of antitrust savings clauses written into legislation by Congress. Antitrust savings clauses are included in legislation as a way of preserving the full range of applicable antitrust laws and remedies. In both *Trinko* and *Credit Suisse*, the Supreme Court rejected antitrust claims despite the presence of broad antitrust savings clauses in the relevant regulatory law. Had the holdings merely found that, although the antitrust laws applied, there was no basis for an antitrust claim in these cases, there would be no controversy. Instead, the decisions went further, suggesting in *Trinko* and actually holding in *Credit Suisse* that the antitrust laws should not have applied regardless of the underlying merits. Such a precedent could weaken all existing antitrust savings clauses, throwing into question what Congress must specify when it intends for the antitrust laws to apply to an industry.

The following witnesses appeared and submitted a written statement for the record: Howard A. Shelanski, Deputy Director for Antitrust in the Bureau of Economics, Federal Trade Commission,

John Thorne, Senior Vice President, Verizon Communications, Incorporated, Mark A. Lemley, William H. Neukom Professor of Law, Stanford University, School of Law, and Dr. Mark Cooper, Director of Research, Consumer Federation of America.

*“Impact of China’s Antitrust Law and other Competition Policies on U.S. Companies” (Serial No. 111–117)*

The hearing examined the anti-monopoly law recently implemented by the People’s Republic of China, focusing on whether the law as written, or applied, have a discriminatory impact on foreign competitors doing business in China. The hearing focused on China’s merger review process, application of the anti-monopoly law to state owned enterprises, and the treatment of intellectual property under the anti-monopoly law.

The following witnesses appeared and submitted a written statement for the record: Shanker A. Singham, Partner, Squire Sanders, LLP, on behalf of the U.S. Chamber of Commerce; Tad Lipsky, Partner, Latham & Watkins; Susan Beth Farmer, Professor of Law, Pennsylvania State University, Dickinson School of Law; and the Honorable Thomas O. Barnett, Partner, Covington & Burling, LLP, and Former Assistant Attorney General of the Antitrust Division, U.S. Department of Justice.

*“The Federal Trade Commission’s Bureau of Competition and the Department of Justice’s Antitrust Division” (Serial No. 111–133)*

The purpose of this hearing was to examine the enforcement records of the two federal antitrust enforcement agencies, the Federal Trade Commission’s Bureau of Competition and the Department of Justice’s Antitrust Division. The hearing also examined whether the Agencies are doing enough to promote competition in such fields as banking, agriculture, and mobile devices. The Agencies are jointly empowered to enforce the federal antitrust laws, whose overarching goal is to promote consumer welfare by ensuring robust competition in the marketplace. The U.S. Supreme Court has referred to the antitrust laws as “the Magna Carta of free enterprise,” declaring them “a comprehensive charter of economic liberty aimed at preserving free and unfettered competition.” Effective antitrust enforcement is key to ensuring a vibrant, competitive marketplace that rewards innovation and creativity and offers consumers greater choice and lower prices. In the absence of antitrust enforcement, companies have less incentive to compete, and more incentive to maintain high profit margins at the expense of consumer welfare and whether the Agencies are effectively enforcing the antitrust laws, and how well they are addressing certain “hot-button” issues. For example, the Agencies have been criticized for lax merger enforcement and wasteful infighting with respect to deciding which Agency reviews a particular merger. Critics also point to different enforcement tools available to the Agencies, and argue that whether a party is found to have violated the antitrust laws now depends significantly upon the investigating Agency.

The following witnesses appeared and submitted a written statement for the record: The Honorable Christine A. Varney, Assistant Attorney General for Antitrust, U.S. Department of Justice, and

the Honorable Jon Leibowitz, Chairman, Federal Trade Commission.

*“Competition in the Evolving Digital Marketplace” (Serial No. 111-147)*

The purpose of this hearing was to examine a range of competition issues in both the online and mobile markets. As these markets evolve, their growth has been driven in large part by innovative competitors and disruptive technologies. While these markets currently appear fluid and competitive, sustained anticompetitive behavior by companies with market power could choke off competition, in turn slowing innovation and raising prices and reducing options for consumers. Former Federal Trade Commission Timothy Muris has argued that there should be looser antitrust enforcement in these nascent markets, as the competitors, their products, and their relative market shares are constantly changing. Proponents of this position argue that antitrust enforcement actions in these markets necessarily rely upon “snapshots” of the market that may not adequately reflect the degree of competition from new entrants or the tenuousness of existing market share, and would only stifle innovation and create disincentives against entrepreneurship.

The bipartisan Congressionally-established Antitrust Modernization Commission, have argued that the antitrust laws are developed from principles not tied to the particulars of any single industry, and whose application is as appropriate in developing markets as it is in more established markets. Moreover, supporters of this position argue that Department of Justice’s antitrust case against Microsoft Corp. in 1998 highlights the dangers of waiting to act, in that, even though Microsoft lost the case, its upstart competitor, Netscape, had gone out of business by the time it won the case.

The following witnesses appeared and submitted a written statement for the record: Richard Feinstein, Director, Bureau of Competition, Federal Trade Commission, Edward J. Black, President & Chief Executive Officer, Computer and Communications Industry Association, Morgan Reed, Executive Director, Association for Competitive Technology, C. Cleland, President, Precursor, LLP, Geoffrey A. Manne, Executive Director, International Center for Law & Economics, Lewis & Clark Law School, and Dr. Mark N. Cooper, Director of Research, Consumer Federation of America.

*“Courtroom Use: Access to Justice, Judicial Administration, and Courtroom Security” (Serial No. 111-153)*

The purpose of the hearing was to consider a recent Government Accountability Office (GAO) report on federal courthouse construction and its effects on courts and access to justice. The GAO report concluded that many of the courthouses built since 2000 include extra space as a result of excessive construction, an overestimation of judges, and an absence of planning for courtroom sharing. The GAO report found that the there was an estimated 887,000 square feet of extra court building space caused by the judiciary overestimating the number of judges the courthouses would have in 10 years. According to the GAO, one reason for the overestimation of judges is inaccurate predictions as to when judges would take senior status. The GAO pointed out that predicting when judges take

senior status is challenging, and overestimates in this regards are due to factors difficult to predict, such as judges deciding to leave the bench, dying, or remaining active after they become eligible for senior status. The GAO essentially determined that empty court-rooms were “excess” space constituting a waste of funding. This is an instance where the GAO is not appropriately applying the planning policies that were in place at the time the building was planned. However, as the judiciary notes, the courthouse space accounted for will be needed at some point in the future, even if that exact time is several years off. Most courthouses are occupied for many decades and planning courthouse without taking account of future needs of delivering justice would not only reduce the useful life of federal courthouses, but would also risk inadequate capacity to house needed judges and staff for the future. One major factor contributing to judge overestimation that the GAO cites is that it is not clear how many new judgeships will ultimately be created by Congress. The GAO report pointed out that Congress had not passed a comprehensive judgeships bill to add to the number of total judgeships since 1990.

The following witnesses appeared and submitted a written statement for the record: Panel I, The Honorable Jim Cooper, Member of Congress, 5th District of Tennessee. Panel II, Mark L. Goldstein, Director, Physical Infrastructure, U.S. Government Accountability Office, The Honorable Michael A. Ponsor, U.S. District Judge, District of Massachusetts, and Chairman of the Judicial Conference’s Committee on Space and Facilities, Robert A. Peck, Commissioner of Public Buildings, U.S. General Services Administration, The Honorable Robert J. Conrad, Jr., Chief U.S. District Judge, Western District of North Carolina, and Judith Resnik, Arthur Liman Professor of Law, Yale Law School.

*“Antitrust Laws and Their Effects on Healthcare Providers, Insurers and Patients” (Serial No. 111-157)*

The purpose of this hearing was to examine the disparate treatment of physicians and health insurers by the antitrust enforcement agencies. Since 2000, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) (hereafter, the Agencies) have brought more than 30 antitrust enforcement actions against physicians for collusive behavior in the course of negotiating reimbursement rates from insurance companies. In contrast, hospital groups, physicians, and patient advocates have complained that the Agencies have pursued fewer actions against health insurance companies.

The following witnesses appeared and submitted a written statement for the record: Panel I, Richard Feinstein, Director, Bureau of Competition, Federal Trade Commission, and Sharis Pozen, Chief of Staff and Counsel to the Assistant Attorney General, Antitrust Division, U.S. Department of Justice. Panel II, Melinda Hatton, Senior Vice President and General Counsel, American Hospital Association, Arthur Lerner, Partner, Crowell & Moring LLP on behalf of America’s Health Insurance Plans, Dr. Peter Mandell, Chair of the Council on Advocacy, American Academy of Orthopaedic Surgeons, Dr. Michael Connair, American Federation of State, County,

and Municipal Employees, AFL-CIO, and David Balto, Senior Fellow, Center for American Progress.



## SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY<sup>1</sup>

ROBERT C. "BOBBY" SCOTT, Virginia, *Chairman*

PEDRO PIERLUISI, Puerto Rico	LOUIE GOHMERT, Texas
JERROLD NADLER, New York	TED POE, Texas
ZOE LOFGREN, California	BOB GOODLATTE, Virginia
SHEILA JACKSON LEE, Texas	DANIEL E. LUNGREN, California
MAXINE WATERS, California	J. RANDY FORBES, Virginia
STEVE COHEN, Tennessee	TOM ROONEY, Florida
ANTHONY D. WEINER, New York	
MIKE QUIGLEY, Illinois	
THEODORE E. DEUTCH, Florida	

<sup>1</sup>Subcommittee chairmanship and assignments approved January 22, 2009.

### *Tabulation of subcommittee legislation and activity*

Legislation referred to the Subcommittee .....	312
Legislation on which hearings were held .....	20
Legislation reported favorably to the full Committee .....	4
Legislation reported adversely to the full Committee .....	0
Legislation reported without recommendation to the full Committee .....	0
Legislation reported as original measure to the full Committee .....	0
Legislation discharged from the Subcommittee .....	5
Legislation pending before the full Committee .....	1
Legislation reported to the House .....	6
Legislation discharged from the Committee .....	5
Legislation pending in the House .....	3
Legislation passed by the House (including suspensions) .....	37
Legislation pending in the Senate .....	22
Legislation vetoed by the President (not overridden) .....	0
Legislation enacted into Public Law .....	7
Legislation enacted into Public Law as part of other legislation .....	--
Days of legislative hearings .....	12
Days of oversight hearings .....	26

### JURISDICTION OF THE SUBCOMMITTEE

The Subcommittee on Crime, Terrorism, and Homeland Security has jurisdiction over: Federal Criminal Code, drug enforcement, sentencing, parole and pardons, internal and homeland security, Federal Rules of Criminal Procedure, prisons, criminal law enforcement, and other appropriate matters as referred by the chairman, and relevant oversight.

### LEGISLATIVE ACTIVITIES

#### *H.R. 743, the "Executive Accountability Act of 2009"*

*Summary.*—H.R. 743, a bill introduced to address concerns about the veracity of the executive branch with respect to statements made in order to generate support in Congress for use of the Armed Forces of the United States.

*Legislative History.*—H.R. 743 was introduced by Rep. Walter B. Jones (R-NC) on January 28, 2009 and referred to the Judiciary

Committee. On July 27, 2009, the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security. The Subcommittee received testimony from the following witnesses: The Subcommittee heard testimony from the following witnesses: The Honorable Walter B. Jones, (NC); Dr. Louis Fisher, Specialist in Constitutional Law, Law Library of the Library of Congress; Washington, DC; Bruce Fein, Legal Consultant, Washington, DC; and Jonathan F. Cohn, Partner, Sidley and Austin, Washington, DC. (Serial No. 111-72) No legislative action was taken on this bill.

*H.R. 748, the “Center to Advance, Monitor, and Preserve University Security Act (CAMPUS Safety Act) of 2009”*

*Summary.*—H.R. 748 was introduced to authorize the Director of the Office of Community Oriented Policing Services to establish and operate a National Center for Campus Public Safety, which would assist campus safety agencies by providing education and training, research, best practices information, and other assistance.

*Legislative History.*—H.R. 748 was introduced on January 28, 2009 by Rep. Robert C. “Bobby” Scott (D-VA) and referred to the House Judiciary Committee and the Senate Judiciary Committee. This bill passed by the House by a voice vote on February 3, 2009.

*H.R. 1064, the “Youth Prison Reduction through Opportunities, Mentoring, Intervention, Support and Education Act” (“Youth PROMISE Act”)*

*Summary.*—H.R. 1064, the “Youth Prison Reduction through Opportunities, Mentoring, Intervention, Support and Education Act” (“Youth PROMISE Act”) is legislation designed to prevent youth violence, delinquency, and street gang crime, and to redirect youth already involved in the juvenile or criminal justice systems toward law abiding and productive lives. The bill will provide federal support for evidence-based and promising local community efforts and programs that prevent the involvement of at risk youth in juvenile delinquency or criminal street gang activity and provide positive alternatives for youth who have become involved in juvenile delinquency or criminal street gang activity.

*Legislative History.*—H.R. 1064 was introduced by Rep. Robert C. “Bobby” Scott on February 13, 2009 and referred to the following Committees: Judiciary; Education and Labor; Energy and Commerce; and the House Financial Services. The Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on July 15, 2009, on H.R. 1064. Testimony was received from Marian Wright Edelman, President and Founder, Children’s Defense Fund; Deborah Prothrow-Stith, MD, Consultant, Spencer Stuart; Leroy D. Baca, Sheriff, Los Angeles County; David B. Muhlhausen, Ph.D., Senior Policy Analyst, Center for Date Analysis, The Heritage Foundation; and Tracy Velázquez, Executive Director, Justice Policy Institute. (Serial No. 111-86)

On October 29, 2009, the Subcommittee on Crime, Terrorism, and Homeland Security met in open session and ordered the bill H.R. 1064 favorably reported, by voice vote, a quorum being present. Rpt. #111-688 pt. 1. On December 16, 2009, the Full Judiciary Committee met in open session and ordered the bill H.R. 1064 favorably reported with an amendment, by a roll call vote of

17 to 14, a quorum being present. We are still awaiting floor action on the legislation. On February 13, 2009, Senator Robert Casey (D-PA) introduced S. 435, the Senate companion bill to the Youth PROMISE Act. That bill has 16 bi-partisan co-sponsors in the Senate. December 17, 2010, House Committee on Financial Services Granted an extension for further consideration ending not later than December 21, 2010.

*H.R. 1110, the “Prohibiting Harassment through Outbound Number Enforcement Act (PHONE Act) of 2009”*

*Summary.*—H.R. 1110, this bill was introduced to prevent and mitigate identity theft and to ensure privacy by establishing criminal penalties for caller ID ‘spoofing.’ The bill targets spoofing by prohibiting the use of caller ID information to hide the callers’ true identity in order to wrongfully obtain anything of value or to commit other abusive acts. The bill provides for felony penalties of up to 5 years in prison for violations committed with the intent to wrongfully obtain anything of value. Certain abusive uses of another person’s caller ID information without commercial motives are classified as misdemeanors under the bill.

*Legislative History.*—The bill was introduced by Robert C. “Bobby” Scott (D-VA) on February 23, 2009, and referred to the Judiciary Committee. On October 7, 2009, the Committee met in open session and ordered the bill H.R. 1110 favorably reported, with one amendment, by a voice vote, a quorum being present. Reported to the House, as amended, November 2, 2009. House Report No. 111-321. Passed the House by a vote of 418 to 1, December 16, 2009.

*H.R. 1139, the “COPS Improvements Act of 2009”*

*Summary.*—H.R. 1139, this bill was introduced to reauthorize the programs administered by the Justice Department’s Office of Community Oriented Policing Services (COPS) for public safety and community-based policing, establish three grant programs: (1) The Troops-to-Cops Program, (2) the Community Prosecutors Program, and (3) the Technology Grants Program. The Troops-to-Cops Program would fund the hiring of former members of the Armed Forces to serve as law enforcement officers in community-oriented policing, particularly in communities adversely affected by recent military base closings. The Community Prosecutors Program would authorize the Attorney General to make grants for additional community prosecuting programs that would, for example, assign prosecutors to pursue cases from specific geographic areas and to deal with localized violent crime. The Technology Grants Program would authorize the Attorney General to make grants to develop new technologies to assist State and local law enforcement agencies in refocusing some of their efforts from reacting to crime to preventing crime.

*Legislative History.*—H.R. 1139 was introduced on February 23, 2009, by Rep. Anthony D. Weiner (D-NY). On March 25, 2009, the Committee ordered the bill, H.R. 1139, favorably reported with amendments, by a vote of 17 to 7. House Rpt.# 111-78. On March 23, 2009, the House passed the bill by a vote of 342-78.

