RPTS BINGHAM

DCMN MAGMER

MARKUP OF H.RES. 994,

H.R. 3190, AND H.R. 569

January 13, 2010

House of Representatives,

Committee on the Judiciary,

Washington, D.C.

The committee met, pursuant to call, at 10:15 a.m., in Room 2141, Rayburn House Office Building, Hon. John Conyers, Jr. [chairman of the committee] presiding.

Present: Representatives Conyers, Nadler, Scott, Watt, Lofgren, Jackson Lee, Delahunt, Cohen, Johnson, Pierluisi, Quigley, Chu, Baldwin, Gonzalez, Weiner, Schiff, Sanchez, Wasserman Schultz, Maffei, Smith, Sensenbrenner, Coble, Goodlatte, Lungren, Issa, Forbes, King, Franks, Gohmert, Jordan, Chaffetz, Rooney, and Harper.

Staff Present: Perry Apelbaum, Staff Director/Chief Counsel;

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

Chairman Conyers. The committee will come to order.

Good morning. The Clerk will call the roll for a rollcall vote.

The Clerk. Mr. Chairman?

Chairman Conyers. Present.

The Clerk. Mr. Conyers, present.

Mr. Berman?

[No response.]

The Clerk. Mr. Boucher?

[No response.]

The Clerk. Mr. Nadler?

[No response.]

The Clerk. Mr. Scott?

[No response.]

The Clerk. Mr. Watt?

[No response.]

The Clerk. Ms. Lofgren?

[No response.]

The Clerk. Ms. Jackson Lee?

[No response.]

The Clerk. Ms. Waters?

[No response.]

The Clerk. Mr. Delahunt?

[No response.]

The Clerk. Mr. Cohen?

[No response.]

The Clerk. Mr. Johnson?

[No response.]

The Clerk. Mr. Pierluisi?

[No response.]

The Clerk. Mr. Quigley?

[No response.]

The Clerk. Mr. Gutierrez?

[No response.]

The Clerk. Ms. Baldwin?

[No response.]

The Clerk. Mr. Gonzalez?

[No response.]

The Clerk. Mr. Weiner?

[No response.]

The Clerk. Mr. Schiff?

[No response.]

The Clerk. Ms. Sanchez?

Ms. Sanchez. [No response.]

The Clerk. Ms. Wasserman Schultz?

[No response.]

The Clerk. Mr. Maffei?

[No response.]

The Clerk. Mr. Smith?

[No response.]

The Clerk. Mr. Sensenbrenner?

[No response.]

The Clerk. Mr. Coble?

[No response.]

The Clerk. Mr. Gallegly?

[No response.]

The Clerk. Mr. Goodlatte?

[No response.]

The Clerk. Mr. Lungren?

[No response.]

The Clerk. Mr. Issa?

[No response.]

The Clerk. Mr. Forbes?

[No response.]

The Clerk. Mr. King?

[No response.]

The Clerk. Mr. Franks?

[No response.]

The Clerk. Mr. Gohmert?

[No response.]

The Clerk. Mr. Jordan?

[No response.]

The Clerk. Mr. Poe?

[No response.]

The Clerk. Mr. Chaffetz?

[No response.]

The Clerk. Mr. Rooney?

[No response.]

The Clerk. Mr. Harper?

[No response.]

The Clerk. Mr. Smith? Mr. Smith?

Mr. Smith. Present.

The Clerk. Mr. Smith, present.

Ms. Chu?

Ms. Chu. Present.

The Clerk. Mr. Harper?

[No response.]

The Clerk. Ms. Sanchez?

Ms. Sanchez. Present.

The Clerk. Ms. Sanchez, present.

Mr. Quigley?

Mr. Quigley. Here.

The Clerk. Mr. Quigley, present.

Mr. Gonzalez?

Mr. Gonzalez. Present.

The Clerk. Mr. Gonzalez, present.

Mr. Johnson?

Mr. Johnson. Present.

The Clerk. Mr. Johnson, present.

Ms. Lofgren?

Ms. Lofgren. Present.

The Clerk. Ms. Lofgren, present.

Mr. Watt?

Mr. Watt. Present.

The Clerk. Mr. Watt, present.

Mr. Lungren?

Mr. Lungren. Present.

The Clerk. Mr. Lungren, present.

Mr. Nadler?

Mr. Nadler. Present.

The Clerk. Mr. Nadler, present.

Mr. Coble?

Mr. Coble. Present.

The Clerk. Mr. Coble, present.

Mr. Maffei?

Mr. Maffei. Here.

The Clerk. Mr. Maffei, present.

Chairman Conyers. The committee will come to order, a quorum being present. We are happy to see everyone back for the new year.

Pursuant to notice, I call up House Resolution 994 directing the Attorney General to transmit to the House of Representatives all information in his possession relating to the decision to dismiss United States v. New Black Panther party and move that it

be reported adversely on the House.

Without objection.

I call up resolution 994.

The Clerk. H.Res. 994, resolution directing the Attorney General to transmit to the House of Representatives all information in the Attorney General's possession relating to the decision to dismiss United States v. New Black Panther party.

Chairman Conyers. Thank you.

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

[The information follows:]

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

Chairman Conyers. This resolution of inquiry was introduced by Representative Frank Wolf, referred to this committee. I think that Ranking Member Smith is a cosponsor of the amendment along with Frank Wolf, and it directs the Attorney General to produce and transmit specified documents relating to the Black Panther party case. I share the interests of many of my colleagues in voting rights related litigation by the Civil Rights Division of the Department of Justice, and so we consider this resolution to determine what should be done with it.

I would like to call to the members' attention that the Department of Justice's efforts to provide information on this subject in response to congressional requests are very numerous. Indeed Lamar Smith, our ranking member, in July was provided an explanation of its actions in the case, plus copies of all nonprivileged documents relating to the partial dismissal that occurred in May.

Although the current Assistant Attorney General for Civil Rights, Tom Perez, wasn't involved in the case, he answered questions on the subject at a Judiciary Committee hearing by the Constitutional Subcommittee in response to other inquiries rather extensively.

In addition, the Department is continuing to provide information on the case and has produced hundreds and hundreds of additional documents concerning the case and related matters as

well from the United States Civil Rights Commission; and they have provided myself and Representative Lamar Smith, Mr. Wolf, with a number of answers to written questions and the correspondence between the Justice Department and each of the defense in the case which tracks what the resolution offered by the gentleman from Virginia, Mr. Wolf, has asked for.

In addition, privileged information for which we have gotten approval has been brought forward in all of the numerous documents that we are poring over at this time.

Now, the decisions on this case were made by career Civil Rights Division attorneys with decades of experience. One was the acting head of the division and served under both President Bush and President Obama. And so what we think is clear is that the Department is quite cooperative and is willing to discuss or even meet with members about this matter. The only thing that happened is that the Office of Professional Responsibility inquiry has truncated the relationship that we have had, and so there has sort of been a temporary hiatus until this inquiry is completed.

But I stand ready to cooperate with the ranking member and the resolution's author in an attempt to make sure that as much material as is possible is made available to them. And so that we think that this resolution is premature and untimely and that the best course of action to be would be to adversely report it.

I am pleased now to turn to Lamar Smith himself for his comments.

Mr. Smith. Thank you, Mr. Chairman.

We are here today to consider a resolution of inquiry introduced by Congressman Frank Wolf of Virginia that would require the Justice Department to provide documents regarding the sudden and unexplained decision to dismiss voter intimidation charges against the New Black Panther Party.

Mr. Chairman, I would like to submit for the record various letters and statements by Mr. Wolf, if I could.

Chairman Conyers. Without objection so ordered.

Mr. Smith. Thank you, Mr. Chairman.

[The information follows:]

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

Mr. Smith. Outside of a polling location in Philadelphia, November, 2008, two men were dressed in paramilitary uniforms, one brandishing a baton in front of voters. They cursed voters, shouted racial obscenities at them, and tried to block voters' entry into the polling location. These men were members of the New Black Panther Party for Self-Defense, an organization so radical that the original Black Panther Party has found it necessary to denounce it.

A year ago, the Civil Rights Division of the Department of Justice filed a complaint against the New Black Panther Party and three of its members for violating the Voting Rights Act, which prohibits any "attempt to intimidate, threaten, or coerce any voter and those aiding voters. According to the complaint, the individuals made statements containing racial threats and racial insults to both black and white individuals and made menacing and intimidating gestures, statements, and movements directed at individuals who were present to aid voters."

