MEMORANDUM

TO: Members, Committee on the Judiciary

FROM: John Conyers, Jr.
Chairman

DATE: December 1, 2009

RE: Full Committee Markup

The Committee on the Judiciary will meet to markup H.R. 3996, the "Financial Stability Improvement Act of 2009"; H.R. 1064, the "Youth Prison Reduction through Opportunities, Mentoring, Intervention, Support, and Education Act"; H.R. 3190, the "Discount Pricing Consumer Protection Act of 2009"; and H.R. 569, the "Equal Justice for Our Military Act of 2009." The markup will take place on Wednesday, December 2, 2009 at 10:15 p.m. in room 2141 of the Rayburn House Office Building.

I. H.R. 3996, the "Financial Stability Improvement Act of 2009"

H.R. 3996, the "Financial Stability Improvement Act of 2009," was introduced by Rep. Barney Frank on November 3, 2009. The bill would establish a non-bankruptcy regime for the resolution of failing large non-bank financial institutions that were highly interconnected with other actors in the Nation's financial system (i.e., those institutions that are said to be "too big to fail"), and is a response to the perceived inability of the Bankruptcy Code to handle effectively the failure of such institutions. Supporters of enhanced resolution authority for a federal agency argue that the lack of such authority to wind-down failing interconnected financial institutions quickly and in an orderly fashion contributed to the recent financial crisis and will continue to constrain the government's capacity to address future financial crises. The Committee proposes certain changes to H.R. 3996 that preserve the flexibility and discretion needed for a federal agency to stabilize the Nation's financial system in response to an emergency while maintaining

the certainty, predictability, and transparency of the bankruptcy process as part of the resolution regime for interconnected financial firms.

The Judiciary Committee received an additional referral of H.R. 3996, which is now being considered by the Financial Services Committee. As introduced, H.R. 3996 has several provisions that fall within the Rule X jurisdiction of the Judiciary Committee. Most of these provisions are within Subtitle G of the bill.

A. Background

1. The Economic Crisis

According to numerous economics experts, one of the factors triggering the present economic malaise was the large-volume issuance of high-risk mortgage-backed securities in the earlier part of this decade. The widespread availability of home mortgage loans fueled rising housing prices, creating a "bubble" in the market. When housing prices began to fall in late 2007, the "bubble" collapsed. As the bubble collapsed, some homeowners were unable to refinance their loans because they owed more on their mortgages than their homes were worth (i.e., they were "upside-down" or "underwater.") Additionally, those with certain adjustable-rate mortgages or other exotic mortgage products found their monthly payments adjusting sharply upwards. With growing numbers of homeowners with mortgage balances greatly in excess of the worth of their homes and their ability to pay, home foreclosures increased dramatically. As a result, financial institutions lost liquidity due to defaults and reductions in cash streams and assets.

The systemic nature of this problem became apparent in March 2008 when investment bank Bear Stearns turned to the federal government and competitor JPMorgan Chase for assistance in addressing a sudden liquidity crisis caused by a shortage of cash precipitated by investors withdrawing their money en masse. The Federal Reserve provided JPMorgan Chase with funds to complete the merger, stating that it was doing so "to promote the orderly functioning of the financial system."[1] In July, the Federal Deposit Insurance Corporation (FDIC) seized control of IndyMac, once one of the nation's largest home lenders after the ailing bank

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[1]JPMorgan Chase, Fed Come to Rescue of Bear Stearns, MSNBC, Mar. 14, 2008, available at http://www.msnbc.msn.com/id/23630319/%20.

shuttered several of its offices and was beset by a run from depositors withdrawing approximately $100 million per day.[2]

The credit crisis deepened in September 2008 when the federal government put Fannie Mae and Freddie Mac into conservatorship after their financial condition rapidly deteriorated.[3] According to then-Treasury Secretary Henry Paulson, intervention was essential because failure of the two companies "would affect the ability of Americans to get home loans, auto loans and other consumer credit and business finance. . . [and] would be harmful to economic growth and job creation."[4] On September 14, 2008, the impact of the crisis widened as global financial services company Merrill Lynch agreed to sell itself to Bank of America and international insurer and financial services company American International Group (AIG) asked the federal government for a $40 billion bridge loan.[5]

On September 15, 2008, the crisis spread to the once-venerable Lehman Brothers Holdings Inc., as the global financial services firm filed a petition under Chapter 11 of the U.S. Bankruptcy Code in the Southern District of New York.[6] According to the filing, Lehman had total debts of $613 billion against total assets of $639 billion.[7] Lehman's business bankruptcy filing was the largest in U.S. history, dwarfing the previous largest bankruptcy, that of WorldCom Inc. in July 2002, which had $104 billion of assets.[8]