*H.R. 1459, "Fairness in Cocaine Sentencing Act of 2009"**Hearing on "Unfairness in Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity?"*

*Summary.*—This hearing was held on May 21, 2009 and focused on legislation that has been introduced in the 111th Congress to address the disparities in federal sentencing for distribution and importation of crack and powder cocaine. Under federal law at the time of the hearing, possession of five (5) grams of crack cocaine resulted in the same five-year mandatory minimum sentence as selling 500 grams of powder cocaine. This was referred to as the "100 to 1" disparity ratio between crack and powder cocaine mandatory sentences. More than twenty years after this federal law was enacted, many people acknowledge that there is neither a scientific, medical nor public policy rationale that supports the 100 to 1 disparity. There were five bills introduced in the House during the 111th Congress to address this disparity: H.R. 1459, the "Fairness in Cocaine Sentencing Act of 2009;" H.R. 2178, the "Crack Cocaine Equitable Sentencing Act of 2009;" H.R. 265, the "Drug Sentencing Reform and Kingpin Trafficking Act of 2009;" H.R. 1466, the "Major Drug Trafficking Prosecution Act of 2009" and H.R. 18, the "Powder-Crack Cocaine Equalization Act of 2009." This hearing focused on the different approaches these bills take to address the disparity, as well as other issues associated with cocaine sentencing. The Subcommittee received testimony from the following witnesses: the Honorable Charles B. Rangel, (D-NY), the Honorable Sheila Jackson Lee, (D-TX), the Honorable Roscoe G. Bartlett, (R-MD), the Honorable Maxine Waters, (D-CA); Lanny A. Breuer, Assistant Attorney General, Criminal Division, U.S. Department of Justice, Washington, DC; The Honorable Ricardo H. Hinojosa, U.S. District Court Judge, Southern District of Texas, and Acting Chair U.S. Sentencing Commission Washington, DC; Scott Patterson, District Attorney, Easton, Maryland on behalf of Joseph I. Cassilly, President of the National District Attorneys Association, Alexandria, VA; Willie Mays Aikens, Kansas City, MO; Bob Bushman, Vice President, National Narcotics Officers Association Coalition, Washington, DC; Veronica Coleman-Davis, President and CEO, National Institute of Law and Equity, Memphis, TN; and Marc Mauer, Executive Director of the Sentencing Project, Washington, DC. (Serial No. 111-27)

*Legislative History.*—H.R. 1459, the "Fairness in Cocaine Sentencing Act of 2009" was introduced March 12, 2009, by Rep. Robert C. "Bobby" Scott (D-VA) and referred to the House Judiciary and the House Energy and Commerce Committees. H.R. 3245, the Fairness in Cocaine Sentencing Act of 2009 was introduced on July 16, 2009 by Rep. Robert C. "Bobby" Scott (D-VA) and referred to the House Judiciary and House Energy and Commerce Committees. This bill included very narrow language that would address the crack cocaine disparity. H.R. 3245 passed out of the Subcommittee on a voice vote on July 23, 2009. The legislation passed the Full Judiciary Committee on July 29, 2009 by a 16-9 vote. On December 1, 2010, the Judiciary Committee reported to the House. Rpt.# 111-670 pt. 1. On March 15, 2010, Senate Judiciary, without written report—reported by Patrick J. Leahy with an amendment

in the nature of a substitute S. 1789, the Fair Sentencing Act of 2009 by a 18–0 vote, which would lower the 100 to 1 disparity between crack and powder cocaine to 18 to 1. On March 17, 2010, the Senate passed S. 1789 with an amendment by unanimous consent. On March 18, 2010, S. 1789 was referred to the House Judiciary and House Judiciary Committees. On July 28, 2010, S. 1789 passed the House on the suspension calendar by voice vote. On August 3, 2010, President Barack Obama signed S. 1789 into law (Public law 111–220).

*H.R. 1514, the “Juvenile Accountability Block Grants Reauthorization Act of 2009”*

*Summary.*—H.R. 1514 was introduced to reauthorize a program that provides formula grants to states and localities to provide individualized treatment of juvenile offenders.

*Legislative History.*—H.R. 1514 was introduced by Rep. Robert C. “Bobby” Scott (D–VA) on March 16, 2009 and referred to the Judiciary Committee and the Senate Judiciary Committee. The bill was taken directly to the House floor for a vote, and was passed by a vote of 364–45 on May 19, 2010.

*H.R. 1727, the “Managing Arson Through Criminal History (MATCH) Act”*

*Summary.*—H.R. 1727 was introduced to establish guidelines and incentives for states to establish criminal arsonist and criminal bomber registries and to require the attorney general to establish a national criminal arsonist and criminal bomber registry program, and for other purposes.

*Legislative History.*—H.R. 1727 was introduced on March 26, 2009 by Rep. Mary Bono Mack, (R–CA–45) and referred to the Judiciary Committee and the Senate Judiciary Committee. There was no Judiciary Committee action on the bill, which was adopted by the House by voice vote on September 30, 2009. October 1, 2009 referred to the Senate Committee on the Judiciary.

*H.R. 1924, the “Tribal Law and Order Act of 2009”*

*Summary*—H.R. 1924 On December 10, 2009, a legislative hearing on H.R. 1924, the “Tribal Law and Order Act of 2009,” sponsored by Representative Stephanie Herseth Sandlin (SD–At Large). The Judiciary Committee had primary jurisdiction over the bill, but it was also referred to the Committees on Natural Resources, Energy and Commerce, and Education and Labor. There was a Senate companion bill, S. 797 (Sen. Dorgan), which was reported out of the Committee on Indian Affairs with amendments that addressed the concerns with the original bill, and was considered closely by the Committee. The Act was a comprehensive bill was an effort to address the public safety crisis occurring on Indian Country. The bill sought to reduce crime through two approaches. First, it increased tribal authority over crime by providing more resources to tribal law enforcement and criminal justice systems and by increasing tribal sentencing authority. Second, it provided for new offices and positions within the federal government that focus on tribal justice, extends concurrent federal jurisdiction to PL–280 states, sets up a reporting system to provide for accountability of the federal govern-

ment, and establishes a Commission to study and recommend changes. The bill amends the Indian Law Enforcement Reform Act, the Indian Tribal Justice Act, the Indian Tribal Justice Technical and Legal Assistance Act of 2000, and the Omnibus Crime Control and Safe Streets Act of 1968. At the hearing, both the needs of Indian country were examined and the challenges with existing tribal justice systems were examined. Witnesses conveyed the importance of balancing more robust sentencing authority with the individual rights of defendants. The Subcommittee heard testimony from the following witnesses: The Honorable Stephanie Herseth Sandlin, United States House of Representatives (SD—At Large); The Honorable Tom Perrelli, Associate Attorney General, United States Department of Justice, Washington, DC; Marcus Levings, Great Plains Area Vice-President, National Congress of American Indians, New Town, ND; Tova Indritz, Chair, National Association of Criminal Defense Lawyers, Native American Justice Committee, Albuquerque, NM; Scott Burns, Executive Director, National District Attorneys Association, Alexandria, VA; and Barbara Creel, Assistant Professor of Law, Southwest Indian Law Clinic, University of New Mexico School of Law, Albuquerque, NM. (Serial No. 111-134)

*Legislative History.*—H.R. 1924 was introduced on April 2, 2009, by Stephanie Herseth Sandlin (SD—At Large) and was referred to the Committee on the Judiciary, as well as the Committees on Natural Resources, Energy and Commerce, and Education and Labor. On April 21, 2009, it was referred to the Subcommittee on Health of Energy and Commerce, on May 21, 2009 to the Subcommittee on Healthy Families and Communities of Education and Labor, and on May 26, 2009 to the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary. The Senate introduced a version of H.R. 1924, S. 797, which passed the Senate by unanimous consent on June 23, 2010. It was attached to H.R. 725, the Arts and Crafts bill and the Fireworks bill. H.R. 1333 was also included in the package (both H.R. 1333 and S. 725 have previously passed the House on suspension). The Senate-passed bill included HJC proposed-provisions on sentencing and defendants' rights. On July 21, 2010, H.R. 725 passed the House and was signed by President Barack Obama on July 29, 2010.

*H.R. 1966, the 'Megan Meier Cyberbullying Prevention Act,' and H.R. 3630, the 'Adolescent Web Awareness Requires Education Act (AWARE Act)'*

*Summary.*—On September 30, 2009, the Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on “Cyberbullying and other online safety issues for children” to examined the problems of bullying perpetrated through the Internet and certain other risks of online victimization for children. H.R. 1996 was introduced to provide federal criminal penalties for cyberbullying. H.R. 3630 was introduced to establish a grant program to be implemented by the Department of Justice to educate young people about safe use of the Internet, partly to prevent cyberbullying and other activities of online victimization. The two bills were examined, with various views expressed about the policy and constitutional implications of criminalizing cyberbullying. The

hearing also examined the need for educating children so that they can avoid victimization on the Internet and the need to provide comprehensive services to at-risk youth so that they are less likely to engage in online bullying.

*Legislative History.*—H.R. 1966, the Megan Meier Cyberbullying Prevention Act was introduced on April 2, 2009 by Rep. Linda Sanchez (D-CA) and referred to the House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security. H.R. 3630, the “Adolescent Web Awareness Requires Education Act (AWARE Act)” was introduced on September 23, 2009 by Rep. Debbie Wasserman Schultz (D-FL) and referred to the Judiciary Committee Subcommittee. The Subcommittee received testimony from Rep. Linda Sanchez, sponsor of H.R. 1966, the “Megan Meier Cyberbullying Prevention Act”; Rep. Debbie Wasserman Schultz, sponsor of H.R. 3630, the “Adolescent Web Awareness Requires Education Act (AWARE Act)”; Robert O’Neil, founding director of The Thomas Jefferson Center for the Protection of Free Expression, Professor emeritus at University of Virginia; Judy Westberg Warren, President, Web Wise Kids; Harvey Silverglate, Attorney, Zalkind, Rodriguez, Lunt & Duncan, LLP; Nancy Williard, M.S., J.D., Director of the Center for Safe and Responsible Internet Use; John Palfrey, Professor of Law at Harvard Law School, Chair of the Internet Safety Task Force. No legislative action was taken on either bill. *Serial No. 111-76*

*H.R. 2157, “DNA Expansion and Improvement Act of 2009.” Hearing on “Rape Kit Backlogs: Failing the Test of Providing Justice to Sexual Assault Survivors”*

*Summary.*—This hearing titled “Rape Kit Backlogs: Failing the Test of Providing Justice to Sexual Assault Survivors” was held on May 20, 2010. Each year, approximately 200,000 rapes are reported in the United States. The majority of these sexual assault victims submit to a medical examination immediately after the attack so that the police can collect evidence for a rape kit. While no national statistics exist to determine the exact number of untested kits, some estimates put the number at around 180,000. Testing a rape kit can identify the attacker, confirm that a suspect had sexual contact with a victim, corroborate the victim’s account of the sexual assault, and exonerate innocent suspect. There are various reasons why so many rape kits go untested including a lack of resources, prioritization of cases by prosecutors and police and delays at police crime laboratories. This hearing explored why so many rape kits are not tested and what can be done to clear up the backlogs that exist in jurisdictions across the country.

*Legislative History.*—On November 11, 2009, Rep. Carolyn B. Maloney (D-NY) introduced H.R. 4114, the Justice for Survivors of Sexual Assault Act of 2009. On April 28, 2009, Rep. Anthony Weiner (D-NY) introduced H.R. 2157, “DNA Expansion and Improvement Act of 2009” and was referred to the House Committee on the Judiciary. This bill which authorizes grants for states and local governments to purchase or improve forensic DNA technology. On June 12, 2009, H.R. 2157 was referred the Subcommittee on Crime, Terrorism, and Homeland Security. On May 20, 2010, the Subcommittee held a hearing and received testimony from the fol-

lowing witnesses: The Honorable Carolyn B. Maloney; The Honorable Anthony D. Weiner; The Honorable Adam B. Schiff; The Honorable Jerrold Nadler; Kym L. Worthy, Esq., Wayne County Prosecutor, Detroit, Michigan; Valerie Neumann, Cincinnati, Ohio; Mariska Hargitay, Joyful Heart Foundation, New York, New York; Dr. Christian Hassell, Assistant Director, Laboratory Division; Federal Bureau of Investigation, (FBI); U. S. Department of Justice, Washington, DC; Jeffrey Boschwitz, Ph.D., Vice President, North American Sales and Marketing; Orchid Cellmark Inc., Princeton, New Jersey; and Peter Marone, Director, Virginia Department of Forensic Science, Richmond, Virginia. (Serial No. 111-115)

*H.R. 2289, the “Juvenile Justice Accountability and Improvement Act of 2009”*

*Summary.*—On June 9, 2009, the Subcommittee held a hearing in which we examined the practice of imposing sentences of life without parole on juvenile defendants. The United States currently is the only country that continues to sentence juveniles to life without parole. The hearing examined this practice and addressed H.R. 2289, introduced by Congressman Scott, which requires states, under risk of losing up to 10% of certain funding, to offer a meaningful opportunity for parole to juveniles sentenced to life after serving 15 years in prison. It also establishes a similar opportunity for parole for juveniles in federal custody, requires victim notification, and establishes a grant program to improve legal representation of children facing life in prison.

*Legislative History.*—H.R. 2289 was introduced on May 6, 2009 by Rep. Robert C. “Bobby” Scott (D-VA) and was referred to the House Committee on the Judiciary. On June 5, 2009, it was referred to the Subcommittee on Crime, Terrorism, and Homeland Security. On June 9, 2009, the Subcommittee held a hearing on the bill. The Subcommittee heard testimony from the following witnesses: Professor Mark Osler, Baylor Law School Waco, TX; Dr. Linda L. White, Former Board Member of the Murder Victims’ Families for Reconciliation, Magnolia, TX; Jennifer Bishop-Jenkins, Co-Founder, National Organization of Victims of “Juvenile Lifers”, Northfield, IL; Anita Colon, Pennsylvania State Coordinator, National Campaign for Fair Sentencing for Children, Springfield, PA; James Fox, District Attorney, San Mateo County, CA; and Marc Mauer, Executive Director of the Sentencing Project, Washington, DC. (Serial No. 111-47)

*H.R. 2780, the “Federal Restricted Buildings and Grounds Improvement Act”*

*Summary.*—H.R. 2780 was introduced to amend the federal criminal code to clarify that the criminal prohibition on entering federal restricted buildings and grounds does not apply to individuals who are have lawful authority to do so.

*Legislative History.*—H.R. 2780 was introduced on June 6, 2009 by Rep. Thomas J. Rooney (R-FL) and referred to the House Committee on the Judiciary and the Senate Committee on the Judiciary. There was no House Committee action on the bill, which was adopted by the House by voice vote on July 27, 2010. On July 28,

2010, the H.R. 2780 was referred to the Senate Committee on the Judiciary.

*H.R. 2811, a bill to amend title 18, United States Code, to include constrictor snakes of the species Python genera as an injurious animal*

*Summary.*—The Subcommittee held a hearing November 6, 2009, and focused on legislation that has been introduced to amend title 18, United States Code, to include constrictor snakes of the species Python genera as an injurious animal. The addition was intended to ban the further importation and interstate transportation of pythons which were initially brought to the U.S. and to Florida and sold as pets. Too often these animals were subsequently introduced into the wild either by owners who could no longer handle them or through escape from owners. Many owners, particularly in South Florida, simply dumped them in the Florida Everglades, believing that to be a suitable and hospitable environment. The pythons have wreaked havoc on the ecosystem, and have become a dominant predator. They have been known to grow to 23 feet and can weigh up to 200 pounds. They consume animals many times their size. In addition to the environmental impact, there is also a safety issue. Since 1980 12 people have been killed by pet pythons, the most recent being a 2 year old girl in Florida. The Subcommittee heard testimony from the following witnesses: The Honorable Kendrick Meek, Member of Congress, District 17 of Florida; Dan Ashe, Deputy Director of the United States Fish and Wildlife Service, Washington, DC; Andrew Wyatt, President, United States Association of Reptile Keepers, Grandy, NC; Dr. Elliott Jacobson, College of Veterinary Medicine, University of Florida, Gainesville, FL; Nancy Perry, Vice President, Government Affairs, The Humane Society of the United States Washington, DC; and George Horne, Deputy Executive Director, Operations and Maintenance, South Florida Water Management District, MSC 5100, West Palm Beach, FL. Witnesses addressed the pros and cons of the proposed legislation. Testimony also included findings of a study by the U.S. Geological Survey (USGS), the National Park Service (NPS) and the U.S. Fish & Wildlife Service (USF&W) entitled, “Giant Constrictors: Biological and Management Profiles and an Establishment Risk Assessment for Nine Large Species of Pythons, Anacondas and the Boa Constrictor.” (Serial No. 111-97)

*Legislative History.*—On June 10, 2009, Rep. Kendrick Meek (D-FL-17) introduced H.R. 2811. On July 23, 2010 the bill was referred to the House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security. Rep. Meek introduced H.R. 2811 for the purpose of amending the first sentence of the Lacey Act, Title 18 United States Code, Section 42 (a)(1) by inserting, “constrictor snakes of the species Python genera” after “polymorpha”. The purpose of the original bill was to add the genus Python, which includes forty seven (47) species of Pythons, to a list of injurious animals that are prohibited from importation and interstate transportation into and throughout the United States, its territories and possessions. The bill was reported out of the Crime Subcommittee in its original form. During the Full Committee markup, Representative Rooney offered an amendment which, be-

ginning in line 6 of H.R. 2811, deleted “constrictor snakes of the species Python Genera” and inserted, “Burmese Python of the species Python Molurus Bivittatus; African Rock Python of the species Python Sebae”. Under the amendment, two (actually three species since the African Rock Python consists of two species the northern African Python and the southern African python) of the forty-seven species of Pythons were to be prohibited. The amendment was accepted and the bill was reported out of the full committee. The hearing was held following the full committee markup at the request of several members. No further action was taken on the bill.