Neither the New Black Panther Party nor its members responded to the lawsuit. The Justice Department effectively won the case when the judge directed the Civil Rights Division to file a final motion. But rather than seek a default judgment to ensure that defendants could not participate in future voter intimidation tactics, the Obama administration abruptly dropped charges against all but one of the defendants. No facts had changed. No new

evidence was uncovered. The only thing that did change was the political party in charge of the Justice Department.

So why would the Obama administration suddenly drop charges in a case that had effectively been won? It appears that the Justice Department gave a free pass to its political allies. One of the defendants against whom charges were dropped was a Democratic poll watcher. Despite continued requests from Congress, the Justice Department has refused to give any explanation for dropping the charges. The Department's silence appears to be an admission of guilt.

According to media reports, senior political appointees may have overridden the decision of career attorneys. The decision to dismiss charges against political allies who allegedly intimidated voters on Election Day, 2008, reeks of political interference. An internal investigation into attorney misconduct by the Justice Department's Office of Professional Responsibility has been ongoing for several months. Unfortunately, Justice Department officials recently made clear that they do not plan to publicize the results.

Yesterday, 24 hours before this markup, the Justice Department provided the committee with responses to the Civil Rights Commission's information request. These comprised more of the same nonresponsive replies the Justice Department provided the Commission and Congress earlier this year. The Department refused to answer, either wholly or in part, 31 of the commission's 49

written questions.

The Department is still unwilling or unable to answer one simple question: What changed between January, 2009, and May, 2009, to justify walking away from a case of blatant voter intimidation? There cannot be true justice if those responsible for ensuring justice rely on a political compass rather than the facts in evidence.

I hope that by reporting this resolution of inquiry out favorably today we can start to get answers to the serious questions raised by the Justice Department's conduct in this case.

The right to cast a ballot free of intimidation is at the heart of our democracy. We jeopardize that democracy if we look the other way in this case.

Mr. Chairman, I will yield back. Thank you.

Chairman Conyers. Dan Lungren is recognized.

Mr. Lungren. Mr. Chairman, thank you very much.

Mr. Chairman, I rise to support this resolution of inquiry.

More than 20 years ago, Mr. Chairman, you may recall that, on a bipartisan basis, a number of us worked to ensure the extension of the Voting Rights Act. You recall that there was some question as to whether or not the Voting Rights Act would be extended at that time, and the ranking Republican on the subcommittee, then Mr. Henry Hyde, was present at all the field hearings that took place around the country. It was after one of those field hearings that Henry Hyde moved from neutral on the bill to

supportive of the bill because he said, if I recall his words correctly, he had seen the parade of horribles. He had seen the type of intimidation that still existed in parts of this country. He had seen the sometimes nuanced, sometimes not so nuanced efforts to intimidate the free expression of political will via the ballot box. And he said that because of the parade of horribles that he had seen, he was convinced that we needed to extend the Voting Rights Act.

And if you will recall, Mr. Chairman, at that time, on a bipartisan basis, we did that. And that extension at that time was signed into law by President Ronald Reagan.

I have seen the video, I am sure as you have, of the incident that we are talking about here; and if that is not an example of intimidation at a polling place, I don't know what is.

Individuals wearing paramilitary uniforms and brandishing -- at least one brandishing a weapon -- at least it looked to me like it is a weapon. Some might call it a baseball bat. I am not sure exactly what it was, but it was a pretty good stick, that could do real harm with people, and at least my observation was that he was utilizing it menacingly. And yet, with that visual evidence, we have a Department of Justice which has basically thrown that case out.

And I don't care which side of the political spectrum you are on. If you see that kind of voter intimidation which is at the essence of the protections under the Voting Rights Act that we

extended back in the 1980s, we have since extended beyond that time, if that is not an example of that, I can't conceive of what would be unless the individual would go through with a threat and actually beat someone on the way to the polls, which we know has happened in the past.

And we now have belated responses by this Justice Department. But I would like to know whether there are facts that we don't have that cast doubt on the opinions of the career attorneys, Christopher Coates, Christian Adams, and Spencer Fisher, as I understand it, the three lead attorneys on this matter who reportedly argued strenuously for the Department to move forward with the default judgment.

And the reason why time is of the essence is, as we know, we have an election upon us. We have not just general elections, but we have primary elections coming up. We have special elections almost immediately. And delay and delay and delay by a Justice Department which will not respond to legitimate questions by Members of this House is a denial of justice.

If this is not intimidation, what is? And if this Justice Department says we are not going to take this seriously enough to act on it, what kind of guidance does that give others who might wish to intimidate people from exercising their voting franchise?

And so, Mr. Chairman, I would just appeal to you, as we did some 20 more years ago, to help give us a leadership position on this and demand that this Justice Department cooperate with us

now, not later, totally, not partially, so that we can send the right message out to anybody who would be tempted to act in a similar way to intimidate or in any other way stop people from their free exercise of their voting right.

And so, Mr. Chairman, I would just ask you to help us in this regard and to vote for this, vote this resolution of inquiry out favorably so that we can show on a bipartisan basis that we don't care what administration it is, we expect them to enforce this law to the full extent. When we see evidence that gives every indication that the intent was to intimidate voters from exercising their franchise, we will not stand idly by. And so, Mr. Chairman, I hope that you would join us in supporting affirmatively this resolution of inquiry.

I thank the chairman, and I yield back the balance of my time.

Chairman Conyers. Thank you very much, Mr. Lungren.

The Chair recognizes Bob Goodlatte, senior member of the Judiciary Committee, from Virginia.

Mr. Goodlatte. Thank you, Mr. Chairman.

I want to associate myself with the remarks of the gentleman from Texas, our ranking member, and the gentleman from California, but I have another reason for appealing to our colleagues on your side of the aisle, Mr. Chairman, to join us in making this a bipartisan effort. And it is not related to the underlying investigation conducted by the Justice Department and their

dropping of these criminal charges, nor is it related to even the underlying legislation, the Voting Rights Act, but it is related to the fact that the issue of the accountability of our executive branch is very much in play here, and it is going to come back to haunt people on either side of the aisle and people who seek good government and accountability by a very large and very powerful executive branch if we fail to hold them accountable for their failure to respond to the U.S. Commission on Civil Rights which is doing its job in asking the Justice Department detailed questions and requesting documents about this measure.

And the Department wrote back that they were declining to answer those questions based on seven distinct claimed privileges and objected to each and every interrogatory and document request.

The letter in the Commission from Justice official Joseph H. Hunt asserts a broader need to protect against disclosures that would undermine its ability to carry out its mission. And this goes far beyond anything asserted by President Nixon during Watergate. The Washington Times, whose editorial I am referring to here, asked Michael Carvin, a very reputable attorney here who handles these types cases and who was the Deputy Assistant Attorney General in the Civil Rights Division and the Office of Legal Counsel under President Reagan, was asked to review these claimed privileges. And the privileges are, quite frankly, extraordinary.

There is no privilege, for instance, in saying that the

Justice Department will not identify the personnel working on the case. I would argue that most of us had never heard of most of these privileges. Mr. Carvin specifically noted, contrary to Justice claims, that normally there is no general attorney-client privilege unless you are dealing with the President, so a claim would have to come under the work product or deliberative process exemption. The work product is very narrow, and the deliberative process privilege is moot once the case closes, which the Justice Department has just done. And this is especially true when the request for the information does not involve litigants but instead an agency with statutory responsibilities concerning civil rights, and I am quoting Mr. Carvin.

So I would urge my colleagues for reasons far beyond whether you think this case has merit with regard to the New Black Panther Party and whether or not you agree with whether this is an appropriate use of the Voting Rights Act, which I agree strongly with the gentleman from California we should be protecting that by examining what the Department has done.

But we have no authority to tell the Justice Department whom to prosecute and whom not to prosecute. We have every authority and every responsibility to ask the Justice Department to defend its claims and then we take it one step further and say, when another entity of our Federal Government, the U.S. Commission on Civil Rights, asks the Justice Department to defend its actions with specific questions and they refuse to answer another

government agency, we ought to come to their defense regardless of the underlying cause there and not allow the Justice Department to assert privileges that are at best specious and, as has been noted by Mr. Carvin, in most instances are unheard of.