Immediately following the Lehman bankruptcy filing, an already distressed financial market began a period of extreme volatility, during which the Dow Jones index experienced its largest one-day point loss, largest intra-day range (more than 1,000 points) and largest daily point gain. During this time, the government's efforts were insufficient to restore earlier levels of liquidity or investor confidence, and the economy continued to slow as banks hoarded their cash reserves, contracted access to existing lines of credit, and declined further extension of credit.[9] On September 23, 2008, Secretary Paulson and Federal Reserve Chairman Ben Bernanke appeared before the Senate Banking Committee to request a $700 million rescue plan to buy and

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[2]Kathy M. Christof & Andrea Chang, IndyMac Bank Seized by Federal Regulators, L.A. TIMES, July 12, 2008, *available at* http://articles.latimes.com/2008/jul/12/business/fi-indymac12.
[3]Stephanie Armour & James R. Healey, Taxpayers Take on Trillions in Risk in Fannie, Freddie Takeover, USA TODAY, Oct. 20, 2008, available at http://www.usatoday.com/money/economy/housing/2008-09-07-fannie-freddie-plan_N.htm.
[4]Stephen Labaton & Edmund L. Andrews, In Rescue to Stabilize Lending, U.S. Takes Over Mortgage Finance Titans, N.Y. TIMES, Sept. 7, 2008, available at http://www.nytimes.com/2008 09/08/business/08fannie.html?pagewanted=1&_r=1.
[5]Andrew Ross Sorkin, Lehman Files for Bankruptcy, Merrill is Sold, N.Y. TIMES, Sept. 7, 2008, available at http://www/nytimes.com/2008/09/15/business/151ehman.html?pagewanted= all.
[6]Press Release, Lehman Brothers, Sept. 15, 2008, available at http://www.lehman.com/press/pdf_2008/091508_lbhi_chapter11_filed.pdf.
[7]Sam Mamudi, Lehman folds with record $613 billion debt, MarketWatch, Sept. 15, 2008.
[8]*Id.*
[9]David Leonhardt, Can't Grasp Credit Crisis? Join the Club, N.Y. TIMES, March 19, 2009, available at http://www.nytimes.com/2008/03/19/business/19leonhardt.html?pagewanted=2.

resell mortgage-backed securities citing fears of a recession if the government did not act.[10] On October 3, 2008, under the Troubled Asset Relief Program (TARP), Congress authorized $700 billion for the Treasury to buy troubled assets to prevent disruption in the economy.[11] A portion of the $700 billion was subsequently used to recapitalize some of the nation's leading banks by buying their shares and to provide lines of credit.

Since Lehman's bankruptcy, more than 100 banks have failed.[12] While small banks have failed at a rate not seen since the savings and loan crisis in the 1980s, the government has deemed the country's 19 largest financial institutions as "too big to fail" in a disorderly fashion.[13] FDIC Chairman Sheila Bair recently testified that large non-bank financial institutions were able to essentially "blackmail" the government because some companies were so large that officials had no way of breaking them apart if they were to falter.[14]

2. Obama Administration Financial Regulatory Reform Package

In the wake of what many have characterized as the worst U.S. financial crisis since the Great Depression, the Obama Administration proposed sweeping reforms of the financial services regulatory system. The broad outline of these reforms, encompassed in the President's White Paper issued in June 2009, set forth five objectives:

(1) "Promote robust supervision and regulation of financial firms";
(2) "Establish comprehensive supervision and regulation of financial markets";
(3) "Protect consumers and investors from financial abuse";
(4) "Improve tools for managing financial crises"; and
(5) "Raise international regulatory standards and improve international cooperation."[15]

Subsequent to the issuance of the White Paper, the Administration offered specific legislative proposals that it forwarded to Congress in the form of 13 separate titles:

Title I - Financial Services Oversight Council
Title II - Tier 1 Financial Holding Companies
Title III – Improvements to Supervision and Regulation of Federal Depository Institutions

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[10] Mark Landler & Steven Lee Myers, Buyout Plan for Wall Street Is a Hard Sell on Capitol Hill, N.Y. TIMES, Sept. 23, 2008, available at http://www.nytimes.com/2008/09/24/business/ economy/24fannie.html?pagewanted=1.
[11] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).
[12] FDIC Failed Bank List, available at http://www.fdic.gov/bank/individual/failed/banklist.html.
[13] David Enrich & Damian Paletta, Finance Overhaul Falters as '08 Shock Fades, WALL ST. JOURNAL, Sept. 9, 2009.
[14] Hearing on Establishing a Framework for Systemic Risk Regulation Before the S. Comm. on Banking, Housing, and Urban Affairs, 111th Cong. (2009) (testimony of Sheila C. Bair, Chairman, Federal Deposit Insurance Corporation).
[15] Financial Regulatory Reform, Obama Administration White Paper, available at http://www.financialstability.gov/docs/regs/FinalReport_web.pdf.