*H.R. 3040, the “Senior Financial Empowerment Act of 2010”*

*Summary.*—The hearing was held on May 25, 2010 and focused on legislation that had been introduced in the 111th Congress to address issues pertaining to mail, telemarketing and Internet fraud targeting seniors. Elder financial abuse is defined as “the unauthorized use or illegal taking of funds or property of people aged 60 and older.” The terminology used in the 2006 Older Americans Act is “exploitation”, defined as “. . . the fraudulent or otherwise illegal, unauthorized, or improper act of process of an individual, including a care-giver or fiduciary, that uses the resources of an older person for monetary or personal benefit, profit, or gain, or that results in depriving an older individual of rightful access to, or use of, benefits, resources, belonging, or assets.” Elder Financial abuse has been called the “crime of the 21st Century”. It is a crime that can have significant impact on its victims because they are incapable of recovering financial losses. For every dollar lost to theft and abuse, there are still more related costs associated with stress and health care and the intervention of social services. Fraud complaints by older persons is increasing annually. The Consumer Sentinel Network (CSN), a secure online database of millions of consumer complaints had recorded 721, 418 fraud-related complaints in 2009. The Subcommittee received testimony from the following witnesses: the Honorable Tammy Baldwin (D-WI); the Honorable Howard Coble (R-NC); Mr. Lee Hammond, Board President, AARP; Mr. Robert Blancato, National Coordinator, Elder Justice Coalition; and Ms. Latifa Ring, personal impact witness.

*Legislative History.*—H.R. 3040, the Senior Financial Empowerment Act of 2010 was introduced on June 25, 2009 by Rep. Tammy Baldwin (D-WI). The bill referred to House Committee on the Judiciary, House Energy and Commerce and the Senate Judiciary Committee. It requires the Federal Trade Commission (FTC): (1) to disseminate to seniors and their care-givers information on mail, telemarketing, and Internet fraud targeting seniors; (2) in response to a request about fraud committed by a particular entity or individual, to provide to the requester publicly available information on any record of civil or criminal law enforcement action against such individual or entity for fraud; and (3) to maintain a website as an information resource for seniors and their care-givers regarding Internet fraud. Authorizes FY2011–FY2015 appropriations. It also directs the Attorney General to establish a grant program for mail, telemarketing, and Internet fraud prevention education programs for senior citizens. Authorizes FY2011–FY2015 appropriations. On

July 29, 2010, on motion to suspend the rules the House passed H.R. 3040, as amended on a vote of 335–81. It was then received in the Senate, read twice referred to the Committee on the Judiciary. (Serial No. 111–137)

*H.R. 3695 the “Help Find the Missing Act” or “Billy’s Law”*

*Summary.*—This hearing was held on January 21, 2010. The FBI and the Justice Department’s National Institute of Justice (NIJ) maintain databases which contain information about missing persons and unidentified remains. H.R. 3695 was introduced to strengthen and expand the accessibility of these databases. This hearing examined the history of the databases, why they were created, whom they serve, why the public needs access to more information, why law enforcement needs to be encouraged to submit more information to the databases, and how the bill can help both the public and law enforcement solve cases of missing persons and unidentified remains. The Subcommittee received testimony from Rep. Christopher Murphy (D-CT); Rep. Ted Poe (R-TX); Ms. Janice Smolinski (mother of Billy Smolinski, missing person); Steven Morris, Deputy Assistant Director, Criminal Justice Information Services, Federal Bureau of Investigation; and Kristina Rose, Acting Director of the National Institute of Justice, U.S. Department of Justice. (Serial No. 111–99)

*Legislative History.*—H.R. 3695 was introduced on October 1, 2009 by Rep. Christopher S. Murphy (D-CT) and referred to the House Judiciary Committee and the Senate Judiciary Committee. The bill was ordered reported with an amendment by the Judiciary Committee on January 27, 2010 (adopted by voice vote), and passed by the House under Suspension of the Rules by voice vote on February 23, 2010. Rpt. #111–416. On February 24, 2010, the bill was referred to the Senate Committee on the Judiciary.

*H.R. 4080, the “Criminal Justice Reinvestment Act of 2009” and H.R. 4055, the “Honest Opportunity Probation with Enforcement (HOPE) Initiative Act of 2009”*

*Summary.*—This hearing was held on May 11, 2009 and focused on two pieces of legislation that were introduced in the 111th Congress by Congressman Adam Schiff, H.R. 4080, the “Criminal Justice Reinvestment Act of 2009” and H.R. 4055, the “Honest Opportunity Probation with Enforcement (HOPE) Initiative Act of 2009.” Both bills seek to address the country’s incarceration crisis by focusing on criminal justice policies that work. The hearing educated members on these bills and brought attention to justice reinvestment efforts that have demonstrated results. “Criminal justice reinvestment” involves redirecting corrections monies into policies that keep people safer, while slowing the growth of the prison and jail populations. The notion is to reinvest the resulting savings back into the community, in ways that advance the goals of public safety through strategies proven to be effective and efficient in accomplishing that result. At the hearing, the successes of several states that have engaged in their own justice reinvestment initiatives were highlighted. Hawaii’s HOPE project, the original project that inspired H.R. 4055, was be presented as a successful example of

what justice reinvestment can do. There appeared to be bipartisan support for both bills.

*Legislative History.*—H.R. 4055, the “Honest Opportunity Probation with Enforcement (HOPE) Initiative Act of 2009 and H.R. 4080, the “Criminal Justice Reinvestment Act of 2009” were both introduced on November 16, 2009 by Rep. Adam B. Schiff (D-CA) and referred to the House Committee on the Judiciary. On January 4, 2010, they were referred to the Subcommittee on Crime, Terrorism, and Homeland Security. On May 11, 2010, the subcommittee held a hearing on the bills and heard testimony from the following witnesses: The Honorable Adam B. Schiff (CA-29th District); Mr. Adam Gelb, Director, Public Safety Performance Project, Pew Center on the States, Washington, DC; The Honorable John T. Broderick, Jr., Chief Justice of the New Hampshire Supreme Court, Concord, New Hampshire; The Honorable Jerry Madden, Texas House of Representatives, Plano, Texas; Dr. Nancy G. La Vigne, Director, Justice Policy Center, The Urban Institute, Washington, DC; and The Honorable Steven Alm, Judge, Second Division, Circuit Court of the First Judicial Circuit, Honolulu, Hawaii. (*Serial No. 111-114*)

*H.R. 5566, the “Prevention of Interstate Commerce in Animal Crush Videos Act of 2010”*

*Summary.*—H.R. 5566 was introduced to prohibit the creation and distribution of certain depictions of extreme animal cruelty, called “crush videos,” in response to the Supreme Court’s decision in April of 2010, invalidating the existing law on First Amendment grounds.

*Legislative History.*—H.R. 5566 was introduced by on June 22, 2010 by Rep. Elton Gallegly (R-CA) and referred to the House Judiciary Committee and the Senate Judiciary Committee. After the Supreme Court’s decision in *United States v. Stephens*, invalidating the existing law criminalizing the possession, creation, and sale of certain depictions of animal cruelty, the Subcommittee on Crime conducted a hearing, on May 26, 2010. Members and the panel of witnesses discussed the law that was overturned, the Court’s rationale for finding the law in violation of the First Amendment, and ways in which a new law could be drafted to avoid these constitutional defects. The Subcommittee on Crime received testimony from Congressman Elton Gallegly (R-CA); Congressman Gary Peters (D-MI); Professor Stephen I. Vladeck, American University Washington College of Law; Professor Nathaniel Persily, Columbia University School of Law; and J. Scott Ballenger, Partner, Latham and Watkins. (*Serial No. 111-129*)

H.R. 5566 was subsequently developed and introduced on June 22, 2010. On July 23, 2010, the Judiciary Committee approved the bill without amendment and favorably reported it by a vote of 23–0. On July 21, 2010, the House passed the bill by a vote of 416–3. Rpt.# 111–549. The Senate passed the bill with an amendment on September 28, 2010. On November 15, 2010, the House passed H.Res. 1172, providing that it agreed to the Senate amendments with an amendment. On November 19, 2010, the Senate agreed to the House amendments by unanimous consent. The President

Barack Obama signed it into law on December 9, 2010. Public Law 111–294

*H.R. 5575, the “Domestic Minor Sex Trafficking*

*Summary.*—The Subcommittee held a hearing on September 15, 2010, on Domestic Minor Sex Trafficking to address issues pertaining to the commercial sexual exploitation of American children within U.S. borders, and their subsequent rescue and rehabilitation. The hearing focused on domestic minor sex trafficking, including H.R. 5575, the “Domestic Minor Sex Trafficking, Deterrence and Victims Supports Act of 2010,” introduced by Representatives Carolyn Maloney and Christopher Smith. At the hearing, the Subcommittee examined the ways in which children are trafficked in the U.S., including the role that the Internet plays, the challenges that these cases pose to law enforcement, and the unique needs of survivors.

*Legislative History.*—H.R. 5575 was introduced June 23, 2010 by Rep. Carolyn B. Maloney (D–NY–14) and referred to the House Judiciary and House Ways and Means Committees. On July 26, 2010, the bill was referred to the Subcommittee on Crime, Terrorism, and Homeland Security. On September 15, 2010 the Subcommittee heard testimony from the following witnesses: The Honorable Carolyn B. Maloney, 14th District of New York; The Honorable Jackie Speier, 12th District of California; The Honorable Ted Poe, 2nd District of Texas; The Honorable Christopher H. Smith, 4th District of New Jersey; The Honorable Linda Smith (Former Member of Congress); Ms. Francey Hakes, National Coordinator for Child, Exploitation Prevention and Interdiction United States Department of Justice, Washington, DC; Mr. Ernie Allen, President & CEO, National Center for Missing and Exploited Children; Alexandria, VA; Ms. Tina Frundt, Executive Director/Founder, Courtney’s House, Washington, DC; Mr. Nicholas Sensley, Chief of Police, Truckee Police Department, Truckee, CA; Ms. Suzanna Tiapula, Director, National Center for Prosecution of Child Abuse, National District Attorneys Association, Alexandria, VA; Ms. Deborah Richardson, Chief Program Officer, Women’s Funding Network, San Francisco, CA; Mr. William “Clint” Powell, Director, Customer Service and Law Enforcement Relations Craigslist, Inc., San Francisco, CA; and Elizabeth “Liz” McDougall, Partner at Perkins Coie, LLP, Seattle, WA. (Serial No. 111–146)

*H.R. 5932, the “Organized Retail Theft Investigation and Prosecution Act of 2010”*

*Summary.*—H.R. 5932 a bill directs the attorney general to establish the Organized Retail Theft Investigation and Prosecution Unit to: (1) investigate and prosecute those instances of organized retail theft over which the Department of Justice (DOJ) has jurisdiction; (2) assist state and local law enforcement agencies in investigating and prosecuting organized retail theft; and (3) consult with key stakeholders, including retailers and online market places, to obtain information about instances of and trends in organized retail theft.

*Legislative History.*—H.R. 5932, was introduced on July 29, 2010 by Rep. Robert C. “Bobby” Scott (D–VA–03). The bill was referred

to the House Judiciary Committee and the Senate Judiciary Committee. The House passed this bill by voice vote on September 29, 2010 was the bill was referred to the Senate Judiciary Committee.

*S. 4005, the “Preserving Foreign Criminal Assets for Forfeiture Act of 2010”*

*Summary.*—S. 4005, this bill provides authority for federal prosecutors to seek court orders restraining foreign assets held in the United States pending asset forfeiture proceedings in foreign courts.

*Legislative History.*—S. 4005 was introduced on December 12, 2010 by Sen. Sheldon Whitehouse (D-RI) and referred to the House Judiciary Committee and the Senate Judiciary Committee. This bill passed by the Senate on December 14, 2010 and then passed by the House by voice vote on December 16, 2010. On December 17, 2010, S. 4005 was presented to President Barack Obama.

#### OVERSIGHT ACTIVITIES

*Hearing on Sex Offender Registration and Notification (SORNA): Barriers to Timely Compliance by States (Serial No. 111-21)*

*Summary:* This hearing, on the Sex Offender Registration and Notification Act (SORNA), was held on March 10, 2009. SORNA became public law on July 27, 2006, as Title I of the Adam Walsh Act. It created a national registry for all sex offenders, and required States to participate in and comply with the requirements of SORNA or lose 10% of Byrne grant funding. The initial deadline for compliance by States was July 2009. As of the date of this hearing, not a single state had been found in compliance. SORNA authorizes the AG to give two one-year extensions upon request. According to the Department of Justice website, at the time the hearing was held only twelve states, four Tribes, and Guam had received a one-year extension. A New York Times article reported that the DOJ admitted that as of December 2008, only four states, Arizona, Idaho, Louisiana and Ohio, had tried to fully comply with SORNA. In January 2009, the DOJ denied Ohio’s application. The Office of the Inspector General concluded in December 2008 that the States “will not fulfill their SORNA requirements by July 2009.” For these reasons, this hearing sought to explore and gather information about problems with implementation of SORNA, to consider whether Congress should extend the deadline that existed at the time, which was July 2009, and to seek alternatives to the present barriers. After the hearing, the Attorney General extended the deadline to July 27, 2010. Prior this extension, the Chairs and Ranking members of the House and Senate Judiciary Committee and Crime Subcommittee sent a letter requesting a one-year blanket extension for all states. While challenges to implementation of SORNA still exist, particularly tribal jurisdictions, more states have been found in compliance as of late, and others have received extensions based on individual applications to the SMART office. The Subcommittee heard testimony from: Laura Rogers, Previous Director of the Department of Justice SMART Office, Washington, DC; Emma J. Devillier, Asst. Attorney General, Criminal Division, Office of the Attorney General of LA, Chief, Sexual Predator Unit,

Baton Rouge, LA; Madeline Carter, Principal, Center for Sex Offender Management, Center for Effective Public Policy, Silver Spring, MD; Ernie Allen, President & Chief Executive Officer, National Center for Missing & Exploited Children, Alexandria, VA; Mark Lunsford, Father of Jessica Lunsford, the Victim of a Sex Offense, Homasassa, FL; Det. Robert Shilling, Seattle Police Department, Sex and Kidnapping Offender Detail, Sexual Assault and Child Abuse Unit, Seattle, WA; and Amy Borror, Public Information Officer, Office of the Ohio Public Defender, Columbus, OH. (Serial No. 111-21)

*Hearing on "Lost Educational Opportunities in Alternative Settings."*

*Summary.*—This hearing was held on March 12, 2009 in conjunction with the Committee on Education and Labor's Subcommittee on Healthy Families and Communities. It is estimated that approximately seven million of the 28 million students enrolled in U.S. middle or junior high schools are at risk of academic failure, drug and alcohol abuse or delinquent behavior. Many of these at risk youth enter alternative schools and ultimately end up in juvenile justice institutions and later prisons. These settings may include day treatment programs, residential treatment centers, group homes, foster care settings, home tutoring, juvenile justice facilities and private therapeutic programs which are funded by public schools. Students find their way to these public and private settings via court mandates, public school referrals for students with certain disabilities, as an alternative to expulsion and a placement for children with substance abuse or other behavioral challenges. This hearing explored the increasing number of challenges associated with educating children in alternative settings and successful models that have overcome obstacles to providing quality education in these settings. On March 12, 2009, the Subcommittee's heard testimony from the following witnesses: Dr. Thomas Blomberg, Professor of Criminology at Florida State University, Tallahassee, FL; Dr. Cynthia Cave, As Director of the Office of Student Services, Virginia Department of Education, Richmond, VA; Leonard Dixon, M.S., Executive Director of the Wayne County Juvenile Detention Facility, Detroit, MI; Janeen Steel, J.D., founder of the Learning Rights Law Center, Los Angeles, CA; Dr. Robert Whitmore, D. Ed., CEO of Manito Incorporated, Chambersburg, PA; and Ms. Linda Brooke, Director of Government Relations and Education Services for the Texas Juvenile Probation Commission, Austin, TX. (Serial No. 111-5)