So there is very strong reason for us to join together in a bipartisan fashion to protect the prerogatives of the Congress and to protect against abuse of privilege, the exercise of claim of privilege in the executive branch. And I urge my colleagues to support this resolution, and I yield back.

Chairman Conyers. Thank you very much.

The Chair is now pleased to recognize Howard Coble, senior member of the Judiciary Committee from North Carolina.

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

Chairman Conyers. Without objection, the gentleman is recognized.

Mr. Coble. Mr. Chairman, normally I am loath to intercede in cases of prosecutorial discretion, but in the case of the New Black Panthers which is now before us I am in disbelief. We know from firsthand accounts, including video footage and from an offer by the Federal district court to award the United States a default judgment, that the government obviously had a compelling case.

If the evidence in this case, Mr. Chairman, is not sufficient for prosecution, it is difficult to imagine anything that would constitute intimidation, threats, and coercion under section 11(b) of the Voting Rights Act.

Members of the New Black Panthers were, A, in uniform; B, members of a well-known and radical agenda; C, deployed on Election Day 2008 at the entrance of a polling place; D, one member brandished a weapon, and the gentleman from California alluded to a weapon, I think he was referring to a nightstick, and, of course, when used in a certain way that can indeed become a weapon. They intimidated voters with racial slurs, I am told, and other remarks and gestures; and one member stated on national television that his activities were part of a nationwide effort involving hundreds of party members and that the display of the weapons was a necessary part of the New Black Panther deployment.

This case is exactly, it seems to me, Mr. Chairman, what section 11(b) of the Voting Rights Act was intended to prohibit, that is, racial intimidation of the electorate. While I understand the New Black Panthers have disavowed the action of the accused, disavowal in and of itself does not negate liability for a prior violation of the law.

Mr. Chairman and colleagues, H.Res. 994 in my opinion is not an intrusive proposal. It simply requires the government to disclose why it chose not to prosecute this case. President Obama and his administration has pledged transparency and even testified before this committee, you all will recall, on the need to protect integrity of our electoral process.

I know it is not popular in some areas, but if these questions aren't answered sooner rather than later, I think

difficulty will arise.

Mr. Chairman, I thank you for the time, and I yield back.

Chairman Conyers. Thank you.

Steve King, are you ready?

The Chair recognizes the distinguished senior member of Judiciary.

Mr. King. Thank you very much. It may be the first time I have been introduced that way.

I do move to strike the last word.

Chairman Conyers. It is only because you are in the top tier.

Mr. King. We can keep that up, Mr. Chairman. I am afraid I will lose all of my time if you use up all of your superlatives this morning.

But I appreciate this coming before the committee, and I want to lay out some statements here for the record and then conclude with an argument that I think we should consider, and that is the New Black Panthers case of voter intimidation in Philadelphia was the most clear-cut, open-and-shut case of voter intimidation in the history of the United States.

Despite the astounding evidence and clear video of this intimidation, the Department of Justice dismissed the case; and as the committee with oversight jurisdiction, we have a duty and an obligation to understand the Department of Justice's decision to dismiss this case. Instead of investigating voter intimidation or

voter fraud by the likes of ACORN, we have been investigating the dismissal of 99 States attorneys in the past, which after 2-1/2 years the committee has not found one shred of credible evidence of wrongdoing.

So why do I bring this up today, Mr. Chairman? That is because, in contrast to the over 2-1/2 years of investigating, numerous hearings and depositions, litigation in Federal court, and review of tens of thousands of pages and of documents related to the U.S. Attorney dismissals, all of this resolution of inquiry request is a small set of documents related to the decision to initiate and then dismiss the Black Panther voter intimidation case.

And I am aware that yesterday the Judiciary Committee received copies of the Department of Justice's responses to questions about this case posed to the Civil Rights Commission last year, but, unfortunately, those responses are largely not responsive, not responsive to the questions raised by the Commission.

The Department of Justice has a history of not responding to questions. Before this committee, Assistant Attorney General Tom Perez was testifying just before the Christmas break and he, I believe, intentionally evaded questions asked by my colleagues and by myself. He wasn't responsive and even made a claim that, and I will quote, "the maximum penalty was sought and obtained."

Well, that wasn't true, Mr. Chairman. It was a prepared

testimony. It was emphatically reiterated in his oral response to questions, and it wasn't true. In fact, the statement was blatantly false, and it clearly misled this committee. Because the Department of Justice could have sought a permanent injunction nationwide for the voter intimidation, rather than a limited injunction only until 2012 and only within the geographic area that I will describe as Philadelphia.

It is clear that this resolution of inquiry is still needed in order to get to the bottom of what really happened in the New Black Panther voter intimidation case. For a committee that has so vigorously investigated alleged wrongdoing of the Bush administration, including beyond the U.S. Attorney matter, it upsets me to see that this committee is shirking its responsibility to investigate why the Black Panther case was dismissed. And it is illuminative that members of this majority could stand in the way of a simple document request. At the very least if this committee does nothing else with regard to the Black Panther case, it should investigate whether the Department's July 13, 2009, letter to Ranking Member Smith of this committee represents who made the decision to dismiss the case.

In that letter, Assistant Attorney General Weich writes that the decision to dismiss the case was, and I quote, "was made after a careful and thorough review of the matter by Acting Assistant Attorney General for civil rights, a career employee with nearly 30 years of experience in the Department."

However, the Washington Times has reported that a political appointee, Associate Attorney General Thomas Perrelli, "from the Times, was consulted and ultimately approved a decision in May to reverse course and drop a civil complaint."

We don't know if the Times got it right, but during Assistant Attorney General Tom Perez's testimony here and before this Constitution Subcommittee, December 2nd of last year, he accredited the decision to dismiss the charges to Loretta King and Steve Rosenbaum.

So who is it? Who made that decision? Under whose direction?

So, at the very least, this committee needs to get to the bottom of the responses or lack of responses to the ranking member's letter.

And, additionally, just as vast resources of this committee were used in the U.S. Attorney matter investigating whether senior administrator officials misled this committee, so too must this committee, if it takes its oversight responsibility seriously, must get to the bottom of whether Ranking Member Smith had been misled in this matter. And I believe that I was misled before the testimony of Perez, and I believe that Mr. Gohmert was misled on the testimony of Mr. Perez.

We are close to a year into this administration, and if we as a committee let this matter pass without taking any serious steps to get answers, where will we be a year from now, 2 years from now

or beyond? Justice not following through with the Black Panther case may embolden future civil rights abusers. So too will failing to follow through on whether the ranking member has been misled may embolden other executive branch officials to ignore Congress' oversight role in the future.

So I would ask, Mr. Chairman, if the image of paramilitarily uniformed Black Panthers standing in front of a polling place in Philadelphia with a billy club in their hand calling people crackers who are white people coming in there that wanted to vote, if that is not an example of voter intimidation and that should be processed and adjudicated, then I pose this question: Let me say if this had been in Tampa, Florida, during the Presidential election of the year 2000 and there had been brown-shirted, jack-booted, skin-headed, swastika-tattooed people standing in front of a polling place in Florida with billy clubs in their hands and they had been making remarks to black voters that wanted to go in and vote for Al Gore, can you imagine that the streets in America would not have been on fire if that had been the case?

But this is the off-color antithesis of the same kind of action that we have an obligation to get to the bottom of, Mr. Chairman. I appreciate your attention, and I yield back the balance of my time, should it exist.

The Chairman. Thank you.

Steve, would you be willing to consult with myself and Mr. Smith about who we would have as witnesses if we were to

follow your suggestion for additional information?

Mr. King. I would be very happy to do that.

Chairman Conyers. Before I recognize Sheila Jackson Lee, I want to recognize the chairman emeritus of the committee for any comments he may choose to make.

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

Chairman Conyers. Without objection.

Mr. Sensenbrenner. Mr. Chairman, I think there is an issue bigger than whether or not the Black Panthers did what has been alleged or whether Justice Department officials misled members of the committee, particularly on our side of the aisle. And that is the issue of the appropriate separation of powers and the duties and roles of each of the three separate but equal branches and when one branch can attempt to hide from another branch or the two other branches things relating to the discharge of the duties of one branch.

In this case, we are dealing with the executive branch, and the privilege that is being proffered by the executive branch is much broader than the privilege that the Nixon administration used in the courts and in this committee during Watergate. And that is something that should concern not only people on both sides of the aisle in this committee and in the Congress but it should concern the American public as well.