Title IV – Registration of Advisers to Private Funds
Title V – Office of National Insurance
Title VI - Bank Holding Company Act amendments and other banking law amendments
Title VII - Improvements to Regulation of Over-the-Counter Derivatives Markets
Title VIII – Settlement Supervision
Title X – Consumer Financial Protection
Title XI – Improvements to the Federal Trade Commission Act
Title XII – Enhanced Resolution Authority
Title XIII - Amendment to Federal Reserve Act section 13(3)[16]

Title XII, providing for enhanced resolution authority for the orderly dissolution of certain failing non-bank financial institutions, forms the basis for Subtitle G of H.R. 3996.

3. Concerns with Enhanced Resolution Authority Proposal

a. Resolution Authority and Bankruptcy

As Alan Blinder, a Princeton economist and former Federal Reserve vice chairman stated:

> People in the market often say they can make money under any set of rules, as long as they know what they are. If Bear Stearns was too big to fail, how could Lehman, at twice its size, not be? If Bear was too entangled to fail, why was Lehman not? After Lehman went over the cliff, no financial institution seemed safe. So lending froze, and the economy sank like a stone. It was a colossal error, and many people said so at the time.[17]

In light of the danger illustrated by the collapse of a financially interconnected firm like Lehman Brothers, and in light of the taxpayer-funded "bailouts" of other similar non-bank financial firms, the Administration proposed a new resolution authority regime that would be able to wind-down insolvent non-bank financial institutions that are deemed to be systemically important, much like the FDIC currently does for insolvent banks pursuant to the Federal Deposit Insurance Act (FDIA).[18]

Currently, there is no resolution mechanism other than dissolution under bankruptcy law for financial institutions that are not subject to the resolution authority of the FDIC but whose collapse would threaten the stability of the financial system, such as a bank holding company or financial holding company (e.g., Citigroup), a securities firm (e.g., Lehman), or a thrift holding

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[16] U.S. Dep't of the Treasury, Financial Regulatory Reform: A New Foundation, available at http://www.ustreas.gov/initiatives/regulatoryreform/.
[17] Michiko Kakutani, Inside the Meltdown: Financial Ruin and the Race to Contain It, N.Y. TIMES, July 20, 2009.
[18] 12 U.S.C. §1811 et seq.

company, (e.g., AIG). H.R. 3996 is modeled on the conservatorship and receivership authorities given to the FDIC under the FDIA. It includes broad powers to intervene in the face of insolvency and to wind down, operate, merge, or otherwise deal with an insolvent systemically significant financial company and its assets and creditors, including creating a bridge financial institution to sell core assets of the financial company in order to stabilize the financial system during a crisis. According to Secretary of the Treasury Timothy Geithner:

> The proposed resolution authority would allow the government to provide financial assistance to make loans to an institution, to purchase its obligations or assets, to assume or guarantee its liabilities, and to purchase an equity interest. The U.S. Government, as conservator or receiver, would have additional powers to sell or transfer the assets or liabilities of the institution in question, to renegotiate or repudiate the institutions' contracts, and to prevent certain financial contracts with the institution from being terminated on account of conservatorship or receivership. Implementation would be modeled on the resolution authority that the FDIC has under current law with respect to banks.[19]

i. Need for non-bankruptcy resolution

Proponents argue that enhanced resolution authority is needed because the existing bankruptcy system is not designed for large, systemically significant non-bank financial institutions, as illustrated by the systemic reaction to the Lehman Brothers bankruptcy case. According to FDIC Chairman Sheila Bair, bankruptcy "is a very messy process for financial organizations and, as was demonstrated in the Lehman Brothers case, markets can react badly. In addition, many feel that the [Lehman] bankruptcy process itself had a destabilizing effect on markets and investor confidence."[20] Others have described the Lehman bankruptcy as "torturous" and "complex."[21] When Lehman collapsed, more than 2.5 million trades in which it was engaged were frozen. Reportedly, one of these trades, which has been settled with the counter-party for about $500 billion, required administrators to look at some 10,000 line items that took months to compute.[22]

Proponents of resolution authority contend that speed is of the essence in the resolution of large, interconnected financial companies because credit disappears quickly during a financial crisis and the value of assets disappears upon a bankruptcy filing. In their view, the bankruptcy