*Hearing on Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?*

*Summary.*—On March 26, 2009, the Subcommittee held a hearing in which we examined the state of indigent defense in Michigan and other states. Despite the Supreme Court's rulings guaranteeing the right to counsel in criminal cases, many defendants are still denied effective, or sometimes any, representation. Many studies of national indigent defense conducted since *Gideon v. Wainright* have documented these problems. A 1999 Department of Justice report found that, despite progress since *Gideon*, indigent

defense remained “in a chronic state of crisis,” and pointed to funding and workload problems as among the causes of the crisis. The hearing focused on the situation in Michigan, although problems faced by other states were addressed generally. Testimony was also received about a paper released in June 2008, by the National Legal Aid & Defender Association NLADA, titled “A Race to the Bottom, Speed & Savings Over Due Process: A Constitutional Crisis,” which concluded that “the [S]tate of Michigan fails to provide competent representation to those who cannot afford counsel in its criminal courts.” The problems can be traced to inadequate funding for indigent defense, a lack of independence in the appointments process, and unmanageable case loads, which are particularly egregious in Michigan. The witnesses conveyed an urgent need for solutions, and discussed whether the federal government had an obligation to assist states with the responsibility imposed upon them by *Gideon*. The Subcommittee heard testimony from the following witnesses: Mr. Dennis Archer, Chairman of Dickinson-Wright, PLLC; Former Michigan Supreme Court Justice; Past-President, American Bar Association; Past-President, State Bar of Michigan, Detroit, MI; Mr. David J. Carroll, Director of Research, National Legal Aid and Defender Association, Washington, DC; Ms. Nancy J. Diehl, Past-President of the State Bar of Michigan; Chief of the Trial Division, Wayne County Prosecutor’s Office Detroit, MI; Mr. Erik Luna, Professor at Washington and Lee University School of Law, Lexington, VA; Ms. Regina Daniels Thomas, Chief Counsel, Legal Aid & Defender Association Juvenile Law Group; Detroit, MI; and Mr. Robin Dahlberg, Senior Staff Attorney with the American Civil Liberties Union, New York, NY. (Serial No. 111-20)

*Hearing on “The Escalating Violence in Mexico and the Southwest Border as a Result of the Illicit Drug Trade.”*

*Summary.*—On May 6, 2009, the Subcommittee held a hearing to provide members of Congress with information regarding illicit drug trafficking originating in Mexico and to review how our law enforcement agencies are responding to its escalating violence. When Mexican President Felipe Calderon took office with a pledge to investigate and prosecute illicit drug organizations. In fulfilling his pledge, President Calderon has made trafficking drugs in Mexico more difficult with one unintended result. As the trafficking has become more difficult, violence among the drug organizations has increased as they fight to control fewer trafficking routes. According to Mexican Attorney General Edwardo Merina Mora, violence directly attributable to the drug organizations was responsible for the deaths of at least 8,150 people between December 2006 and December 2008. This hearing also examined how the border violence affects the security of the U.S. Southwest border and made recommendations to Congress to determine what response, if any, may be necessary. The Subcommittee heard testimony from the following witnesses: Mr. Stuart G. Nash, Associate Deputy Attorney General, and Director, Organized Crime Drug Enforcement Task Forces (OCDETF), U.S. Department of Justice, Salvador Nieto, Deputy Assistant Commissioner, Office of Intelligence and Operations Coordination, U.S. Customs and Border Protection, U.S. Department of Homeland Security; Janice Ayala, Deputy Assistant

Director, Office of Investigations, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, Anthony Placido, Assistant Administrator for Intelligence, United States Drug Enforcement Administration, U.S. Department of Justice; and William J. Hoover, Acting Deputy Director, Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice. (*Serial No. 111-25*)

*Hearing on “Strengthening Forensic Science in the United States: A Path Forward”*

*Summary.*—On May 13, 2009, the Subcommittee held a hearing to examine the state of forensic sciences in the United States, focusing on the assessments and recommendations made in a report published by the National Research Council of the National Academies of Science entitled “Strengthening Forensic Science in the United States: A Path Forward.” The Subcommittee heard testimony detailing many of the problems facing forensic science, including vast disparities in standards, resources, and technology between different jurisdictions; the need for further research in many forensic disciplines; and the lack of standards and education requirements for practitioners. The Subcommittee heard testimony from the following witnesses: Kenneth Melson, Acting Director Bureau of Alcohol, Tobacco, Firearms and Explosives, Former Director, Executive Office for the United States Attorneys, U.S. Department of Justice, Washington, DC; Peter Marone, Director, Virginia Department of Forensic Science, Richmond, VA; John W. Hicks, Director, Northeast Regional Forensic Institute, The University at Albany, State University of New York, Albany, NY; Peter Neufeld, Co-Director, The Innocence Project, New York, NY. (*Serial No. 111-28*)

*Hearing on Indigent Representation: A Growing National Crisis*

*Summary.*—This hearing, held on June 4, 2009, examined the problems surrounding the right and access to counsel for indigent defendants throughout the United States. This hearing continued the discussion of the problem presented in the March 26, 2009 hearing, which focused on the indigent defense crisis in Michigan. Many of the problems plaguing Michigan, such as inadequate funding for defense counsel, lack of independence in the appointment process, lack of representation, and the risk of wrongful convictions are prevalent in other states throughout the country. This hearing focused on these problems and explore the possible role of Congress in helping to solve them. Possible solutions included expanding DOJ’s Byrne-JAG grants to include funding for indigent defense, creating a federal office to oversee and assist state indigent defense systems, and creating a cause of action for DOJ to vindicate the rights of defendants in states that are systematically failing to provide effective assistance of counsel. The Subcommittee heard testimony from the following witnesses: Robert M.A. Johnson, Co-Chair, National Right to Counsel Committee and District Attorney, Anoka County, Minnesota; Alan Crotzer, Probation and Community Intervention Officer, Florida Department of Juvenile Justice; wrongfully convicted and sentenced to 130 years in prison Tallahassee, FL; Erik Luna, Professor at Washington and Lee University School of

Law, Lexington, VA; Malcolm R. "Tye" Hunter: former Executive Director, North Carolina Office of Indigent Defense Services, Durham, North Carolina; John Wesley Hall, President, National Association of Criminal Defense Lawyers, Little Rock, Arkansas; and Rhoda Billings, Co-Chair, National Right to Counsel Committee, Former Justice and Chief Justice of the North Carolina Supreme Court, Lewisville, NC. (Serial No. 111-29)

*Hearing on the National Prison Rape Elimination Commission Report and Standards*

*Summary.*—The Subcommittee held a hearing on July 8, 2009 on a report released by the National Prison Rape Elimination Commission. On June 23, 2009, the National Prison Rape Elimination Commission (NPREC) released its final report and proposed standards on prevention, detection, and monitoring of sexual abuse of incarcerated and detained individuals in the United States. The report and standards are the culmination of many years of work by Members of Congress, prison-reform advocates, corrections and detention officials and sexual assault victims to bring attention to this serious problem. During the hearing, the findings of the report and the standards developed by the Commission were discussed. The Subcommittee heard testimony from: Melissa Rothstein, East Coast Program Director, Just Detention International, Washington, DC; Reggie B. Walton, Judge, United States District Court of the District of Columbia, Chair, National Prison Rape Elimination Act Commission; Sean E. Kenyon, Attorney, Hoeppner Wagner & Evans LLP, Merrillville, Indiana; Jon Ozmint, Director, South Carolina Department of Corrections, Columbia, SC; and Lisa Freeman, Prisoner Rights Project, Legal Aid Society of New York, New York, NY. (Serial No. 111-49)

*Hearing on Mandatory Minimums and Unintended Consequences*

*Summary.*—This hearing, held on July 14, 2009, examined the nature and consequences of the, at the time, 170 existing mandatory minimum sentencing laws in the federal criminal code. Various groups, including the federal Judicial Conference, the ABA—through its Kennedy Commission, the Sentencing Project, the U.S. Sentencing Commission, Families Against Mandatory Minimums, and others have long advocated for the elimination of mandatory minimum sentencing laws. The hearing examined the consequences of mandatory minimum sentencing laws on the criminal justice system, including unprecedented rates of incarceration, disparate impacts on minorities, and irrational sentencing results. Moreover, the hearing explored whether mandatory minimum penalties are meeting the goals of increased uniformity in sentencing, fairness, deterrence and reduction of crime. Finally, three bills, the "Common Sense in Sentencing Act of 2009" (H.R. 2934); the "Ramos and Compean Justice Act of 2009" (H.R. 834); and the "Major Drug Trafficking Prosecution Act of 2009" (H.R. 1466) were considered. The Subcommittee heard testimony from: Honorable Julie E. Carnes, Chair, Criminal Law Committee of the Judicial Conference of the United States, Washington, DC; Grover G. Norquist, President, Americans for Tax Reform, Washington, DC; Michael J. Sullivan, Partner, Ashcroft Sullivan, LLC, Boston, MA; T.J. Bonner,

President, National Border Patrol Council, Campo, CA; and Julie Stewart, President and Founder Families Against Mandatory Minimums Foundation, Washington, DC. (Serial No. 111-48)

*Hearing on Oversight of the Federal Bureau of Prisons*

*Summary.*—On July 21, 2009, the Subcommittee held a hearing to conduct general oversight over the Federal Bureau of Prisons (BOP). BOP was established by an act of Congress in 1930 and is within the Department of Justice (DOJ). The agency director is Harley G. Lappin who was appointed in April 2003. The BOP is charged with the “management and regulation of all Federal penal and correctional institutions.” The mission of the BOP is “to protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens.” The BOP is responsible for the incarceration of over 205,000 inmates. Almost 82% of these inmates are confined in Bureau-operated facilities, while 18% are confined primarily in private sector prisons. The average sentence length for inmates in BOP custody is 9.9 years. The Subcommittee heard testimony from the following witnesses: The Honorable Dennis Cardoza (D) Calif. 18th District; Harley G. Lappin, Director, Federal Bureau of Prisons, U.S. Department of Justice; Washington, DC; Reginald A. Wilkinson, President & CEO, Ohio College Access Network, Columbus, Ohio; Philip Fornaci, Director, DC Prisoners’ Project, Washington Lawyers’ Committee for Civil Rights & Urban Affairs, Washington, DC; Richard A. Lewis, Senior Manager, ICF International, Fairfax, VA; Stephen R. Sady, Chief Deputy Federal Public Defender, Portland, Oregon; and Phil Glover, Legislative Coordinator, the American Federation of Government Employees, Johnstown, PA. (Serial No. 111-89)

*Hearings on “Over-Criminalization of Conduct/Over-federalization of Criminal Law”*

*Summary.*—On July 22, 2009, the Subcommittee held a hearing. We focused on the issue of Over-Criminalization of Conduct/Over-federalization of Criminal Law. The purpose of the hearing was to address the mounting concerns about both the number of new federal crimes being created annually by Congress, as well as the deterioration in the mens rea traditionally needed to find a person guilty of a crime. There was also the question of whether these new laws have any deterrent effect when they seek to prohibit and punish conduct that merely involves negligence or bad judgment. Finally, there was also the question of whether the increase in federal crimes has, in effect, only duplicated crimes that already (and rightly) reside within the jurisdiction of the states. The Subcommittee had been encouraged to conduct this hearing by a coalition of organizations that includes the National Association of Criminal Defense Lawyers, The Heritage Foundation, The Constitution Project, and the Innocence Project, among others. The coalition has been actively engaged in the advocacy of reform of federal criminal laws as well as the process by which federal crime legislation is enacted in the future. This was a bi-partisan hearing

involving the full participation and support of both Chairman Scott and Ranking Member Gohmert. Testimony began with a consensus over-criminalization expert with extensive background in the issues of over-federalization of crime and over-criminalization. That expert framed the problems and summarized their depth. Other experts focused on specific reforms with respect to mens rea, over-federalization, and sentencing. Victim witnesses' testimony highlighted the need for the reforms recommended by our experts. Each of the witnesses was a consensus witness of the above-referenced coalition.

The hearing explored whether Congress should: authorize a review of existing Federal laws with specific emphasis on those laws that have been enacted but are not being enforced; reconsider how best to fight crime within the Federal system; reconsider the true Federal interests in crime control versus the risks of Federalizing local crime; articulate general principles which should guide it (Congress) in determining whether to create new crimes—implement mechanisms to foster restraint on further Federalization—(such as through a federalization assessment by a select joint committee); implement/enact “Sunset” provisions with respect to both existing laws that are not being enforced and those enacted in the future; and whether the proper response to public safety concerns is enactment of new federal crime legislation or increased federal support for state and local crime control efforts. The Subcommittee heard testimony from the following witnesses: The Honorable Richard Thornburgh, former U.S. Attorney General, presently with K&L Gates LLP, Washington, DC; Timothy Lynch, Cato Institute, Washington, DC; Kathy Norris, Victim/Personal Impact; Krister Evertson, Victim/Personal Impact, Professor Stephen Saltzburg, George Washington University Law School, Washington, DC; and James Strazzella, Temple University Beasley School of Law, Philadelphia, PA. (Serial No. 111-67)

*Hearing on “Reauthorization of the Innocence Protection Act of 2004”*

*Summary.*—This hearing was held on September 22, 2009, and focused on the Reauthorization of the Innocence Protection Act of 2004, a part of the Justice for All Act of 2004 (P.L. 108-406, Title IV) (IPA) which was set to expire on September 30, 2009. At the time, there was no pending legislation for reauthorization of the IPA. The Subcommittee heard testimony about the implementation of the two grant programs authorized by the IPA: the Kirk Bloodsworth Post-Conviction DNA Testing Grants Program (Subtitle A, Sections 412 and 413) and the Capital Representation Improvement Grants (Subtitle B, Sections 421 and 422). Testimony described initial problems with the Bloodsworth program that were remedied by a temporary adjustment of statutory language during the appropriations process for FY 2008. Witnesses addressed the issue of whether the temporary adjustment should become permanent, and whether additional changes are needed to improve the Bloodsworth program. The hearing also focused on continuing issues surrounding the efficacy of improving competent legal representation of indigent defendants in State capital cases through Capital Representation Improvement Grants. The Department of

Justice (DOJ) witness explained how Capital Representation Improvement Grants have worked in practice under the IPA. Advocate witnesses described general problems with indigent defense representation in State Capital cases, and possibly suggest improvements that can be made to the IPA to spur the creation of more effective systems for providing legal representation in State capital cases. The Subcommittee heard testimony from the following witnesses: Lynn Overmann, Senior Advisor, Office of Justice Programs, U.S. Department of Justice, Washington, DC; Barry C. Scheck, Co-Director and Co-Founder, The Innocence Project, Benjamin N. Cardozo School of Law, New York, NY; Karen A. Goodrow, Esq., Director, Division of Public Defender Services; c/o McCarter & English, Hartford, CT; Pete Marone, Director, Virginia Department of Forensic Science, Richmond, VA; and Stephen B. Bright, President & Senior Counsel, Southern Center for Human Rights, Atlanta, GA. (Serial No. 111-74)

*Hearing on The Crime Victims Rights Act of 2004*

*Summary.*—The Subcommittee held a hearing on the Crime Victims Rights Act of 2004 on September 29, 2009. The purpose of the hearing was to conduct oversight of the implementation of the statutory rights for victims of federal crimes and the grant programs established under the Act. As of September 2008, according to the Department of Justice, over 750,000 crime victims with active cases were registered with the Victim Notification System. The most common types of cases prosecuted in the federal criminal justice system during March 2006 and March 2007 that involve victims included: fraud; burglary, larceny and theft; sex offenses; and robberies. Almost half of the federal criminal cases that were initiated during the same time period in the federal criminal justice system were related to immigration and narcotics violations, which generally do not involve any victims. There have been several attempts to amend the U.S. Constitution to establish a constitutionally recognized role for crime victims in the criminal justice process. After several failed attempts to pass a Constitutional Amendment, Congress enacted statutes that established certain rights for federal crime victims and made funding available to provide services to crime victims including the Crime Victims Rights Act of 2004. The Subcommittee heard testimony from the following witnesses: Eileen Larence, Director, Homeland Security and Justice Issues, U.S. Government Accountability Office, Washington, DC; Laurence E. Rothenberg, Deputy Assistant Attorney General, Department of Justice, Office of Legal Policy, Washington, DC; Mary Lou Leary, Acting Assistant Attorney General, Department of Justice, Office of Justice Programs, Washington, DC; Douglas E. Beloof, Professor of Law, Lewis & Clark Law School, Portland, OR; Susan Howley, Director, Public Policy, National Center for Victims of Crime, Washington, DC. (Serial No. 111-78)

*Hearing on Strategies to Help Girls Achieve Their Full Potential*

*Summary.*—On October 20, 2009, the Subcommittee on Crime, Terrorism and Homeland Security held a hearing entitled Girls in the Juvenile Justice System: Strategies to Help Girls Achieve Their Full Potential. The increasing number of girls' in the juvenile delin-

quency system has attracted the attention of federal, state, and local officials for more than a decade. While the majority of juvenile arrests and cases involve boys, for the past twenty years girls have increasingly become involved in the juvenile justice system. In 1980, 20 percent of all juvenile arrests were girls; by the mid-1990s about one quarter of these arrests were girls; and by 2007, girls accounted for 29 percent of all juvenile arrests. Although arrests for some violent crimes, such as assaults, have decreased for males, they have decreased less, or in some cases have increased, for females. This hearing examined prevention and intervention programs that have been successful at keeping girls safe and helping them successfully transition out of the juvenile justice system. The Subcommittee heard testimony from the following witnesses: Eileen Larence, Director, Homeland Security and Justice Issues, United States Government Accountability Office, Washington, DC; Dr. Lawanda Ravoira, Director, NCCD Center for Girls and Young Women, Jacksonville, FL; Ms. Tiffany Rivera, GEMS, New York, NY; Ms. Nadiyah Shereff, San Francisco, CA; C. Jackie Jackson, Ph.D., Executive Director, Girls, Inc. of the Greater Peninsula, Hampton, VA; and Mr. Thomas Stickrath, Director, Ohio Department of Youth Services, Columbus, OH. (Serial No. 111-77)