The argument that is made is that anything that the Justice

Department has to disclose that would undermine its ability to carry out its mission means that everything the Justice Department would do would be privileged, and there is no way on Earth that this committee should go along with that kind of an argument.

Now let's forget about the fact that the Democrats control the White House and, thus, the Justice Department and the Democrats control the Congress. If this precedent is set, the time is going to come when there is a Republican administration and a Democratic Congress or a Democratic administration and a Republican Congress when the precedent will be quoted to stonewall any type of effective oversight that is being proposed. And this question goes to the very issue of whether or not Congress is going to be able to do its oversight free of the stonewalling that the executive branch will attempt to do whenever we try to do oversight.

Oversight is tough. When you are the recipient of oversight letters, you don't like them. But oversight is one of the things that Framers gave Congress the responsibility to do. We can't drop the ball on this. Because if we drop the ball on this particular instance and accept the excuse that is being proffered by the Justice Department, this Congress and the American public will live to regret it for years and decades to come. So this resolution ought to be approved.

I yield back.

Chairman Conyers. Thank you, Mr. Sensenbrenner.

The Chair recognizes Sheila Jackson Lee of Texas.

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

Chairman Conyers. The gentlelady is recognized.

Ms. Jackson Lee. I rise for two reasons, and one I will be somewhat brief, Mr. Chairman.

I know the work that many of this committee but in particular John Conyers has done with respect to the people of Haiti, and today we face the enormity of the largest and most devastating earthquake that I have come to know on this side of the Atlantic ocean, and that is the 7.0 earthquake in Haiti. And I would ask, I am asking, Mr. Chairman, that some of us be allowed to go there as soon as possible. But I would ask if we could take just a moment of silence for the recognition of the devastation in Haiti and the many friends that we have there.

[Moment of silence.]

Ms. Jackson Lee. Thank you very much, Mr. Chairman. Thank you, colleagues, for your indulgence.

Chairman Conyers. If the gentlelady would yield, I have been talking with Ranking Member Smith about a codel that would go down and include a number of other members. We probably will ask the chairman emeritus to go back with us and a few other people.

Ms. Jackson Lee. Thank you, Mr. Chairman. I am making inquiries and would like to join you and thank you again for the leadership that you have shown in the trips that we have made to

Haiti together. I know that they are in most desperate need.

I will finish the comment on Haiti by making note as well that they believe that a large number of the U.N. force may have been lost, and that is certainly an enormous tragedy, and I also pay my respects to the United Nations and the forces that they have on the ground.

This issue, if I might turn to this resolution and indicate that I think information sharing, if you will, from the administration is crucial. I was delayed coming into this markup because of a classified briefing on Flight 253. So I know the importance of truthfulness and the administration being truthful.

But I would make the argument, first of all, I want to be very clear those of us know the distinction this is the New Black Panther Party. Many of us knew members of the Black Panther Party, of which this is not, and we know members of the New Black Panther Party, some in my own constituency, who work to empower people to vote; and in my jurisdiction I never saw any group of New Black Panther individuals standing by discouraging people to vote or discouraging them from voting for President Barack Obama.

So I would make the assumption, and my speculation only, that this was an isolated incident, and individuals chose to take a name of a group so they could possibly take advantage of that name.

At the same time, the administration I think has been forthright. And my understanding is that, as of January 11, there

was a determination of what documents relating to this case could be appropriately released; and on January 12, yesterday, my birthday, more than 1,850 pages of documents relating to the case were sent to Ranking Member Smith and Mr. Wolf and Chairman Conyers and the U.S. Civil Rights Commission along with answers to written questions from the Commission.

Now I know that there are three branches of government and we all have responsibilities, but I don't think we should be in the level of, and I put this word in quotes, harassing, when we have received information. Wouldn't it be appropriate to review what we have received -- and I am not sure if my colleagues will tell me that they have reviewed every document of the 1,850 pages -- and then determine further how we should proceed?

But going forward with a resolution of inquiry to suggest that there is a coverup I think is a stretch. And I would make the argument that the documents have been released, that it was an isolated incident, that, curiously, these individuals were represented that they were intimidating, which I don't in any way agree with and if there were appropriate local charges and jurisdictional issues that could be addressed of their actions, it should be done. If there is a denial of someone's civil rights and someone makes that case, the Department of Justice should handle it.

But to suggest that they have not been forthcoming with all these documents before us I think is a wrong assessment, and it is

a misstatement. And I believe that we should move to not favorably report this resolution, and I would ask my colleagues to do so.

With that, Mr. Chairman, I yield back.

[The statement of Ms. Jackson Lee follows:]

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

Chairman Conyers. Thank you very much, Sheila Jackson Lee.

We will take three more speakers and then go to a vote. I see Mr. Franks and Judge Gohmert, but Franks has more seniority than Gohmert, so we recognize him.

Mr. Franks. Sometimes it is my only protection, Mr. Chairman.

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

Chairman Conyers. Without objection, the gentleman is recognized.

Mr. Franks. Mr. Chairman, I support the resolution of inquiry. And I think it is important first to ask, what is the New Black Panther Party? What is this group that the Obama administration, the Holder Justice Department are protecting from appropriate prosecution for what may be the most publicized and egregious violation of the Voting Rights Act in history?

The Southern Poverty Law Center reports that the New Black Panthers' leaders have seemed to focus almost exclusively on hatred for Jews and whites. A former member of the New Black Panther Party, Khalid Muhammad, said that, quote -- now these are hard words, Mr. Chairman -- quote, there are only two kinds of white folks, bad white folks and worse white folks. Regarding whites in South Africa after apartheid, he said that, quote, we will kill the women; we will kill the babies; we will kill the blind; we will kill the cripples. We will kill them all.

Mr. Chairman, those are horrifying words.

The Anti-Defamation League has called the new Black Panther Party, quote, the largest organized anti-Semitic black militant group in America. After Khalid Muhammad died, leadership of the new Black Panther Party fell to Malik Zulu Shabazz. The Anti-Defamation League reports that Shabazz has blamed Jewish people for the 9/11 attacks, called the United States and Israel "the number one and number two terrorists right now on the planet". He has also led chants of Jihad at rallies outside a synagogue.

Recall that Shabazz was one of the defendants who was let go scot-free in this case where members of the Shabazz party dressed in paramilitary garb brandished a nightstick and shouted racial slurs at a polling station to prevent whites from voting.

The New Black Panther Party has been harshly denounced, Mr. Chairman, by the original Black Panther Party, which denounces the New Black Panther Party, quote, saying that they are failing to find its own legitimacy in the Black community. This band would graft the party's name upon itself, which we condemn. The foundation denounces the usurpation of the Black Panther Party name by this questionable band of self-appointed leaders. Unquote.

Now the SPL also reports that Bobby Seale, founding member of the original Black Panther Party, called the New Black Panther Party "a black racist hate group."

Why is it, Mr. Chairman, that the Obama administration and its political appointees in the Justice Department seem to want to protect this "New Black Panther Party" from legitimate prosecution?

Multiple media sources assert that Mr. Obama's Department of Justice ignored the recommendation of a number of senior career attorneys in the voting rights section of the Civil Rights Division when it decided to seek a dismissal of the case, including that of the four lead career attorneys in this case, Christopher Coates, J. Christian Adams, Robert Popper, and Spencer R. Fisher, who reportedly urged the Department to move forward with its default judgment.

Likewise, Mr. Chairman, Civil Division Appellate Chief Diana Flynn and Appellate Section lawyer Marie McElderry agreed that the complaint appeared supported by the facts as well.

Now in light of these facts, Mr. Chairman, and the concerns repeatedly raised by my colleagues in the U.S. Commission on Civil Rights and concerns which I cannot even begin to have time to fully address here today, the Department has a moral and civic responsibility to provide justification for the dismissal of the suit against the New Black Panthers; and for this reason, Mr. Chairman, I support the resolution and yield back my time.

Chairman Conyers. I thank the gentleman.

Does anyone else seek time?

Yes, Judge Gohmert of Texas is recognized.

Mr. Gohmert. Thank you, Mr. Chairman.

You know we had Mr. Perez, the head of the Department of Justice Civil Rights Division, come testify in this proceeding in this committee; and he told us about the extensive experience of the attorneys who made the decision to drop the lawsuit and just take a simple injunction against the one that basically did nothing more than say the violator had to follow local law. It wasn't the toughest things he could have done.

And so when we get to looking at the extensive experience of the attorneys he was talking about, when they overrode the career attorneys who had pursued this case and had accumulated the evidence, we find out that the very attorneys who reportedly overrode the career attorneys that recommended moving forward and taking the default judgment, which was ripe, and the judge had asked for a form judgment be submitted, well, we find out a great deal. In one case, the Department of Justice had to pay close to $600,000 in attorney's fees and in another that figure is still being worked out.

RPTS DEAN

DCMN HOFSTAD

Mr. Gohmert. In the first case, Johnson v. Miller, the Civil Rights Division was chastised for its conduct leading up to the approval of the Georgia redistricting plan that was rejected by the courts. A Federal district judge said that, quote, "The considerable influence of ACLU advocacy on the voting rights decision of the U.S. Attorney General is an embarrassment." Quote, "It is surprising that the Department of Justice was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote."

And a Mrs. King was the Acting Assistant Attorney General of the division who reportedly chose to dismiss the Black Panther Party case, and she was the attorney of record in the Georgia litigation that resulted in that large sanction.

And then just a few weeks ago, Ms. King and her colleague Mr. Rosenbaum were implicated in another District Court ruling involving attorneys' fees. This one involved the actual conduct of the Division of Attorneys in litigation. And, in that one, the judge not only imposed monetary sanctions against the government, he imposed sanctions against the attorneys themselves.

Mr. Rosenbaum, who is believed to have worked with Ms. King and agreed with the decision to dismiss most of the New Black Panther Party charges, was head of the housing section during the

time in which this questionable conduct occurred.

So this is the kind of experience we have referred to. We had Mr. Perez sit right here and say, "Well, there just wasn't enough evidence to go forward." I asked him if he had seen the video. He kept dancing around the question, and he finally got around to saying, well, yes, he had.

But there was also in the record and I have a copy of the declaration, the affidavit from Bartle Bull. It is filed in that case; it was part of the evidence. And this man swears that he participated in civil rights lawsuits against municipalities in Mississippi. He worked closely with Charles Evers on a variety of matters to help defend the Voting Rights Act and voting rights in Mississippi. In '68, he served as the campaign manager in the State of New York for Senator Robert Kennedy in his campaign for President. He aided President Jimmy Carter in his '76 campaign in New York. He is very familiar with Election Day polling procedures.

He says, and under oath, "I watched two uniformed men confront voters, attempt to intimidate voters, that were positioned in a location that forced every voter to pass in close proximity to them. The weapon was openly displayed and brandished in plain sight of voters." He said, quote, "I had never encountered or heard of another instance in the United States where armed and uniformed men blocked the entrance to a polling location. Their clear purpose and intent was to intimidate voters

with whom they did not agree." And he goes on to say he had never seen anything like this, in the way of intimidating voters.

If that is what the head of the Civil Rights Division of our country says is not evidence to go forward and get a default judgment, then we got bigger problems than anybody has admitted around here. We do need to demand answers.

And when my colleague from Texas mentioned she believed this was an isolated incident, well, it concerns me they didn't take the default judgments and do discovery in aid of that judgment so we could find out if this was an isolated incident or if this was widespread in other locations. My friend said she didn't observe it in Houston. We need to know where all it happened.

And by cutting this case short, they prevented the effort to go forward and see how widespread these violations were, if there were others. That is not doing the job, and we need to get to the bottom of it.

And I yield back.

Chairman Conyers. Thank you very much.

Our last speaker for the morning on this matter is Mr. Jordan, and he is recognized at this time.

Mr. Jordan. Thank you, Mr. Chairman. I won't read my prepared statement. I will be just real brief and make two quick points.

First, I think every member of this committee takes seriously any potential violation of the Voting Rights Act. I mean, I think

that is just a given. When you look at the video, I think as Mr. Lungren very eloquently pointed out, if that is not intimidation, I don't know what intimidation is.

And those are the two key facts. And that is why -- and I will just finish here, Mr. Chairman -- that is why we need a favorable report on this resolution of inquiry. It is really that basic. That is why we need to proceed.

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

Chairman Conyers. I thank you, Mr. Jordan.

We are now ready to vote.

All those in favor of the resolution -- the motion -- that the motion be reported adversely -- let's have a roll-call vote on that.

The clerk will call the roll.

The Clerk. Mr. Conyers?

Chairman Conyers. Aye.

The Clerk. Mr. Conyers votes aye.

Mr. Berman?

[No response.]

The Clerk. Mr. Boucher?

[No response.]

The Clerk. Mr. Nadler?

Mr. Nadler. Aye.

The Clerk. Mr. Nadler votes aye.

Mr. Scott?

Mr. Scott. Aye.

The Clerk. Mr. Scott votes aye.

Mr. Watt?

Mr. Watt. Aye.

The Clerk. Mr. Watt votes aye.

Ms. Lofgren?

Ms. Lofgren. Aye.

The Clerk. Ms. Lofgren votes aye.

Ms. Jackson Lee?

Ms. Jackson Lee. Aye.

The Clerk. Ms. Jackson Lee votes aye.

Ms. Waters?

[No response.]

The Clerk. Mr. Delahunt?

[No response.]

The Clerk. Mr. Cohen?

Mr. Cohen. Aye.

The Clerk. Mr. Cohen votes aye --

Mr. Cohen. Mr. Chairman, how am I recorded?

The Clerk. Mr. Cohen has not voted.

Mr. Cohen. I voted aye.

The Clerk. Oh, okay, Mr. Cohen did vote aye.

Mr. Johnson?

Mr. Johnson. Aye.

The Clerk. Mr. Johnson votes aye.

Mr. Pierluisi?

Mr. Pierluisi. Aye.

The Clerk. Mr. Pierluisi votes aye.

Mr. Quigley?

[No response.]

The Clerk. Ms. Chu?

[No response.]

The Clerk. Mr. Gutierrez?

[No response.]

The Clerk. Ms. Baldwin?

[No response.]

The Clerk. Mr. Gonzalez?

Mr. Gonzalez. Aye.

The Clerk. Mr. Gonzalez votes aye.

Mr. Weiner?

[No response.]

The Clerk. Mr. Schiff?

Mr. Schiff. Aye.

The Clerk. Mr. Schiff votes aye.

Ms. Sanchez?

[No response.]

The Clerk. Ms. Wasserman Schultz?

[No response.]

The Clerk. Mr. Maffei?

Mr. Maffei. Pass.

The Clerk. Mr. Maffei passes.

Mr. Smith?

Mr. Smith. No.

The Clerk. Mr. Smith votes no.

Mr. Goodlatte?

Mr. Goodlatte. No.

The Clerk. Mr. Goodlatte votes no.

Mr. Sensenbrenner?

Mr. Sensenbrenner. No.

The Clerk. Mr. Sensenbrenner votes no.

Mr. Coble?

Mr. Coble. No.

The Clerk. Mr. Coble votes no.

Mr. Gallegly?

[No response.]

The Clerk. Mr. Lungren?

Mr. Lungren. No.

The Clerk. Mr. Lungren votes no.

Mr. Issa?

Mr. Issa. No.

The Clerk. Mr. Issa votes no.

Mr. Forbes?

[No response.]

The Clerk. Mr. King?

Mr. King. No.

The Clerk. Mr. King votes no.

Mr. Franks?

Mr. Franks. No.

The Clerk. Mr. Franks votes no.

Mr. Gohmert?

Mr. Gohmert. No.

The Clerk. Mr. Gohmert votes no.

Mr. Jordan?

Mr. Jordan. No.

The Clerk. Mr. Jordan votes no.

Mr. Poe?

[No response.]

The Clerk. Mr. Chaffetz?

Mr. Chaffetz. No.

The Clerk. Mr. Chaffetz votes no.

Mr. Rooney?

Mr. Rooney. No.

The Clerk. Mr. Rooney votes no.

Mr. Harper?

Mr. Harper. No.

The Clerk. Mr. Harper votes no.

Mr. Weiner. How am I recorded?

The Clerk. Mr. Weiner is not recorded.

Mr. Weiner. I vote aye.

The Clerk. Mr. Weiner votes aye.

Mr. Forbes?

Mr. Forbes. No.

The Clerk. Mr. Forbes votes no.