*Hearing on Racial Disparities in the Criminal Justice System*

*Summary.*—The Subcommittee held a hearing October 29, 2009 on “Racial Disparities in the Criminal Justice System.” During this hearing the witnesses discussed recent reports about the growing racial disparities in the criminal justice system. Every person in this country is guaranteed to be treated fairly by the justice system under the U.S. Constitution. When people are treated differently in the criminal justice system based on their race or ethnicity it undermines the important Constitutional principle of equal rights under law. Our criminal justice system is rife with evidence of racial disparities. Racial disparities in the criminal justice system exist when the proportion of a racial or ethnic group involved in the system is greater than the proportion of such group in the general population. In the United States, African Americans make up 13% of the general U.S. population, yet they constitute 28% of all arrests, 40% of all inmates held in prisons and jails, and 42% of the population on death row. Whites make up 67% of the total U.S. population and 70% of all arrests, yet only 40% of all inmates held in state prisons or local jails and 56% of the population on death row. The following witnesses appeared and submit a statement for the record. The Honorable Steve Cohen, United States House of Representatives, 9th District of Tennessee: Barry Krisberg, President, National Council on Crime and Delinquency, Jacksonville, FL; The Honorable James Reams, President-Elect, National District Attorneys Association, Alexandria, VA; Wayne McKenzie, Director, Program on Prosecution and Racial Justice, New York, NY; and Marc Mauer, Executive Director, The Sentencing Project, Washington, DC. (Serial No. 111-78)

*Hearing on “Combating Organized Retail Crime—The Role of Federal Law Enforcement”*

*Summary.*—This hearing was conducted on November 5, 2009. The hearing examined the roles of the several federal law enforcement agencies that investigate instances of organized retail crime. This type of crime is perpetrated by sophisticated, multi-level criminal organizations, often operating across state and even international boundaries, to steal and resell high-value retail goods. The Subcommittee received testimony from David Johnson, Section Chief, Criminal Investigations Division, Federal Bureau of Investigation; Special Agent in Charge John R. Large, Criminal Investigative Division, U.S. Secret Service; Janice Ayala, Deputy Assistant Director, Office of Investigations, ICE; and Deputy Chief Postal Inspector Zane Hill, U.S. Postal Inspection Service. (Serial No. 111-96)

*Hearing on “FBI Oversight Regarding Recent DOJ Inspector General Reports”*

*Summary.*—This hearing was held February 24, 2010. The Department of Justice’s Office of the Inspector General which had released several reports that focused on the Federal Bureau of Investigation’s track record with respect to handling information and effective cooperation with other federal, state and local law enforcement agencies: Explosives Investigation Coordination between the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (Audit Report 10-01); the Federal Bureau of Investigation’s Foreign Language Translation Program (Audit Report 10-02); and a Review of the Department’s Anti-Gang Intelligence and Coordination Centers (I-2010-01). During the hearings, the findings of the reports and the recommendations of the OIG were discussed as well as the FBI’s Responses to the Reports. The Subcommittee received testimony from representatives from the Office of the Inspector General, the Office of the Deputy Attorney General, and the FBI: the Honorable Glenn A. Fine, Office of the Inspector General, U.S. Department of Justice; Margaret Gulotta, Section Chief, Language Services Section, Directorate of Intelligence, Federal Bureau of Investigation; and Jennifer Shasky Calvery, Senior Counsel to the Deputy Attorney General, Office of the Deputy Attorney General, U.S. Department of Justice. (Serial No. 111-102)

*Hearing on “Keeping Youth Safe While in Custody: Sexual Assault in Adult and Juvenile Facilities”*

*Summary.*—On February 23, 2010, the Subcommittee held a hearing titled “Keeping Youth Safe While in Custody: Sexual Assault in Adult and Juvenile Facilities.” On January 7, 2010, the U.S. Department of Justice’s Bureau of Justice Statistics released a report titled “Sexual Victimization in Juvenile Facilities Reported by Youth, 2008–09” (hereinafter “BJS report”). During the hearing, witnesses discussed the findings of the report and the problem of sexual assault of youth in adult and juvenile facilities. The Prison Rape Elimination Act of 2003 (P.L. 108-79) (PREA) required the Bureau of Justice Statistics (BJS) to conduct a comprehensive statistical review and analysis of the incidents of sexual assault in ju-

venile correctional facilities for at least 90 days. PREA also required the BJS report to provide a list of juvenile correctional facilities according to the prevalence of sexual victimization. The January BJS report findings shed light on the dangerous conditions under which many youth in juvenile correctional facilities live. The report focused on larger juvenile institutions that typically detain adjudicated youth for longer periods of time. The Subcommittee heard testimony from the following witnesses: Brenda Smith, Professor, American University, Washington, DC; Troy Erik Isaac, North Hollywood, CA; Bernard Warner, Chief Deputy Secretary for Juvenile Justice; Department of Corrections and Rehabilitation, Division of Juvenile Justice, Sacramento, CA; Gabriel Morgan, Sheriff, Newport News, VA; and Grace Bauer, Campaign for Youth Justice, Washington, DC. (Serial No. 111-100)

*Hearing on “United States v. Stevens—The Supreme Court’s Decision Invalidating the Crush Video Statute”*

*Summary.*—This hearing was conducted on May 26, 2010. The hearing examined the Supreme Court’s decision which invalidated the federal law enacted in 1999 to criminalize the creation, sale, and possession of certain depictions of animal cruelty. Members and the panel of witnesses discussed the law that was overturned, the Court’s rationale for finding the law in violation of the First Amendment, and ways in which a new law could be drafted to avoid these constitutional defects. The Subcommittee on Crime received testimony from Congressman Elton Gallegly (R-CA); Congressman Gary Peters (D-MI); Professor Stephen I. Vladeck, American University Washington College of Law; Professor Nathaniel Persily, Columbia University School of Law; and J. Scott Ballenger, Partner, Latham and Watkins. (Serial No. 111-129)

*Hearing on “Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated”*

*Summary.*—On June 9, 2010, the Subcommittee held a hearing titled “Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated.” On April 9, 2008, the Second Chance Act (P.L. 110-199) was signed into law. This law authorizes federal grants to government agencies and nonprofit organizations to provide employment assistance, substance abuse treatment, housing, family programming, mentoring, victims support, and other services that can help reduce recidivism and better address the needs of the growing population of ex-offenders returning to their communities. The two year authorization for the Second Chance Act expired on September 30, 2010. As the Committee evaluates the successes and challenges of implementing Second Chance Act programs, this hearing examined the continuing barriers that ex-offenders in this country face as they reenter society after being released from jails and prisons. In addition, this hearing explored whether any of these obstacles to successful reintegration should be addressed in Second Chance Act reauthorization legislation. On June 9, 2010, the Subcommittee held a hearing on Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated. The Subcommittee heard testimony from the following witnesses: Marc Mauer, Executive Director, The Sen-

tencing Project, Washington, DC; Maurice Emsellem, Policy Co-Director, National Employment Law Project, Oakland, CA; Calvin Moore, DC Employment Justice Center, Washington, DC; Richard A. Lewis, Fellow ICF International, Fairfax, VA; Pamela K. Lattimore, Ph.D., Principal Scientist, RTI International, Research Triangle Park, NC; and Richard Cassidy, Hoff Curtis, Burlington, VT. (Serial No. 111-139)

*Hearing on Hearing on the Role and Operations of the United States Secret Service*

*Summary.*—This hearing was held by the Subcommittee on Crime on June 29, 2010, and examined the dual role (protection and investigation) and operations of the United States Secret Service. The Members and witness discussed current challenges with the protective function, including concerns about security breaches. The hearing also focused on the Service's evolving and growing investigative role, particularly with respect to financial and computer crimes. The Crime Subcommittee received testimony from Mark Sullivan, Director of the United States Secret Service. (Serial No. 111-140)

*Hearing on Hearing on Internet Privacy, Social Networking, and Crime Victimization*

*Summary.*—On July 28, 2010, the Subcommittee on Crime conducted a hearing examining the intersection between Internet privacy and crime victimization of Internet users, with a focus on the particular risks raised by participation on social networking sites. The Members and witnesses discussed means by which criminals spread malware to social networking participants, obtain private information of social networkers, and the need for enhanced privacy protection. The Subcommittee on Crime received testimony from Mr. Gordon M. Snow, Assistant Director, Federal Bureau of Investigation, United States Department of Justice, Washington, DC; Mr. Michael P. Merritt, Assistant Director, United States Secret Service, United States Department of Homeland Security, Washington, DC; Mr. Joe Sullivan, Chief Security Officer (CSO), Facebook Inc., Palo Alto, CA; Mr. Marc Rotenberg, Executive Director, Electronic Privacy Information Center (EPIC), Washington, DC; and Mr. Joe Pasqua, Vice President for Research, Symantec Inc., Washington, DC. (Serial No. 111-144)

*Hearing on “The Reauthorization of the Second Chance Act”*

*Summary.*—A hearing was held on September 29, 2010 by the Subcommittee titled “the Reauthorization of the Second Chance Act.” On April 9, 2008, the Second Chance Act (P.L. 110-199) was signed into law. The Second Chance Act authorizes federal grants to government agencies and nonprofit organizations to provide employment assistance, substance abuse treatment, housing, family programming, mentoring, victims support, and other services that can help reduce recidivism and better address the needs of the growing population of ex-offenders returning to their communities. The two year authorization for the Second Chance Act expired on September 30, 2010. This hearing examined some of the programs that have been funded under the Second Chance Act. In addition,

witnesses discussed the Department of Justice's Office of Inspector General (OIG) audit released in July, 2010 reviewing OJP's design and management of its three prisoner reentry grant programs. Also, witnesses discussed changes that could be made in a reauthorization bill to facilitate the work of government agencies and non-profit organizations in their efforts to address the needs of former offenders reintegrating back into their communities. The Subcommittee heard testimony from the following witnesses: Le'Ann Duran, Director, National Reentry Resources Center, Council of State Governments, New York, NY; Michele Banks, Richmond Second Chance Reentry Program Manager, Richmond City Sheriff's Office, Richmond, VA; Nancy La Vigne, Director, Justice Policy Center, The Urban Institute, Washington, DC; David B. Muhlhausen, Ph.D., The Heritage Foundation, Washington, DC; and Gladys Taylor, Acting Director, Illinois Department of Correction, Chicago, Ill. (Serial No. 111-154)

*Hearing on "Reining in Over-Criminalization: Assessing the Problems, Proposing Solutions"*

*Summary.*—This hearing was held on September 28, 2010, and was a follow up to an earlier hearing held on July 22, 2009, on the same issue. The earlier hearing addressed mounting concerns about the number of new federal crimes being created annually by Congress. These concerns specifically revolve around questions of the laws' effectiveness, the dilution of the mens rea element, whether the increase in federal crimes duplicated crimes that already (and appropriately) reside within the jurisdiction of the states, and whether many of these newly enacted laws have had any deterrent effect when they seek to prohibit and punish conduct that merely involves negligence or bad judgment (and should therefore be regarded as administrative rather than criminal infractions). Following that earlier hearing, a coalition comprised of the Heritage Foundation, the Washington Legal Foundation, the National Association of Criminal Defense Lawyers, the American Bar Association (ABA), the Cato Institute, the Federalist Society, and the American Civil Liberties Union (ACLU) reconvened to address the issue of over-criminalization. A non-partisan, joint study, "Without Intent", prepared by two of the organizations, the Heritage Foundation and the National Association of Criminal Defense Lawyers, was also released following that first hearing. In the report, Heritage and the defense lawyers suggested that lawmakers take a few steps to improve matters, including requiring the House and Senate judiciary committees to review all proposed criminal laws and writing into law that defendants should get the benefit of the doubt when laws are not written clearly. It was the recommendation of the coalition that, in order to avoid adding to the problems of over-criminalization, Congress should ask the hard questions before enacting new criminal laws. Do we need to enact more laws at the federal level for a particular type of conduct? Is there a valid purpose to be served by creating criminal law at the federal level when it duplicates an existing state level law? Would it be a better use of resources for the federal government to supplement state enforcement of criminal laws rather than replicating their efforts? It was the position of the coalition that Congress

should be asking these same questions about the thousands of laws already in the federal criminal code. The Subcommittee heard testimony from the following witnesses: Jim Lavine, President, National Association of Criminal Defense Lawyers, Washington, DC; Bobby Unser, Personal Impact Victim, Albuquerque, NM; Abner Schoenwetter, Personal Impact Victim, Pinecrest, FL; Brian Walsh, Senior Legal Research Fellow, The Heritage Foundation, Washington, DC; Stephen Smith, Professor of Law, University of Notre Dame Law School, Notre Dame, IN; Ellen Podgor, LeRoy Highbaugh, Sr. Research Chair and Professor of Law, Stetson University College of Law, Gulfport, FL; and Andrew Weissmann, Partner, Jenner & Block, LLP, New York, New York. (*Serial No. 111-151*)



## SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW<sup>1</sup>

ZOE LOFGREN, California, *Chairman*

HOWARD L. BERMAN, California  
SHEILA JACKSON LEE, Texas  
MAXINE WATERS, California  
PEDRO PIERLUISI, Puerto Rico  
LUIS V. GUTIERREZ, Illinois  
LINDA T. SANCHEZ, California  
ANTHONY D. WEINER, New York  
CHARLES A. GONZALEZ, Texas  
JUDY CHU, California

STEVE KING, Iowa  
GREGG HARPER, Mississippi  
ELTON GALLEGLY, California  
DANIEL E. LUNGREN, California  
TED POE, Texas  
JASON CHAFFETZ, Utah

<sup>1</sup> Subcommittee chairmanship and assignments approved January 22, 2009.

### *Tabulation of subcommittee legislation and activity*

#### Public:

Legislation referred to the Subcommittee .....	258
Legislation on which hearings were held .....	1
Legislation reported favorably to the full Committee .....	4
Legislation reported adversely to the full Committee .....	0
Legislation reported without recommendation to the full Committee .....	0
Legislation reported as original measure to the full Committee .....	0
Legislation discharged from the Subcommittee .....	1
Legislation pending before the full Committee .....	0
Legislation reported to the House .....	4
Legislation discharged from the Committee .....	0
Legislation pending in the House .....	3
Legislation passed by the House .....	8
Legislation pending in the Senate .....	1
Legislation vetoed by the President (not overridden) .....	0
Legislation enacted into Public Law .....	5
Legislation enacted into Public Law as part of other legislation .....	19
Days of legislative hearings .....	1
Days of oversight hearings .....	6

#### Private:

##### Claims:

Legislation referred to the Subcommittee .....	1
Legislation on which hearings were held .....	0
Legislation reported favorably to the full Committee .....	0
Legislation pending before the full Committee .....	0
Legislation reported to the House .....	0
Legislation discharged from the Committee .....	0
Legislation pending in the House .....	0
Legislation passed by the House .....	0
Legislation pending in the Senate .....	0
Legislation enacted into Private Law .....	0

#### Immigration:

Legislation referred to the Subcommittee .....	62
Legislation on which hearings were held .....	0
Legislation reported favorably to the full Committee .....	0
Legislation pending before the full Committee .....	0
Legislation reported to the House .....	0
Legislation discharged from the Committee .....	0
Legislation pending in the House .....	0
Legislation passed by the House .....	0

Legislation pending in the Senate .....	0
Legislation enacted into Private Law .....	3

#### LEGISLATIVE ACTIVITY

*H.R. 42 /S. 69, the “Commission on Wartime Relocation and Internment of Latin Americans of Japanese Descent Act”*

*Summary.*—H.R. 42 addresses the mistreatment of Japanese Latin Americans during World War II and creates a fact-finding commission to extend the study of the Commission on Wartime Relocation and Internment of Civilians. The commission would investigate and determine facts and circumstances surrounding the relocation, internment, and deportation to Axis countries of Latin Americans of Japanese descent from December 1941 through February 1948. The commission would also assess the impact of those actions by the United States, and recommend appropriate remedies, if any.

*Legislative History.*—On January 6, 2009, Representative Xavier Becerra (D-CA) introduced H.R. 42, which on the same day was referred to the Committee on the Judiciary. Also on the same day, Senator Daniel Inouye (D-HI) introduced a companion bill, S. 69. On February 9, 2009, H.R. 42 was referred to the Immigration Subcommittee, which reported the bill to the full Judiciary Committee on July 23, 2009 by a vote of 7 to 2. The Judiciary Committee marked up the bill on October 21, 2009 and ordered it to be reported favorably by a vote of 22-10. On February 11, 2009, the Senate Committee on Homeland Security and Governmental Affairs ordered S. 69 to be reported favorably without amendment. No further action was taken on H.R. 42 or S. 69.

*H.R. 847/S. 1334, the “James Zadroga 9/11 Health and Compensation Act”*

*Summary.*—H.R. 847 establishes the World Trade Center Health Program to provide medical monitoring and treatment benefits to emergency responders, recovery and cleanup workers, area residents, and others who were directly impacted by the attacks of September 11, 2001. The bill also reopens the September 11 Victim Compensation Fund of 2001 to provide compensation to anyone who was injured in the aftermath of the attacks, including persons who were injured during debris removal at the September 11 crash sites. The bill extends the deadline for making claims under the fund, and it provides certain liability protections for the City of New York and other entities that engaged in recovery efforts and debris removal following the September 11 attacks.