Ms. Lofgren. Mr. Chairman?

The Clerk. Ms. Lofgren --

Ms. Lofgren. I would like to inquire how I am recorded.

The Clerk. Ms. Lofgren voted aye.

Ms. Lofgren. Thank you.

Mr. Watt. Mr. Chairman? Mr. Chairman.

The Clerk. Mr. Watt --

Mr. Watt. How am I recorded, please?

The Clerk. Mr. Watt is recorded as voting aye.

Ms. Baldwin?

Ms. Baldwin. Aye.

The Clerk. Ms. Baldwin votes aye.

Ms. Jackson Lee. How am I recorded?

The Clerk. Ms. Jackson Lee is recorded as voting aye.

Mr. King. Regular order? Regular order?

The Clerk. Mr. Delahunt?

Mr. Delahunt. Yes.

The Clerk. Mr. Delahunt votes yes.

Mr. Maffei?

Mr. Maffei. Aye.

The Clerk. Mr. Maffei votes aye.

Chairman Conyers. Are there any other Members that want to

vote?

The clerk will report.

The Clerk. Mr. Chairman, 15 Members voted aye, 14 Members voted nay.

Chairman Conyers. A reporting quorum being present and the majority have voted in support of the resolution -- of the motion, and that is ordered reported adversely. Members will have 2 days to submit views.

The Chair will take advantage of the short time remaining to call up, pursuant to notice, H.R. 3190.

Mr. King. Mr. Chairman?

The Clerk. "H.R. 3190, a bill to restore 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."

[The information follows:]

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

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

Mr. King. Mr. Chairman, reserving my right to object.

Chairman Conyers. Chairman Johnson will be recognized for an --

Mr. King. Mr. Chairman?

Chairman Conyers. -- opening statement.

For what reason does the gentleman --

Mr. King. Just reserving my right to object, Mr. Chairman.

Before I can quite move on to this next process of this committee, I am taking away a message from this previous vote that the majority of the committee had concluded that voter intimidation didn't take place. And I would just -- if that is the message, if I am incorrect, I would appreciate if you could clarify that for me before we move on.

Chairman Conyers. This is not regular order. I would be happy to discuss the matter with you as soon we finish this.

Mr. King. Mr. Chairman, that will be my conclusion then, and I will yield back.

Chairman Conyers. All right. Thank you.

Chairman Johnson is recognized to explain the bill briefly.

Mr. Johnson. Thank you, Mr. Chairman.

For nearly 100 years, it was illegal for a manufacturer to fix a minimum price for its product at the retail level. Once the

product was in the hands of retailers, they were free to compete vigorously with one another for customers, offering lower prices, sales discount racks, bargain bins, what have you. Whenever retailers compete aggressively on price, the consumer unquestionably wins.

However, this all changed 2 years ago with the Supreme Court's decision in Leegin, which overturned almost 100 years of antitrust jurisprudence. Minimum retail price fixing was now permissible and subject to antitrust challenge under a standard that is more expensive and facts-intensive, or fact-intensive, and less favorable to plaintiffs.

In the 2 years since the decision came down, we have begun to see an increasing number of manufacturers implement minimum retail prices. There are documented instances of minimum price policies being imposed upon retailers by manufacturers of baby goods, consumer electronics, home furnishings, and pet foods.

When manufactures implement these policies, that means that you can't go shop for the best price on the same shoes in different stores. It means you won't find that stereo cheaper on the Internet. It means that retailers won't be able to put that end-of-season sweater on clearance.

And I realize that a lot of people went shopping over the Christmas holidays and they saw some of these racks of discounted clothing, but those are from manufacturers that have not imposed this retail price agreement upon their distributors and retailers.

But I can guarantee, if this legislation does not pass, particularly if there is a change in leadership in the Congress or the executive branch, then there will be -- they are just waiting to pull the trigger, in other words.

And it means that you are going to start seeing the same price for a product wherever you look. It also means that the big national chains have less to worry about from small entrepreneurs and Internet retailers, who won't be able to undercut their prices. And we all know that 85 percent of the new jobs in this country come from small business, small entrepreneurs.

This is not just an academic issue. In his dissent in the Leegin decision, Justice Breyer noted that even if only 10 percent of manufacturers implemented minimum price-fixing policies, the average annual shopping bill for a family of four would increase by between $750 and $1,000. And just to make sure that didn't slip by anybody, Justice Breyer said that if only 10 percent of the manufacturers implemented minimum price-fixing policies the average annual shopping bill for a family of four would increase by $750 up to $1,000. No telling how much more money was paid this last Christmas season than would been paid by consumers if there had not been these retail price maintenance agreements in place.

All this bill does is to restore the state of play that existed in the market for 96 years prior to Leegin. That means nationwide advertising campaigns offering a manufacturer's

suggested retail price remain permissible, and companies that wholly own their retail franchises can set uniform prices without violating the law. What it does do is prevent distributors from getting too cozy with manufacturers, ensuring that they compete aggressively and pass those savings on to consumers.

This bill is endorsed by 41 State attorneys general out of 50. It is also endorsed by the National Consumers League, the American Antitrust Institute, the Consumers Union, U.S. PIRG, the Consumer Federation of America, and a variety of independent retailers, including Amazon.com and eBay.

I would like to have these letters entered into the record.

Chairman Conyers. Without objection, it is ordered.

[The information follows:]

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

Mr. Johnson. And I yield back, Mr. Chairman.

Chairman Conyers. Thank you.

Mr. Issa. Mr. Chairman?

Chairman Conyers. Yes, but --

Mr. Issa. I have an amendment at the desk. Oh, I am sorry, I am sorry. It is the ranking member --

Chairman Conyers. Mr. Issa, you are completely out of control. It is shocking.

Mr. Issa. Mr. Chairman, I thought you wanted to have all due haste. I apologize for undue haste.

Chairman Conyers. We want to expedite things, but for goodness sake.

I recognize Mr. Smith, the ranking member of the committee.

Mr. Smith. Thank you, Mr. Chairman, and I won't be long.

For 96 years, the U.S. Supreme Court has held that agreements between a manufacturer and a retailer to set the minimum price that the retailer can sell the manufacturer's product -- also known as a resale price maintenance -- are violations of antitrust laws.

However, over that time, the Supreme Court has moved away from most per se standards to a rule of reason standard. Under the rule of reason standard, both the plaintiff and defendant put forth evidence of the relative pro- and anticompetitive effects of a given practice. A court then decides whether the challenge

practice constitutes an unreasonable restraint of trade. By contrast, under a per se standard, once the plaintiff proves the basic elements of its claim, in this case that the manufacturer entered into a price agreement with a retailer, liability automatically attaches.

In 2007, in a case called Leegin v. PSKS, the Supreme Court continued its trend away from per se rules and held that resale price maintenance would be evaluated under the rule of reason. The decision was not without controversy. The Bush administration's Department of Justice, the Federal Trade Commission, along with a number of economists, filed amicus briefs in favor of the position ultimately adopted by the Supreme Court. However, some 37 States filed an amicus brief in favor of retaining the per se standard. Critics of the Leegin decision claim that it will lead to higher prices for consumers.

Before legislating a return to a per se standard, this committee and the courts should take a hard look at the actual facts supporting resale price maintenance. The rule of reason allows courts to conduct the kind of detailed fact-finding necessary to determine the actual harm and benefits to consumers of resale price maintenance. Congress should only repeal the Supreme Court's decision when it is absolutely clear that the practice in question is never pro-competitive.

After only 2 years of rule of reason analysis, the record has not been established to justify a return to the old rule. For

example, we heard testimony from a former official in the Solicitor General's office that these agreements can benefit consumers through greater inter-brand competition and enhanced consumer service.

The Antitrust Modernization Commission noted that, quote, "Allowing the ongoing incorporation of economic learning into antitrust case law and agency guidelines is preferable to attempts at legislative change to specify different antitrust analyses for industries characterized by innovation, intellectual property, and technological change," end quote.

We also need to be careful that our decisions here do not have unintended consequences. At the subcommittee markup, one Member inquired as to whether this legislation is intended to apply to agreements between a manufacturer and that manufacturer's wholly owned retail outlets. What followed was a lengthy and confusing discussion about whether this legislation implicates other Supreme Court decisions, such as Copperweld Corp. v. Independence Tube Corp. That decision held that a parent corporation and its wholly owned subsidiary cannot conspire under the Sherman Act. While it was clear from that discussion that the sponsor of this legislation did not intend for this bill to overrule Copperweld, it is not clear from the text of the legislation.

That is only one item that needs to be cleared up. In the absence of a more thorough record, it is hard to know whether we

need to carve out other safe harbors.

That said, I support the committee's efforts to ensure that consumers are seeing a benefit from this treatment of resale price maintenance. However, at this time, I cannot support the measure for the reasons that I have mentioned.

I will yield back the balance of my time.

Chairman Conyers. Thank you very much, Mr. Smith.

Darrell Issa of California?

Mr. Issa. Thank you, Mr. Chairman.

Thank you, Mr. Ranking Member.

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

Chairman Conyers. The clerk will report the amendment.

The Clerk. "Amendment to H.R. 3190, offered by Mr. Issa of California. Page 2, strike line 6, and insert 'U.S.C. 1)--'. Page 2, after line 6" --

[The information follows:]

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

Mr. Issa. Mr. Chairman, I ask unanimous consent it be considered as read.

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

Mr. Issa. Thank you, Mr. Chairman.

As the amendment is being given to individual Members, I would ask unanimous consent that letters in support of my amendment, or opposing the bill itself, from the National Association of Manufacturers and from the Consumer Electronics Association be entered in the record.

Chairman Conyers. Both of them will be entered into the record, without objection.

[The information follows:]

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

Mr. Issa. Thank you, Mr. Chairman.

My amendment is the middle ground, and I hope that it will be seen by the majority, in addition to the minority, as just that.

It is very clear that we do want to protect the consumer. That is a bipartisan effort. As someone who has been a manufacturer, though, let me hopefully explain very quickly one thing that causes this amendment to be offered.

A manufacturer in a retail environment has but one product; that is their suitcase, their computer, their iPod. They have a product in the flow of commerce. The retailer, on the other hand, has a plethora of choices. Normally, a retailer, if you don't go to the Apple store, a retailer has Apple, BlackBerry, Samsung. In fact, most retailers, particularly the large retailers and the retailers that are in support of this legislation unamended, have all the brands.

If you are eBay or you are Best Buy or you are any retailer and you have the ability to take the most expensive brand, the best brand, the one that has the most demand and reduce its price, and then when people come in because it says on the bottom "limit one per store," you have created traffic at the expense of the perceived value of that product. You also, of course, have the ability to raise and lower that price to suit your whim. You have all the options.

A manufacturer, again, has but one product, the product that

they are presenting in the way that they would like to present it. If that manufacturer -- and this is the crux of the amendment -- has market power, then, in fact, Mr. Johnson is right, we should hold that manufacturer to the higher standard.

If that manufacturer does not have antitrust consideration of any kind of market power, if it is the small manufacturer, the start-up, the little guy, and they say, "The only way that we believe that we can get the attention of the market is to price our product where it belongs, realizing that we may sell less but we will sell to a discerning customer who appreciates the advantage," if that is the decision of the manufacturer with their prize, their intellectual property, the thing that they created and proudly brought to market, then, in fact, if they have no market power, why shouldn't they be given some reasonable control over their own product, with standard of review but not the standard of review that is the same as a corporation which has real market power?

That is the standard for the amendment that we are offering. The reason we are offering it is, one, it is the middle ground; two, there is a fundamental flaw in the underlying bill as it is.

I happen to be the owner of many Apple products. I like them. I have been to the Apple stores; I have been to other retailers. Under this legislation, if unamended, because Apple owns an interest, as a large corporation might, in many of their stores, they would be exempt from this pricing policy while, in

fact, a small company, one that could not begin to own a piece of a retailer, would not.

So even the exemptions in this bill would need to be changed if we do not, in fact, open up the reasonable rule that if you are not under any definition of a "trust" able to have any market power, then why is it that you shouldn't be held to the post-Leegin standard. If, in fact, you have reason to believe that you have market power, then, in fact, I think we should stick to what this committee has supported for a long time, which is: Those who have market power are dealt with with a dubious eye as to whether or not they assert that power in order to gain excess profits through their monopoly.

So, with that, Mr. Chairman, I would hope that this is the kind of middle ground that can be voice-voted and we can move on. And I thank the gentleman, and I yield back.

Chairman Conyers. Thank you very much, Darryl Issa.

The chairman of the subcommittee seeks recognition and is recognized.

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

Chairman Conyers. Without objection, the gentleman is recognized.

Mr. Johnson. I strongly oppose Representative Issa's amendment and urge my colleagues to vote against it.

What Mr. Issa is proposing is a rule-of-reason test to

determine whether or not the rule of reason would apply. There is no rule of thumb in determining what constitutes market power. Forty-nine percent may not constitute market power in some markets, while 8 percent may constitute dominance in others. The only way to determine whether a manufacturer has market power is to go through much of the same rule-of-reason analysis that Leegin applies to all minimum price maintenance agreements.

By doing this, you make all such agreements de facto legal. And this hurts small retailers. The small retailers who get harmed by these agreements don't have the time or the money to litigate an out-of-State antitrust case. That is what makes the effects of Leegin so pernicious. You can't always see how far-reaching it is because a lot of retailers won't be able to fight these practices.

It is the case of David versus Goliath again that we are confronted with. And we know these types of agreements are bad for consumers. Some of these types of agreements were briefly exempted from antitrust scrutiny under the State fair trade laws right after the Great Depression. The Department of Justice, however, later found that these agreements raised consumer prices between 18 and 27 percent, costing consumers an extra $1.2 billion.

For 96 years, the rule was simple: Minimum retail price agreements are illegal. I challenge you to show me that, from 1911 to 2007, small manufacturers were frozen out of the

marketplace because of the Leegin rule.

In his dissent in the Leegin case -- and I just misspoke. Not the Leegin case, but in the fact that it was a per se antitrust standard prior to Leegin. So these retail price maintenance agreements were per se illegal.

For 96 years, the rule was simple: Minimum retail price agreements are illegal. And, again, I would challenge anyone to come forward with empirical data that supports the notion that small manufacturers were hurt by this rule.

In his dissent in the Leegin case, Justice Breyer pointed out the problems with using a market power test in resale price maintenance cases. He noted that they are easier said than done and that they invite lengthy, time-consuming arguments among competing experts and require the application of abstract, highly technical criteria to often ill-defined markets.

The real question is, do we want retailers to serve as agents of consumers and deliver the best price or as agents of manufacturers? For 96 years, this answer was to create an environment in which retailers compete vigorously with each other and the savings will get passed on to the average American's wallet. In these economic times, we should be looking for every opportunity to lower prices for consumers, not raise them. And for this reason I urge my colleagues to vote against Mr. Issa's amendment.

And with respect to the Copperweld case raised by Ranking

Member Smith, a company cannot form an agreement with a wholly observed subsidiary. They are part of the same entity, and the term agreement, as it has been interpreted for decades under the antitrust laws, requires two or more separate entities. The bill has been carefully drafted to use a term that would not go back and undo the Copperweld decision. This bill is intended to be narrow in scope and only reverses the holding in the Leegin case.

And I will yield back.

Chairman Conyers. Thank you very much.

Could I ask Darryl Issa --

Mr. Smith. Mr. Chairman?

Mr. Watt. Mr. Chairman?

Chairman Conyers. Well, let me just do this, and then I will yield to Mel Watt.

Drawing on your legal experience and knowledge, are you with the consumers or with the anticompetitive crowd?

Mr. Issa. Mr. Chairman, that is a narrowly defined question.

In a nutshell, I believe the consumer deserves to have real price competition. I also believe that, in fact, when you buy a General Motors automobile, you not only want a good price but you want to ensure they will be there to back the warranty, you want to make sure that when you take your car from one dealer to one across the country that they are prepared to meet those obligations. And that is part of what happens.

But, additionally, I believe that under this rule you would

expect that every McDonald's franchise not owned by McDonald's would set whatever price it wanted and compete for the lowest price, so you would never know what a Big Mac was going to cost. Because, of course, we want the consumer to get the lowest price, so if there are two McDonald's in the region, they would compete artificially low. Not always is the consumer taken care of best by the lowest price. Certainly, when I go to McDonald's, price is important, but I darn well want consistency and quality.