*Legislative History.*—On February 4, 2009, Representative Carolyn Maloney (D-NY) introduced H.R. 847, which was referred that same day to the Committees on Energy and Commerce and Judiciary. On February 9, 2009, the Committee on Energy and Commerce referred H.R. 847 to its Subcommittee on Health. On March 16, 2009, the Judiciary Committee referred H.R. 847 to its Crime and Immigration Subcommittees, and the Full Committee further referred the bill to its Constitution Subcommittee on March 27, 2009. The Immigration and Constitution Subcommittees held a joint hearing on H.R. 847 on March 31, 2009. A hearing on H.R. 847 was also held by the Health Subcommittee of the Energy and

Commerce Subcommittee on April 22, 2009. On June 24, 2009, Senator Kirsten Gillibrand (D-NY) introduced a companion bill, S. 1334, which saw no further action in the Senate. On July 29, 2009, the House Judiciary Committee marked up H.R. 847 and ordered it to be reported with amendments by a vote of 22 to 9. On March 16, 2010, the Subcommittee on Health of the Energy and Commerce Committee marked up H.R. 847 and ordered it to be reported with amendments by a vote of 25 to 8. The Energy and Commerce Committee marked up H.R. 847 on May 25, 2010, when it was ordered to be reported with amendments by a vote of 33 to 12. On July 22, 2010, the Judiciary and Energy and Commerce Committees each reported H.R. 847 out of committee. On July 29, 2010, H.R. 847 was considered under suspension of the rules, where it failed to be passed by the House by a vote of 255 to 159. On September 29, 2010, the House passed H.R. 847 under a rule by a vote of 268 to 160. H.R. 847 was received in the Senate on that same day. On December 9, 2010, the Senate considered a motion to invoke cloture on a motion to proceed to consideration of H.R. 847 in the Senate, but the cloture motion failed by a vote of 57 to 42. On December 22, 2010, the Senate reconsidered H.R. 847 and passed the bill with an amendment by unanimous consent. Later that same day, the House concurred in the Senate amendment to H.R. 847 by a vote of 206 to 60. H.R. 847 became Public Law 111-347 on January 2, 2011.

*H.R. 1029, the “Alien Smuggling and Terrorism Prevention Act of 2009”*

*Summary.*—H.R. 1029 provides strong new enforcement tools at the border, including increased criminal penalties for: alien smuggling; human trafficking and slavery; drug trafficking; and terrorism or espionage. The bill subjects smugglers and traffickers to even higher penalties for transporting persons under inhumane conditions, such as in an engine or storage compartment, or for causing serious bodily injury, or for endangering them by running the vessel transporting them to ground in order to escape apprehension. H.R. 1029 directs the Department of Homeland Security to check against all available terrorist watch lists alien smugglers and smuggled individuals who are interdicted at U.S. land, air, and sea borders. It also tightens proof requirements for distinguishing covert transportation of family members or others for humanitarian reasons, for which the penalties are appropriately less severe when truly justified.

*Legislative History.*—On February 12, 2009, Representative Baron Hill (D-IN) introduced H.R. 1029. On March 31, 2009, the House passed H.R. 1029 under suspension of the rules by voice vote. The bill was received in the Senate and referred to the Senate Committee on Judiciary on April 1, 2009 and no further action was taken on the bill. Certain portions of H.R. 1029 that dealt with alien smuggling and human trafficking by sea were added to H.R. 3619, the Coast Guard Authorization Act for Fiscal Years 2010 and 2011. H.R. 3619 became Public Law 111-281 on October 15, 2010.

*H.R. 1127—To extend certain immigration programs*

*Summary.*—H.R. 1127 extends two expiring immigration programs until September 30, 2009. The bill amends the Immigration and Nationality Act to extend the R visa special immigrant program for non-minister religious workers, which expired on March 6, 2009. The bill also amends the Immigration and Nationality Technical Corrections Act of 1994 to extend the Conrad 30 J-1 visa waiver program for doctors serving rural areas, which also expired on March 6, 2009.

*Legislative History.*—On February 23, 2009, Representative Zoe Lofgren (D-CA) introduced H.R. 1127. On March 4, 2009, the House passed the bill under suspension of the rules by voice vote. On March 11, 2009, the Senate passed the bill by unanimous consent. H.R. 1127 became Public Law 111-9 on March 20, 2009.

*H.R. 1425/S. 564, the “Wartime Treatment Study Act”*

*Summary.*—H.R. 1425 creates a fact-finding commission that would review the U.S. Government’s wartime treatment of European Americans and European Latin Americans during World War II. The bill also creates a second commission to review the U.S. Government’s refusal to allow Jewish and other refugees fleeing persecution or genocide in Europe entry to the United States between January 1, 1933 and December 31, 1945.

*Legislative History.*—On March 10, 2009, Representative Robert Wexler (D-FL) introduced H.R. 1425, which on the same day was referred to the Committee on the Judiciary. Also on the same day, Senator Russell Feingold (D-WI) introduced a companion bill, S. 564. On April 27, 2009, H.R. 1425 was referred to the Immigration Subcommittee, which reported the bill to the full Judiciary Committee on July 31, 2009 by a vote of 9 to 1. The Judiciary Committee marked up the bill on October 21, 2009 and ordered it to be reported by a vote of 19-7. No further action was taken on H.R. 1425 or S. 564.

*H.R. 2892, Extension of E-Verify and other expiring immigration programs (religious workers, EB-5 investor visas, and J-1 waiver for doctors serving in under-served areas) and elimination of widow penalty*

*Summary.*—H.R. 2892, the Department of Homeland Security Appropriations Act for 2010, extends several expiring immigration programs until September 30, 2012. Section 547 extends the E-Verify pilot program to electronically check the employment eligibility of job applicants; section 548 extends the EB-5 investor visa immigration program; and section 568 extends the R visa special immigrant program for non-minister religious workers and the Conrad 30 J-1 visa waiver program for doctors serving rural areas. The bill, in section 568, also amends the Immigration and Nationality Act to allow spouses and other close relatives of U.S. citizens or lawful permanent residents to complete the permanent resident process if the petitioning U.S. citizen or lawful permanent resident passes away before the process is completed.

*Legislative History.*—The immigration provisions in H.R. 2892 were added by the Senate and amended in a conference between the Houses. The House agreed to the conference report on October

15, 2009 by a vote of 307 to 114. The Senate agreed to the conference report on October 20, 2009 by a vote of 79 to 19. H.R. 2892 became Public Law 111–83 on October 28, 2009.

*H.R. 3290/S. 1736, the “September 11 Family Humanitarian Relief and Patriotism Act of 2009”*

*Summary.*—H.R. 3290 permits a defined set of surviving dependents of undocumented workers killed during the terrorist attacks of September 11, 2001, to apply for lawful permanent residence in the United States.

*Legislative History.*—On July 22, 2009, Representative Carolyn Maloney (D–NY) introduced H.R. 3290, which on the same day was referred to the Committee on the Judiciary. On October 1, 2009, Senator Frank Lautenberg (D–NJ) introduced a companion bill, S. 1736. Also on July 22, 2009, H.R. 3290 was referred to the Immigration Subcommittee, which reported the bill to the full Judiciary Committee on July 23, 2009 by a vote of 7 to 5. The Judiciary Committee marked up the bill on September 16, 2009 and ordered it to be reported by voice vote. No further action was taken on H.R. 3290 or S. 1736.

*H.R. 4748/S. 3467, the “Northern Border Counternarcotics Strategy Act of 2010”*

*Summary.*—H.R. 4748 requires the Director of National Drug Control Policy to submit to Congress a Northern Border Counternarcotics Strategy. The Strategy must set forth the Government’s strategy for preventing the illegal trafficking of drugs across the international border between the United States and Canada, state the specific roles and responsibilities of relevant federal agencies to implement that Strategy, and identify the resources required for implementation.

*Legislative History.*—On March 3, 2010, Representative William Owens (D–NY) introduced H.R. 4748, which on the same day was referred to the Committees on the Judiciary and Homeland Security. On May 5, 2010, H.R. 4748 was referred by the Committee on Homeland Security to the Subcommittee on Border, Maritime, and Global Counterterrorism, but no further committee action was taken on the bill. On June 9, 2010, Senator Charles Schumer (D–NY) introduced a companion bill, S. 3467. On July 27, 2010, the House passed H.R. 4748 under suspension of the rules by a vote of 413 to 0. On December 20, 2010, the Senate passed H.R. 4748 with an amendment by unanimous consent. On December 21, 2010, the House concurred in the Senate amendment under suspension of the rules by voice vote. H.R. 4748 became Public Law 111–356 on January 4, 2011.

*H.R. 4862, To permit Members of Congress to administer the oath of allegiance to applicants for naturalization, and for other purposes*

*Summary.*—H.R. 4862 amends the Immigration and Nationality Act to permit each applicant for naturalization to choose to have the oath of allegiance for naturalization administered by a Member of Congress, Delegate, or Resident Commissioner (Member). The bill limits the administration of the oath (1) by a Member of the

Senate to individuals who reside in the Senator's state; and (2) by a Member of the House to individuals who reside in the respective congressional district. The bill also: prohibits a Member from administering the oath during the 90-day period before any election in which the Member is a candidate; requires a Member to administer the oath only at times and places designated by the Secretary of Homeland Security; and prohibits a Member from administering the oath during any period in which exclusive authority to administer it may be exercised by an eligible court for the person concerned, unless the court has waived such exclusive authority.

*Legislative History.*—On March 16, 2010, Representative José Serrano (D-NY) introduced H.R. 4862, which was referred to the Committee on the Judiciary that same day. On April 26, 2010, H.R. 4862 was referred to the Immigration Subcommittee, but no further Committee action was taken on the bill. On September 15, 2010, the House passed the bill under suspension of the rules by voice vote. The bill was received in the Senate on September 16, 2010, but no further action was taken on the bill.

*H.R. 5138/H.R. 1623, the “International Megan’s Law of 2010”*

*Summary.*—H.R. 5138 contains provisions designed to protect children from sexual exploitation by restricting or monitoring the international travel of certain sex offenders who pose a risk of committing a sex offense against a minor while traveling. The bill introduces new reporting requirements for registered sex offenders who wish to depart from or return to the United States. The knowing failure to report such travel is punishable by a fine and/or prison term of up to 10 years. The bill also requires diplomatic or consular missions in each foreign country to establish and maintain a countrywide sex offender registry for sex offenders from the U.S. who temporarily or permanently reside in such country. H.R. 5138 directs the President to establish the International Sex Offender Travel Center, headed by U.S. Immigration and Customs Enforcement, to coordinate the travel notification requirement. The Travel Center is authorized to determine whether a sex offender who has provided advance notice of travel is a “high interest registered sex offender” and to provide advance notice of such travel to destination countries. The traveler must be informed whether the destination country will be notified and must be provided an opportunity to appeal the high interest registered sex offender determination. The bill additionally authorizes the Secretary of State to revoke the passport or passport card of a person who has been convicted in a foreign jurisdiction of a sex offense and to limit to one year the period of validity for passports issued to persons designated as high interest registered sex offenders. The bill amends the minimum standards in the Trafficking Victims Protection Act of 2000 to include consideration of whether a particular government cooperates with other governments in the investigation and prosecution of severe forms of trafficking in persons, including cases involving nationals of that country who are suspected of engaging in severe forms of trafficking in persons in another country.

*Legislative History.*—On March 19, 2009, Representative Christopher Smith (R-NJ) introduced H.R. 1623, the International Megan’s Law of 2009, which was on the same day referred to the

Committees on the Judiciary and Foreign Affairs. On April 27, 2009, the bill was referred to the Judiciary Committee's Immigration and Crime Subcommittees, but no further committee action was taken on the bill. On April 26, 2010, Representative Christopher Smith introduced H.R. 5138, the International Megan's Law of 2010, which was on the same day referred to the Committees on the Judiciary and Foreign Affairs. The Committee on Foreign Affairs marked up the bill on April 28, 2010 and ordered it to be reported by voice vote. On June 15, 2010, the bill was referred to the Judiciary Committee's Crime Subcommittee, but the Committee discharged the bill on July 27, 2010. Also on July 27, 2010, the House passed H.R. 5138, as amended, under suspension of the rules by voice vote. The bill was received in the Senate on July 28, 2010 but no further action was taken on the bill.

*H.R. 5281/H.R. 1751/H.R. 6497/S. 729/S. 3827/S. 3962/S. 3963/S. 3992, the "Development, Relief, and Education for Alien Minors (DREAM) Act of 2010"*

*Summary.*—The DREAM Act authorizes the Secretary of DHS to cancel the removal of, and adjust to conditional nonimmigrant status, an alien who: entered the U.S. before his or her 16th birthday; has been present in the U.S. for at least five years on the date of enactment; is under age 30 on the date of enactment; is a person of good moral character; is not inadmissible or deportable under specified grounds of the Immigration and Nationality Act; and has been admitted to an institution of higher education or has earned a high school diploma or general education development certificate in the United States. An alien is also required to: submit biometric and biographic data and pass security and law enforcement background checks; register for Selective Service; undergo a medical examination; and meet other specific requirements. For an alien who meets all of the above requirements, the bill establishes an initial five-year period of conditional nonimmigrant status, which can be revoked if the alien violates any requirement for such status. The alien can extend the status for an additional five-year period if the alien continues to meet the above requirements and has either completed at least two years of higher education (or received a degree from an Institution of Higher Education) or has completed at least two years in the Armed Forces. The bill further allows an alien who has been on conditional nonimmigrant status for 10 years, without violating such status, to adjust his or her status to that of an alien lawfully admitted for permanent residence. To obtain permanent residency, the alien would need to satisfy citizenship and federal tax requirements and again pass security and law enforcement background checks. The bill further allows an alien who has adjusted status to permanent residency and has been in such status for three years to apply for naturalization.

*Legislative History.*—On March 26, 2009, Representative Howard Berman (D-CA) introduced H.R. 1751, which was referred to the Committee on the Judiciary and the Committee on Education and Labor on the same day. Also on the same day, Senator Richard Durbin (D-IL) introduced a companion bill, S. 729. Senator Durbin subsequently filed four different versions of the bill: S. 3827 on September 22, 2010; S. 3962 and S. 3963 on November 17, 2010;

and S. 3992 on November 30, 2010. On December 6, 2010, a motion to proceed was filed on S. 3992, along with a motion to invoke cloture on the motion to proceed. On December 7, 2010, Representative Berman filed a new version of the DREAM Act, H.R. 6497, in the House. On December 8, 2010, the House voted to add the provisions contained in H.R. 6497 to an unrelated bill, H.R. 5281, which had already passed the House and been returned by the Senate with an amendment. The House voted to concur in the Senate amendment with an amendment—the DREAM Act provisions in H.R. 6497—by a vote of 216 to 198. On December 9, 2010, the Senate received H.R. 5281 as amended. That same day, the Senate voted to table the motion to proceed on S. 3992 by a vote of 59 to 40. On December 18, 2010, the Senate failed to invoke cloture on a motion to agree to the House amendment to H.R. 5281 by a vote of 55 to 41. No further action was taken on the bill.

*H.R. 5283/S. 3411, the “Help HAITI Act of 2010”*

*Summary.*—H.R. 5283 authorizes the Secretary of the Department of Homeland Security (DHS) to provide permanent resident status to Haitian orphans who were granted admission into the United States pursuant to the humanitarian parole policy for such orphans announced on January 18, 2010. These orphans were in the process of being adopted by U.S. citizens when an earthquake hit Haiti on January 12, 2010. DHS used emergency parole procedures to bring those orphans to the U.S. and expedite their reunification with their prospective-adoptive families. The bill provides these children with permanent immigration status.

*Legislative History.*—On May 12, 2010, Representative Jeff Fortenberry (R-NE) introduced H.R. 5283, which was referred to the Committee on the Judiciary on the same day. On May 25, 2010, Senator Kirsten Gillibrand (D-NY) introduced a companion bill, S. 3411. S. 3411 was referred to the Senate Judiciary Committee but no further action was taken on the bill. On June 15, 2010, H.R. 5283 was referred to the Immigration Subcommittee, but no further Committee action was taken on the bill. On July 20, 2010, the House passed H.R. 5283 under suspension of the rules by voice vote. On August 4, 2010, the Senate passed H.R. 5283 with an amendment by unanimous consent. On December 1, 2010, the House concurred in the Senate amendment to H.R. 5283 under suspension of the rules by voice vote. H.R. 5283 became Public Law 111-293 on December 9, 2010.

*H.R. 5532, the “International Adoption Harmonization Act of 2010”*

*Summary.*—H.R. 5532 amends the Immigration and Naturalization Act (INA) to harmonize its international adoption provisions. Currently, the INA contains two age requirements related to the adoption of foreign children. The general rule is that an adoption must be finalized before a child turns 16 in order for the child to qualify for legal status. For any siblings of such a child, the adoption must be finalized before the sibling’s 18th birthday, but only if the sibling comes from a country that has not signed the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague Convention). The age cut-off for siblings from signatory countries is the child’s 16th birthday. H.R. 5532

harmonizes these provisions by applying the more generous 18-year-old age cut-off to all foreign children adopted by U.S. citizens, irrespective of whether they are a sibling of another adopted child or whether their home country is a signatory to the Hague Convention. Similarly, H.R. 5532 also harmonizes vaccination requirements for adopted children by expanding a documentation exemption, which was previously available only to children from countries that had failed to sign the Hague Convention, to children from signatory countries as well.

*Legislative History.*—On June 15, 2010, Representative Zoe Lofgren (D-CA) introduced H.R. 5532, which was referred to the Committee on the Judiciary that same day. On July 20, 2010, the House passed the bill under suspension of the rules by voice vote. The bill was received in the Senate on July 21, 2010, but no further action was taken on the bill.

*H.R. 6397, the “Marine Sergeant Michael H. Ferschke, Jr. Memorial Act”*

*Summary.*—Under current immigration law, when a marriage takes place between two persons who cannot both be physically present during the ceremony, the marriage is not valid unless and until it is consummated. H.R. 6397 amends the Immigration and Nationality Act to create a narrow exception in cases where the failure to consummate the marriage is caused by physical separation due to the active-duty military service abroad of one of the parties to the marriage.

*Legislative History.*—On November 15, 2010, Representative John J. Duncan, Jr. (R-TN) introduced H.R. 6397, which was referred to the Committees on the Judiciary and Budget that same day. Also on the same day, the House passed the bill under suspension of the rules by voice vote. The bill was received in the Senate on November 17, 2010, but no further action was taken on the bill.

*S. 1023/H.R. 2935, the “Travel Promotion Act of 2009”*

*Summary.*—S. 1023 establishes a nonprofit corporation, the “Corporation for Travel Promotion,” to promote the United States as a tourist destination for foreign tourists. The bill authorizes up to \$10 million in seed money in fiscal year 2010, and allows in following fiscal years federal matching funds of up to \$100 million per year if matched with corporate contributions. The federal share would come from fees assessed by the Secretary of Homeland Security on users of the Visa Waiver Program, which allows citizens of specified countries (including many European countries, Japan, South Korea, and Australia) to travel to the United States for up to 90 days without obtaining visas.

*Legislative History.*—Senator Byron Dorgan (D-ND) introduced S. 1023 on May 12, 2009. On June 18, 2009, Representative Bill Delahunt introduced a companion bill, H.R. 2935, which on the same day was referred to the Committees on Energy and Commerce, the Judiciary, and Homeland Security. H.R. 2935 was referred to subcommittees in each committee of jurisdiction, but no further action was taken on the bill. On September 9, 2009, the Senate passed S. 1023 by a vote of 79 to 19. On September 23, 2009, the House returned S. 1023 to the Senate via H. Res. 1653,

which stated that the bill contravened Art. 1, Sec. 7 of the U.S. Constitution. Similar provisions to those in S. 1023/H.R. 2935 were thereafter added by the House as section 9 of H.R. 1299, the United States Capitol Police Administrative Technical Corrections Act of 2009. H.R. 1299 became Public Law 111–145 on March 4, 2010.

*S. 1376, the “International Adoption Simplification Act”*

*Summary.*—S. 1376 restores two international adoption exemptions to the Immigration and Nationality Act (INA) that were inadvertently eliminated when the United States became a signatory to the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague Convention). Prior to the enactment of this bill, the law generally made U.S. permanent residency available to foreign children adopted by U.S. citizens while such children were less than 16 years of age. An exemption to this 16-year age cut-off existed for siblings of such adopted children, but this exemption was available only in relation to countries that had failed to sign the Hague Convention. S. 1376 harmonizes the international adoption provisions in the INA by expanding the sibling-adoption exemption to children adopted from signatories to the Hague Convention. Similarly, S. 1376 also expands a vaccination documentation exemption, which was previously available only to children from non-signatory countries, to children from signatory countries as well.

*Legislative History.*—Senator Amy Klobuchar (D–MN) introduced S. 1376 on June 25, 2009. On July 21, 2010, the Senate passed the bill by unanimous consent. On November 15, 2010, the House passed the bill under suspension of the rules by voice vote. S. 1376 became Public Law 111–287 on November 30, 2010.

*S. 1472, the “Human Rights Enforcement Act of 2009”*

*Summary.*—S. 1472 establishes a new section within the Department of Justice’s Criminal Division to enforce human rights laws. The bill also strengthened the provision in the Immigration and Nationality Act that makes the commission of acts of genocide a ground of inadmissibility by clarifying that the provision applies to acts of genocide wherever and by whomever committed.

*Legislative History.*—Senator Richard Durbin (D–IL) introduced S. 1472 on July 20, 2009. On November 21, 2009, the Senate passed the bill by unanimous consent. On December 15, 2009, the House passed the bill under suspension of the rules by a vote of 416 to 3. S. 1472 became Public Law 111–122 on December 22, 2009.

*S. 1599, the “Reserve Officers Association Modernization Act of 2009”*

*Summary.*—S. 1599 amends title 36, United States Code, to revise the federal charter of the Reserve Officers Association of the United States. The bill revises the federal charter by: making the president-elect of the Association an officer and including such person on the national executive committee as a non-voting member; amending the number of national executive committee members who may be officers of the Association and who may serve on the

national executive committee; amending provisions that regulate who may serve as officers of the Association; declaring that the officers shall take office at the Association's national convention; requiring the Association's judge advocate to be appointed by the national executive committee; allowing for appointment by the national executive committee of any other national officers specified in the Association's constitution; revising the requirement that minutes be kept of the proceedings of the national council; and eliminating specification of the national council and replacing it with other national entities of the Association.

*Legislative History.*—Senator Patrick Leahy (D–VT) introduced S. 1599 on August 6, 2009. On September 24, 2009, the Senate passed the bill by unanimous consent. On September 25, 2009, S. 1599 was referred to the Committee on the Judiciary. On October 19, 2009, the bill was referred to the Immigration Subcommittee, but no further action was taken on the bill by the Judiciary Committee. On November 19, 2009, the House passed the bill under suspension of the rules by a vote of 425 to 0. S. 1599 became Public Law 111–113 on December 14, 2009.

*S. 1774/H.R. 3182, For the relief of Hotaru Nakama Ferschke*

*Summary.*—S. 1774/H.R. 3182 provides lawful permanent residency to beneficiary Hotaru Nakama Ferschke.

*Legislative History.*—On July 10, 2009, Representative John J. Duncan, Jr. (R–TN) introduced H.R. 3182, which on the same day was referred to Committee on the Judiciary. On July 20, 2009, H.R. 3182 was referred to the Immigration Subcommittee, but no further action was taken on the bill. On October 13, 2009, Senator Jim Webb (D–VA) introduced a companion bill, S. 1774, which was referred to the Senate Judiciary Committee on the same day. On December 3, 2010, the Senate passed S. 1774 with an amendment by unanimous consent. The House received S. 1774 on December 7, 2010 and passed the bill on December 15, 2010 under suspension of the rules by voice vote. S. 1774 became Private Law 111–2 on December 22, 2010.

*S. 4010/H.R. 698/S. 124—For the relief of Shigeru Yamada*

*Summary.*—S. 4010 /H.R. 698/S. 124 provides lawful permanent residency to beneficiary Shigeru Yamada.

*Legislative History.*—On January 6, 2009, Senator Dianne Feinstein (D–CA) introduced S. 124, which was referred to the Senate Committee on the Judiciary on the same day. On January 26, 2009, Representative Bob Filner (D–CA) introduced a companion bill, H.R. 698, which on the same day was referred to the Committee on the Judiciary. On March 10, 2009, H.R. 698 was referred to the Immigration Subcommittee, but no further committee action was taken on the bill. On December 3, 2010, the Senate passed S. 124 without amendment by unanimous consent. S. 124 was received in the House on December 7, 2010, but no further action was taken on the bill. On December 6, 2010, Senator Feinstein introduced S. 4010, which was similar in substance to S. 124. On that same day, the Senate passed S. 4010 without amendment by unanimous consent. The House received S. 4010 on December 7, 2010 and passed the bill on December 15, 2010 under suspension of the rules by

voice vote. S. 4010 became Private Law 111–1 on December 22, 2010.

*H.J. Res. 26/S.J. Res. 12—Proclaiming Casimir Pulaski to be an honorary citizen of the United States posthumously*

*Summary.*—Casimir Pulaski was a citizen of Poland who fought alongside American colonists during the American Revolution. He quickly rose to the rank of brigadier general of the American cavalry and led a courageous charge at the Battle of Brandywine that averted defeat and saved the life of George Washington. Pulaski is often referred to as the “Father of the American Cavalry.” He died in battle fighting for the nation’s independence before he was able to become a U.S. citizen. H.J. Res. 26 posthumously provides Pulaski with honorary citizenship.

*Legislative History.*—On March 2, 2009, Representative Dennis Kucinich (D–OH) introduced H.J. Res. 26, which on the same day was referred to the Committee on the Judiciary. Also on the same day, Senator Richard Durbin (D–IL) introduced a companion bill, S.J. Res. 26. On March 16, 2009, H.J. Res. 26 was referred to the Immigration Subcommittee, which reported the bill to the full Judiciary Committee on July 23, 2009 by a vote of 10 to 1. The Judiciary Committee took no further action on the bill. On October 8, 2009, the House passed H.J. Res. 26 under suspension of the rules by a vote of 422 to 0. H.J. Res. 26 was received in the Senate on that same day. On October 22, 2009, the Senate passed H.J. Res. 26 by unanimous consent. H.J. Res. 26 became Public Law 111–94 on November 6, 2009.

#### OVERSIGHT ACTIVITIES

*Oversight Hearing on the “Treatment of Latin Americans of Japanese Descent, European Americans, and Jewish Refugees During World War II”*

*Summary.*—This March 19, 2009, hearing examined the mistreatment of Latin Americans of Japanese descent, European Americans, and Jewish refugees during World War II by the U.S. Government. The purpose of the hearing was to explore the facts and listen to the history in order to determine whether it would be appropriate to move legislation authorizing the creation of commissions to further report on this issue.

Witnesses at this hearing were: Daniel Masterson, Professor of Latin American History, U.S. Naval Academy; Grace Shimizu, Director, Japanese Peruvian Oral History Project; Libia Yamamoto, Former Japanese of Latin American Descent Internee; John Christgau, Author of “Enemies: World War II Alien Internment”; Karen Ebel, President, German American Internee Coalition; Heidi Gurcke Donald, Board and Founding Member, German American Internee Coalition; John Fonte, Director of Center for American Common Culture and Senior Fellow at Hudson Institute; Valery Bazarov, Director of Location and Family History Service, Hebrew Immigrant Aid Society; David A. Harris, Executive Director, American Jewish Committee; Leo Bretholz, Author of “Leap Into Darkness”; Michael Horowitz, Senior Fellow, Hudson Institute.

*Joint Hearing on H.R. 847, the “James Zadroga 9/11 Health and Compensation Act of 2009”*

*Summary.*—This March 21, 2009, hearing focused on the experience of the Victim Compensation Fund (VCF) established by Congress to provide compensation to survivors of persons killed, or to those who were injured, in the immediate aftermath of the attacks of September 11, 2001. The hearing also looked at the current problems arising from injuries sustained by first responders, construction workers, local residents, and other individuals who sustained injuries that did not become manifest until after the deadline for seeking compensation from the VCF. This hearing highlighted the need to reopen the VCF and consider H.R. 847’s approach to this end.

The witnesses were: Kenneth Feinberg, Former Special Master, Victim Compensation Fund; Barbara Burnette, Detective, New York Police Department; Christine LaSala, Chief Executive Officer, World Trade Center Captive Insurance Fund; James Melius, M.D., Administrator, N.Y.S. Laborers’ Health and Safety Trust Fund; Michael Cardozo, Corporation Counsel, City of New York; Ted Frank, American Enterprise Institute; Rich Wood, President, Plaza Construction Corporation.

*Oversight Hearing on the “United States Citizenship and Immigration Services”*

*Summary.*—This March 23, 2010, hearing examined the funding structure for the U.S. Citizenship and Immigration Services (USCIS) and the impact that it has on immigration policies, as well as the status of USCIS’s efforts to transform its business and technology processes.

The witnesses were: Hon. Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services; Frank W. Deffer, Assistant Inspector General for IT Audits, Office of the Inspector General, Department of Homeland Security; Susan J. Irving, Ph.D., Director, Federal Budget Analysis, U.S. Government Accountability Office.

*Joint Oversight Hearing on “The Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws”*

*Summary.*—This April 2, 2009, hearing focused on the public safety and civil rights concerns that arise when state and local law enforcement get involved in immigration enforcement, most commonly through an agreement with the U.S. Immigration and Customs Enforcement under § 287(g) of the Immigration and Nationality Act. In particular, this hearing examined the risk of racial profiling and the erosion of trust between the police and local communities that can occur when states and localities attempt to enforce immigration laws without appropriate and necessary safeguards.

The witnesses were: Julio Cesar Mora, victim of racial profiling, Avondale, AZ; Antonio Ramirez, Frederick, Maryland Community Advocate; Deborah Weissman, Reef C. Ivey II Distinguished Professor of Law, Director of Clinical Programs, University of North Carolina at Chapel Hill School of Law; Ray Tranchant, Operations

Director, Advanced Technology Center, Virginia Beach, VA and Adjunct Professor at Cambridge College, Cambridge, MA, Chesapeake Campus and Bryant and Stratton College in Virginia Beach, VA; David Harris, Professor of Law, University of Pittsburgh School of Law; Hubert Williams, President, Police Foundation; George Gascon, Chief, Mesa Police Department, Mesa, AZ; Kris Kobach, Professor of Law, University of Missouri—Kansas City School of Law.

*Oversight Hearing on The Executive Office for Immigration Review*

*Summary.*—This June 17, 2010, hearing examined the Executive Office for Immigration Review’s efforts to improve the Immigration Courts and Board of Immigration Appeals, as well as the challenges that the agency faces as immigration enforcement continues to rise.

The witnesses were: Juan P. Osuna, Associate Deputy Attorney General, Office of Immigration Litigation, U.S. Department of Justice; Karen T. Grisez, Chair, Commission on Immigration, American Bar Association; Russell R. Wheeler, Ph.D., President, The Governance Institute and Visiting Fellow, The Brookings Institution; Hon. Dana Leigh Marks, President, National Association of Immigration Judges; Hon. Mark H. Metcalf, Former Immigration Judge.

*Oversight Hearing on The Ethical Imperative for Reform of our Immigration System*

*Summary.*—This July 14, 2010, hearing brought together prominent leaders from three traditionally conservative religious denominations to present the moral argument for a just and humane overhaul of our country’s immigration laws.

The witnesses were: Richard D. Land, Ph.D., President, Ethics and Religious Liberty Committee of the Southern Baptist Convention; Gerald F. Kicanas, D.D., Bishop, Archdiocese of Tucson, Arizona and Vice-President of the U.S. Conference of Catholic Bishops; Mathew D. Staver, J.D., Founder and Chairman, Liberty Counsel and Dean and Professor of Law, Liberty University School of Law; James R. Edwards, Jr., Ph.D., Fellow, Center for Immigration Studies.

*Oversight Hearing on Protecting America’s Harvest*

*Summary.*—This September 24, 2010, hearing explored labor needs in the agricultural sector, attempts to recruit U.S. workers for agricultural labor, the lack of reliable and efficient avenues to legally hire foreign workers, and potential solutions.

The witnesses were: This hearing explored labor needs in the agricultural sector, attempts to recruit U.S. workers for agricultural labor, the lack of reliable and efficient avenues to legally hire foreign workers, and potential solutions.

*Oversight Hearing on Role of Immigration in Strengthening America’s Economy*

*Summary.*—This September 30, 2010, hearing brought together prominent political and business leaders to explore the rationale and framework for comprehensive immigration reform presented by the “Partnership for a New American Economy.”

The witnesses were: Hon. Michael R. Bloomberg, Mayor, City of New York; Rupert Murdoch, Chairman and CEO, News Corporation; Jeff Moseley, President and CEO, The Greater Houston Partnership; Steven A. Camarota, Director of Research, Center for Immigration Studies.

#### OVERSIGHT LETTERS

##### *Request for Investigation into Civil Rights Violations in Maricopa County, Arizona*

On February 12, 2009, Chairman John Conyers, Immigration Subcommittee Chairwoman Zoe Lofgren, Constitution Subcommittee Chairman Jerrold Nadler, and Crime Subcommittee Chairman Bobby Scott, wrote to Attorney General Eric Holder, Jr. and Secretary of Homeland Security Janet Napolitano concerning allegations of misconduct on the part of Maricopa County, Arizona, Sheriff Joe Arpaio. The letter requested that the Special Litigation and Criminal Sections of the Department of Justice Civil Rights Division undertake an investigation into actions taken by the Maricopa County Sheriff's Office and urged the Secretary of Homeland Security to review the agency's 287(g) agreement with Maricopa County.

##### *H-2A Regulations*

On May 5, 2009, Chairman John Conyers, Immigration Subcommittee Chairwoman Zoe Lofgren, Foreign Affairs Chairman Howard Berman, Education and Labor Chairman George Miller, and Representative Luis Gutierrez, wrote to Secretary of Labor Hilda Solis concerning H-2A regulations that weaken enforcement and government oversight in the program and suppress wages and weaken other worker protections. The letter urged the Secretary to immediately suspend the existing regulations.