And having been a manufacturer, having lived with fair trade laws before they went away, and having lived with minimum advertised price, a narrow way to allow the consumer to buy for whatever he can when he gets into the Circuit City store, but, in fact, carefully make sure that at least the advertisement of my logos, trademarks, and patented materials was consistently seen throughout the country so that there would be an expectation that the consumer could count on what he saw in advertising being delivered when he went to the retailer, I know there is a balance.

I sought this amendment because the consumer should understand, if you have market power, you might misuse it; therefore, we want to constrain you. If you are the manufacturer a fraction of the size of Best Buy or eBay, you should be protected, too, in your ability to deliver that quality product.

So I am with the consumer getting the quality product at a predictable price. And, of course, I want to see that that price be as low as possible.

Chairman Conyers. Well, nothing could rattle the American consumer more than going into a McDonald's and not knowing for sure what a Double Whopper Big Mac is going to cost. I mean, you are right there.

Mr. Issa. You have made my point in many ways, Mr. Chairman.

Chairman Conyers. And drawing further on your legal experience, do you support the Dr. Miles decision or the Leegin Leather decision?

Mr. Issa. I think Leegin got it right, partially. But, like anything else, the court only can use the tools it is given. It makes a decision based on what is before it. That is the reason that, if this amendment is allowed, I will support this all the way through the Senate and the signing by the President, because I think there is a fair balance that we can send back to the court so that they can answer the question.

And to the extent Mr. Johnson and I may disagree on some things, I hope we agree that there is a huge body, a huge body, that tells us what market power is under antitrust laws and that that is not a vague standard but, in fact, a very definable standard. Microsoft knows it has market power; clearly, the little company just starting off knows it doesn't.

Chairman Conyers. Thank you very much.

I turn now to Mel Watt, distinguished member of the committee from North Carolina.

Mr. Watt. Thank you, Mr. Chairman. I move to strike the

last word.

Chairman Conyers. The gentleman is recognized.

Mr. Watt. And I will speak on the underlying bill and Mr. Issa's amendment at the same time.

At the subcommittee hearing and markup, both Mr. Issa and I raised some question about the breadth of the language in this bill. And I am happy to say that my staff has done a substantial amount of research and put it in front of me between then and now.

And one piece of information that I think the committee would benefit from -- and I therefore ask unanimous consent to submit it for the record --

Chairman Conyers. Without objection.

Mr. Watt. -- is a law review article written by Mr. Michael A. Carrier of the George Mason Law School in the summer of 2009 in which he refers to an earlier law review article that he wrote 10 years ago, in early or late 1999 or early 2000.

[The information follows:]

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

Mr. Watt. And, at that time, he concluded that, as I was asserting at the subcommittee markup, the rule of reason seems like it could only be reasonable. But, unfortunately, what he found in his analysis was that the application of the rule of reason had not been nearly as reasonable as the articulation of the rule of reason.

This is what he found. He found that, in the 10-year decade that he had originally analyzed, the rule of reason had, in effect, become a burden-shifting rule of reason in its application by the courts. And, in the first stage of that burden-shifting process, the plaintiff would have to show a significant anticompetitive effect, and that in only 84 percent of the cases was the plaintiff able to demonstrate to get past that first stage.

Then you would have to go on to a second stage in the application of the rule of reason. And, in that second stage, the defendant would then have to demonstrate a legitimate pro-competitive justification for the price fixing. And, in that stage, only 3 percent of the cases survived. So you were up to 87 percent from 84.

And then you would have to go on to a third stage in which the plaintiff would show that the restraint is not reasonably necessary or that the defendant's objectives could be achieved by less restrictive alternatives. And that kicked out another

4 percent of the cases, so you were up to 91 percent of the cases.

And then you would have a balance, in effect, like the one Mr. Issa has proposed here. And, in that process, another 4 percent of the cases were kicked out. So, by the time you got to the end of this process, only 4 percent of the cases were surviving the entire process.

Then he went back 10 years later and did the same analysis, following all of the cases that had been decided in that subsequent 10-year interval, and surprisingly -- or unsurprisingly -- the results were even worse, so that in the first 10 years, 4 percent of the cases were surviving the process; in the second 10 years, only 2 percent of the cases were surviving the process. So, in 98 percent of the cases, the consumer, in effect, was getting shafted by this rule of reason that the court said was such a wonderful rule-of-reason approach.

Now, I did have some concern about the original language in the bill that says retail or wholesaler or distributor. I thought it was too broad. But I think that has been addressed by my research also. As Mr. Issa will probably recall, I was pretty balanced and fair. In fact, it sounded like me and Mr. Issa were on the same side of this issue. And he was rejoicing and I was rejoicing because that was so uncommon in our committee.

But I wanted to advise Mr. Issa that subsequent research done by my very capable staff and put in front of me, not in a biased way but just to show me what was really happening in the real

world, has led me to the conclusion that this legislation is not only appropriate but necessary if the consumer is going to be protected.

A final point, Mr. Chairman, and then I will yield back. And I say this -- a lot of my friends on the other side the aisle have been very religious in their adamant belief that we should be reducing litigation. I think Issa's amendment would actually increase the amount of litigation substantially. And it would do so to the detriment of the smallest people in the market who have the least capacity to be involved in that litigation.

The big distributors who can, as Mr. Issa says, have market power can afford, maybe, to do this litigation. But the ones who would have the price fixing imposed on them, the smallest ones, would be the least able, under Mr. Issa's approach, to afford the litigation. And those are the ones in our neighborhoods that we like to shop at, that we like to get our bargains from, our least costly avenues.

So, with that, I will officially jump ship on Mr. Issa.

Mr. Issa. Will the gentleman yield?

Mr. Watt. I know he is getting ready to accuse me of doing that. And I am happy to yield to him if I have any time left.

Mr. Issa. I thank the gentleman for yielding briefly.

I am sorry to lose you. We were so close.

Perhaps I won't get you back, but I might remind you that the real consumer protection comes usually not from a manufacturer of

a widget who says, I would like my -- let's just say my briefcase, "I want it advertised at this price," and it is at that price, if you go to your store in the inner city that is small, it is the same price when you go to the small store in rural America and it is the same price at Wal-Mart.

In fact, the real problem that we usually deal with on behalf of consumers is, in the big city or the big suburb, the price is lower, and when you get to the small shop, whether rural or urban, the price is suddenly higher because the retailer has no competition. The retailer, under this legislation, is completely -- completely -- available to jack up the price to redline areas that they could make more money, when in fact they could have it priced far lower than the manufacturer might need in order to service the product.

So I think it --

Mr. Watt. Reclaiming my time, I understand that he can jack it up and he can jack it down. And, you know, sometimes you win and sometimes you lose. But if in 96 percent of the cases 10 years ago consumers were losing and 10 years later 98 percent of the cases consumers are losing, that is a price that I believe is too high to pay.

One final note, Mr. Chairman, which might start to satisfy Mr. Issa a little bit. I did convince the staff that we ought to put in the report language something that assures us that we are not talking about prohibiting manufacturers' suggested retail

prices. I think that serves a useful purpose in the auto manufacturers' context, in the McDonald's context that Mr. Issa suggested.

But that suggested retail price should not be a mandatory minimum price. It should be only suggested. And I think that can be covered in the report language. And I appreciate Mr. Johnson and his staff being kind enough to acknowledge that that probably is necessary.

And, with that, I yield back and oppose Mr. Issa's amendment and support the underlying bill.

Chairman Conyers. The vote is on the Issa amendment.

All in favor, say, "Aye."

All opposed, say, "No."

The noes have it. The amendment is unsuccessful.

Mr. Issa. Mr. Chairman?

I thank you, Mr. Chairman. Yield back.

Chairman Conyers. You are welcome.

If there are no further amendments, a reporting quorum is present --

Ms. Jackson Lee. Mr. Chairman?

Chairman Conyers. No, I can't recognize anybody else.

[The statement of Ms. Jackson Lee follows:]

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

Chairman Conyers. The question is on reporting the bill favorably.

Those in favor of reporting 3190 favorably, say, "Aye."

Those opposed, say, "No."

The ayes have it, and the bill is ordered reported favorably.

And, without objection, staff is authorized to make technical and conforming changes. Members have 2 days to submit views.

And, with that, we will end our session for the day. All in favor -- well, we don't have to vote on adjournment. The committee stands in adjournment.

[Whereupon, at 12:06 p.m., the committee was adjourned.]