On October 20, 2009, Immigration Subcommittee Chairwoman Zoe Lofgren and Foreign Affairs Chairman Howard Berman, wrote to Secretary of Labor Hilda Solis and the Office of Policy Development and Research Administrator Thomas Down, largely in support of proposed modifications to the H-2A temporary foreign agricultural worker regulations.

##### *Prosecution of Undocumented Workers Arrested in the Postville, Iowa Immigration Raid*

On May 12, 2009, Immigration Subcommittee Chairwoman Zoe Lofgren wrote to Attorney General Eric Holder, urging the agency to review and reconsider the cases of 270 undocumented workers arrested in the May 2008 immigration raid in Postville, Iowa.

##### *Vigorous Enforcement of Anti-Trafficking Legislation to Combat Modern-Day Slavery*

On May 14, 2009, Chairman John Conyers and Immigration Subcommittee Chairwoman Zoe Lofgren, together with Representatives Howard Berman, George Miller, Jerrold Nadler, Yvette D. Clarke, Neil Abercrombie, Donald Payne, Luis Gutierrez, Jeff Fortenberry, Daniel E. Lungren, Ileana Ros-Lehtinen, Michael Simpson, Carolyn Maloney, Robert C. "Bobby" Scott, Debbie Wasserman Schultz,

Albio Sires, Jim Moran, and Sheila Jackson Lee, wrote to Director Robert M. Mueller, III, of the Federal Bureau of Investigations to urge the Bureau to continue and intensify its efforts to combat modern slavery in America and abroad. The letter highlighted and clarified key provisions of the William Wilberforce Trafficking Victims Reauthorization Act of 2008, enacted into law with bipartisan support in December 2008.

*Budgeting for U.S. Citizenship and Immigration Services*

On June 5, 2009, Immigration Subcommittee Chairwoman Zoe Lofgren wrote Appropriations Chairman David Obey and Appropriations Subcommittee on Homeland Security Chairman David Price to express support for the President's budgetary request for \$206 million in direct appropriations to U.S. Citizenship and Immigration Services.

*Views on Department of Homeland Security Appropriations Provisions*

On June 11, 2009, Chairman John Conyers and Immigration Subcommittee Chairwoman Zoe Lofgren, wrote to Appropriations Chairman David Obey to express concerns about expanding or mandating the current E-Verify program prematurely or through the appropriations process. The letter expressed support for a short term extension of the current voluntary E-Verify program while work proceeds on more comprehensive efforts.

On September 11, 2009, Chairman John Conyers and Immigration Subcommittee Chairwoman Zoe Lofgren wrote Appropriations Chairman David Obey and Appropriations Subcommittee on Homeland Security Chairman David Price regarding provisions in the Senate version of the Department of Homeland Security Appropriations Act for Fiscal Year 2010 that fall within the jurisdiction of the Judiciary Committee. The letter expressed opposition to Senate amendments pertaining to a mandatory expansion of the E-Verify pilot program, a prohibition on funds being used to implement changes to the "no match" rule, and an expansion of the current statutory mandate to complete fencing on our international land borders. The letter also expressed support for several provisions, including extended authorization for the Special Immigrant Non-Minister Religious Worker and the Conrad State 30 J-1 Visa Waiver Programs for doctors who serve in medically underserved areas, a fix to the so-called "widow penalty", and a permanent reauthorization of the EB-5 Immigrant Investor regional center pilot program.

On June 24, 2010, Chairman John Conyers and Immigration Subcommittee Chairwoman Zoe Lofgren, wrote to Appropriations Subcommittee on Homeland Security Chairman David Price to express concerns about expanding or mandating the current E-Verify program prematurely or through the appropriations process. The letter advised that E-Verify remain in its current form until further comprehensive efforts and changes can be made to the program.

*Conditions of Confinement for Immigration Detainees and Efforts at Reforms*

On September 25, 2009, Immigration Subcommittee Chairwoman Zoe Lofgren wrote to Secretary of Homeland Security Janet Napolitano and Assistant Secretary John Morton to request a copy of the report submitted to the agency by Dora Schriro prior to her departure in order to become Commissioner of the New York City Department of Corrections.

On April 9, 2010, Chairman John Conyers wrote to Assistant Secretary of Homeland Security John Morton to request copies of investigative reports prepared in connection with allegations that U.S. Immigration and Customs Enforcement employees hid the truth of immigrant detainee custodial deaths.

On May 5, 2010, Immigration Subcommittee Chairwoman Zoe Lofgren wrote to Homeland Security Inspector General Richard Skinner to request copies of investigative reports pertaining to the in-custody deaths of Arnulfo Rodriguez-Solis and Evelyn Obey.

On May 5, 2010, Immigration Subcommittee Chairwoman Zoe Lofgren wrote to Assistant Secretary of Homeland Security John Morton to request a copy of an investigative report pertaining to the in-custody death of Ernesto Gomez-Vasquez.

On July 2, 2010, Immigration Subcommittee Chairwoman Zoe Lofgren wrote to Assistant Secretary of Homeland Security John Morton regarding allegations of sexual abuse of women detainees at the T. Don Hutto Detention Center, operated by the Corrections Corporation of America (CCA). The letter expressed support for reforms that CCA had agreed to make to all of its immigration detention facilities, in order to make them more appropriate for a civilly-detained population. The letter expressed continuing concern regarding the conditions of confinement within many of our detention facilities and urged the Department to implement these reforms throughout the detention system, where appropriate.

*USCIS Fee Increases*

On October 7, 2009, Immigration Subcommittee Chairwoman Zoe Lofgren wrote to Director of U.S. Citizenship and Immigration Services Alejandro Mayorkas to express concern that the agency was considering another fee increase for immigration and naturalization applications. The letter requested that USCIS consult with the Committee before considering another fee increase and expressed the view that any further fee increases be justified by both financial need and a demonstrated ability by USCIS to fulfill its promises to improve the provision of services.

*Refugee Consultation Follow-up*

On October 13, 2009, Chairman John Conyers and Immigration Subcommittee Chairwoman Zoe Lofgren wrote to Secretary of State Hillary Rodham Clinton to thank her for participating in the refugee consultation and to highlight the Administration's commendable actions to systemically improve our refugee admissions program. The letter also reiterated views expressed during the consultation about various refugee concerns, including continued shortfalls in domestic funding for resettled refugees, delays in exercising waiver or exemption authority for material support and re-

lated bars to admission, serious unmet refugee resettlement needs in Africa, and particular populations of concern with respect to international protection in countries of first asylum or resettlement.

*Alleged Terrorist Activity*

On October 20, 2009, Chairman John Conyers and Ranking Member Lamar Smith wrote to Attorney General Eric Holder and Secretary of Homeland Security Janet Napolitano to request the immigration files of five persons recently arrested in connection with alleged terrorist activities in the United States.

*Abuses and Violations in the H-1B Visa Program*

On November 12, 2009, Chairman John Conyers and Immigration Subcommittee Chairwoman Zoe Lofgren wrote to Attorney General Eric Holder, Secretary of Homeland Security Janet Napolitano, and Secretary of Labor Hilda Solis, regarding abuses and violations in the H-1B visa program, as detailed in media reports pertaining to hundreds of Filipino nationals brought to the United States on H-1B visa to work as public school teachers in Louisiana. The letter urged all three Departments to review the reports of abuse, as appropriate.

*USCIS Policy Guidance on Implementing the So-Called “Widow Penalty” Fix*

On June 1, 2010, Immigration Subcommittee Chairwoman Zoe Lofgren wrote to Director of U.S. Citizenship and Immigration Services Alejandro Mayorkas commenting on a recent policy guidance pertaining to the so-called “Widow Penalty” fix. The letter requested that the policy clarify additional areas of concern.

*The Humanitarian Crisis Left Behind by the Haitian Earthquake*

On January 13, 2010, Chairman John Conyers, Immigration Subcommittee Chairwoman Zoe Lofgren, and Representatives Alcee Hastings, Ileana Ros-Lehtinen, Lincoln Diaz-Balart, and Mario Diaz-Balart, wrote to President Barack Obama to express gratitude for the emergency response efforts undertaken by the Department of Homeland Security in light of the devastating earthquake that struck Haiti’s capital city of Port-au-Prince. The letter requested that the Administration exercise its authority to designate Haiti for Temporary Protected Status pursuant to section 244 of the Immigration and Nationality Act.

On January 28, 2010, Chairman John Conyers, Ranking Member Lamar Smith, Foreign Affairs Chairman Howard Berman, Foreign Affairs Ranking Member Ileana Ros-Lehtinen, and Immigration Subcommittee Chairwoman Zoe Lofgren, wrote to Secretary of State Hillary Rodham Clinton pertaining to the ongoing protection needs of Haitian children who were adopted, or who were in the process of being adopted, by U.S. citizens prior to the January 12, 2010, earthquake. The letter urged the State Department to develop a plan to provide for the security and humanitarian needs of these children until such time as they are safely with their U.S. citizen parents in the United States.

On March 8, 2010, Chairman John Conyers, Foreign Affairs Chairman Howard Berman, Foreign Affairs Ranking Member Ileana Ros-Lehtinen, Immigration Subcommittee Chairwoman Zoe Lofgren, and Representatives Yvette Clarke, Lincoln Diaz-Balart, Mario Diaz-Balart, and Anh “Joseph” Cao, wrote to Secretary of Homeland Security Janet Napolitano to commend the significant humanitarian actions already taken by the Department of Homeland Security since the January 12, 2010, earthquake in Haiti. The letter additionally requested that the Department use its parole authority to allow Haitians with an already approved, legal method of entering the United States to be reunited with close family members in the United States while awaiting visa availability. Expediting reunification in this manner would bring families together without risking a dangerous maritime migration, and would increase the flow of remittances back to Haiti to assist in that country’s rebuilding effort.

On July 26, 2010, Chairman John Conyers and Immigration Subcommittee Chairwoman Zoe Lofgren wrote to Director of U.S. Citizenship and Immigration Services Alejandro Mayorkas to commend the agency’s implementation of Temporary Protected Status for Haitians already in the United States. The letter encouraged USCIS, when drafting the final rule adjusting applications fees, to include the humanitarian parole application form among the list of forms eligible for an application fee waiver.

*Administrative Actions to Maximize Efficiencies*

On June 8, 2010, Immigration Subcommittee Chairwoman Zoe Lofgren wrote to Director of U.S. Citizenship and Immigration Services Alejandro Mayorkas urging the agency to take administrative actions to maximize efficiencies. The letter requested that the agency consider actions including extending employment authorization to spouses of certain employment-based visa holders, expanding the use of premium processing for various applications and petitions, and expanding the use of multi-year employment authorization documents.

*Lethal Use of Force Along the Southwest Border*

On July 2, 2010, Immigration Subcommittee Chairwoman Zoe Lofgren wrote to Assistant Secretary of Homeland Security Janet Napolitano regarding the recent deaths of two Mexican nationals along our southwest border following the use of force by Department of Homeland Security personnel. The letter expressed support for ongoing investigations into the deaths by federal and local authorities. The letter also encouraged the Department to review policies, procedures, and training protocols pertaining to the use of forces along our land borders, and to utilize the expertise of the Department’s Civil Rights and Civil Liberties Officer and Office of Health Affairs in such a review.

*Confusion Surrounding the Ability of Local Law Enforcement Agencies to “Opt Out” of Secure Communities*

On July 27, 2010, Immigration Subcommittee Chairwoman Zoe Lofgren wrote to Assistant Secretary of Homeland Security Janet Napolitano and Attorney General Eric Holder pertaining to the cur-

rent deployment of ICE's Secure Communities program. The letter requested a clear explanation of how local law enforcement agencies may "opt out" of Secure Communities by having fingerprints they collect and submit to the State Identification Bureaus checked against criminal, but not immigration, databases.

## TASK FORCE ON JUDICIAL IMPEACHMENT

ADAM B. SCHIFF, California, *Chairman*

SHEILA JACKSON LEE, Texas  
WILLIAM D. DELAHUNT, Massachusetts  
STEVE COHEN, Tennessee  
HENRY C. "HANK" JOHNSON, JR., Georgia  
PEDRO PIERLUISI, Puerto Rico  
CHARLES A. GONZALEZ, Texas  
BOB GOODLATTE, Virginia  
F. JAMES SENSENBRENNER, JR.,  
Wisconsin  
DANIEL E. LUNGRON, California  
J. RANDY FORBES, Virginia  
LOUIE GOHMERT, Texas  
H. Res. 1031, Impeaching G. Thomas Porteous, Jr., judge of the United States District Court for the Eastern District of Louisiana, for high crimes and misdemeanors .....

On January 6, 2009, Chairman Conyers introduced H. Res. 15, which continued the authority of H. Res. 1448 (from the 110th Congress) and provided that the Committee on the Judiciary inquire into whether Judge Porteous should be impeached. H. Res. 15 passed the full House on January 13, 2009, by a voice vote. At its organizational meeting January 22, 2009, the Committee voted to refer the impeachment inquiry to a "Task Force on Judicial Impeachment," comprised of 13 Committee Members, to conduct the factual investigation. Members of the Task Force were Chairman Adam B. Schiff, Ranking Member Bob Goodlatte, William D. Delahunt, Sheila Jackson Lee, Steve Cohen, Henry C. "Hank" Johnson, Pedro Pierluisi, Charles Gonzalez, F. James Sensenbrenner, Daniel E. Lungren, J. Randy Forbes, and Louis Gohmert. ....

On July 29, 2009, the full Committee voted 30-0 to request the House General Counsel to seek immunity orders to compel the testimony of 8 witnesses. ....

The Task Force held fact-finding hearings on November 17–18, 2009, December 8, 2009, December 10, 2009 and December 15, 2009. On January 21, 2010, the Task Force voted 8–0 to recommend four articles of impeachment to the full Committee. On that day, Chairman Conyers, with 13 original co-sponsors, introduced H. Res. 1031, which set forth the four articles that had been approved by the Task Force. On January 27, 2010, the Committee met and approved the four articles by separate votes as follows: Article I—29–0; Article II—28–0; Article III—23–0; and Article IV—25–0, with one Member passing. Thereafter, H. Res. 1031 was favorably reported without amendment by a roll call vote of 24–0. On March 11, 2010, H. Res. 1031 passed the House by unanimous votes on each of the four Articles as follows: Article I—412–0; Article II—410–0; Article III—416–0; and Article IV 423–0. In addition, on March 11, 2010, the House passed by unanimous consent H. Res. 1165, which designated 5 Members of the Judiciary Committee—Reps. Schiff, Goodlatte, Lofgren, Johnson, and Sensenbrenner—to be the House Managers for the purposes of conducting the Impeachment trial before the Senate. The Articles were presented to the Senate on March 17, 2010. After pre-trial proceedings, an evidentiary hearing was held in front of the Senate Impeachment Trial Committee commencing September 13, 2010. On December 7, 2010, Mr. Schiff and Mr. Goodlatte argued the House's case before the Full Senate. On December 8, 2010, the Senate found Judge Porteous guilty on each of the four Articles by the following votes (two-thirds being required to convict): Article I—96–0; Article II—69–27; Article III—88–8; and Article IV—90–6. Upon his conviction by the Senate, Judge Porteous was removed from his position as United States District Court Judge. The Senate thereafter voted 94–2 to disqualify Judge Porteous from holding further office. ....

H. Res. 520—Impeaching Samuel B. Kent, judge of the United States District Court for the Southern District of Texas, for high crimes and misdemeanors .....

On May 12, 2009, Chairman Conyers introduced H. Res. 424, which authorized the Committee on the Judiciary to inquire into whether Judge Samuel B. Kent (S.D. Tx.) should be impeached. The House passed that Resolution by unanimous consent. The next day, May 13, 2009, the Committee on the Judiciary passed a resolution to provide that the Impeachment Task Force (which had been previously established to investigate Judge Porteous) conduct an inquiry into whether Judge Kent should be impeached. The Task Force held an evidentiary hearing on June 3, 2009. On June 9, 2009, the Task Force met and approved a proposed resolution recommending four articles of impeachment to the full Committee. Later that day, H. Res. 520 was introduced by Chairman Conyers. On June 10, 2010, the Committee considered and approved the four Articles by separate votes as follows: Article I—30–0; Article II—28–0; Article III—30–0; Article IV—28–0 (with one Member passing). Thereafter, by a vote of 29–0, the Committee voted to report H. Res. 520 favorably. On June 19, 2009, the House approved the Articles by separate votes as follows: Article I—289–0; Article II—385–0; Article III—381–0; and Article IV—372–0 (with one Member voting present). Also on June 17, 2009, the House passed H. Res. 565, appointing Mr. Schiff, Mr. Goodlatte, Ms. Lofgren, Mr. Johnson and Mr. Sensenbrenner to be the House Managers for purpose of conducting the impeachment trial before the Senate. On June 24, 2010, the House Managers presented the Articles of Impeachment to the Senate. Judge Kent thereafter submitted his resignation, effective June 30, 2009. On July 20, 2009, the House passed by unanimous consent H. Res. 661, instructing the House Managers to advise the Senate that the House did not desire further to urge the articles of impeachment against Judge Kent. On July 22, 2009, the Senate dismissed the Articles against Judge Kent. ....