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[19]Oversight Hearing on the Federal Government's Intervention at American International Group Before the H. Comm. on Financial Services, 111th Cong. (2009) (statement of Timothy Geithner , Secretary of the Treasury).
[20]Hearing on Regulating and Resolving Institutions Considered "Too Big to Fail" Before the S. Comm. on Banking, Housing and Urban Affairs, 111th Cong. (2009) (statement of Sheila C. Bair, Chairman, FDIC).
[21]John Reid, Beyond the Crisis, N.Y. TIMES, Sept. 11, 2009. See also, David A. Moss, An Ounce of Prevention, Harvard Magazine, Sept.-Oct. 2009, at 29 (stating, with respect to systemically significant financial institutions, that "regulators often feel the need to prop up such institutions when they falter to avoid a messy and potentially destructive bankruptcy process.").
[22]Id.

process is too slow to respond to such a crisis and is not well-suited to stabilizing the financial system. Assistant Treasury Secretary Michael S. Barr testified before the House Judiciary Committee's Subcommittee on Commercial and Administrative Law that "Lehman's collapse has shown quite starkly . . . [that] there are times when the existing options under the Bankruptcy Code are simply not adequate to deal with the insolvency of large financial institutions in times of severe crisis."[23] During that same hearing, Michael Krimminger, Special Advisor for Policy to the FDIC, testified that bankruptcy "can create dangerous uncertainty about the resolution of a systemically significant financial firm because the process entails negotiated solutions that, as in the Lehman bankruptcy, may leave hundreds of thousands of contracts unresolved for months. While the bankruptcy process works well for the vast majority of commercial insolvencies, it can engender broad disarray in the markets if the debtor's financial interconnections extend throughout the credit, derivatives, and other financial markets around the globe."[24]

Proponents also cite the AIG case in support of enhanced resolution authority.[25] In testimony before the House Financial Services Committee about the government's financial assistance to AIG, Treasury Secretary Geithner stated that "the U.S. government does not have the legal means today to manage the orderly restructuring of a large, complex, non-bank financial institution that poses a threat to the stability of our financial system."[26] Because of this deficiency, the government was obligated to infuse capital into AIG on an *ad hoc* basis.[27] As of June 2009, the government had provided at least $180 billion in financial assistance to AIG to avert a disorderly collapse.[28] Such a collapse could have further destabilized financial markets, undermined confidence in the economy, and restricted the flow of credit.[29] According to proponents, resolution authority would have allowed the government to address the AIG case in a more orderly manner with less cost to the taxpayer.[30] Under the proposed resolution authority, systemically important institutions might in the future receive limited capital infusions in times of great financial distress, but individual firms facing insolvency would be taken over by a federal receiver and restructured, sold, or liquidated.

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[23]Hearing on Too Big to Fail: The Role of Bankruptcy and Antitrust Law in Financial Regulation Reform Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 111th Cong. (2009) (statement of Michael S. Barr, Assistant Secretary of the Treasury).
[24]Id. (statement of Michael Krimminger, Special Advisor for Policy, Federal Deposit Insurance Corporation).
[25]Hearing on the Administration's Proposals for Financial Regulatory Reform Before the H. Comm. on Financial Services, 111th Cong. (2009) (statement of Timothy Geithner, Secretary of the Treasury); Oversight Hearing on the Federal Government's Intervention at American International Group Before the H. Comm. on Financial Services, 111th Cong. (2009) (statement of Timothy Geithner , Secretary of the Treasury).
[26]Oversight Hearing on the Federal Government's Intervention at American International Group Before the H. Comm. on Financial Services, 111th Cong. (2009) (statement of Timothy Geithner , Secretary of the Treasury).
[27]Id.
[28]AIG Sells Nan Shan for $2.15 Billion: Biggest Sale to Date, CNNMoney.com, October 13, 2009, available at http://money.cnn.com/news/newsfeeds/articles/djf500/200910130011DOWJONESDJONLINE000006_FORTUNE5.htm.
[29]Oversight Hearing on the Federal Government's Intervention at American International Group Before the H. Comm. on Financial Services, 111th Cong. (2009) (statement of Timothy Geithner , Secretary of the Treasury).
[30]Press Release, Dep't of the Treasury, Treasury Proposes Legislation for Resolution Authority (March 25, 2009), available at http://www.ustreas.gov/press/releases/tg70.htm.

Proponents maintain that the AIG case also illustrates the existence of moral hazard in the absence of resolution authority. They assert that, in the absence of resolution authority, "too big to fail" financial companies will continue to engage in excessively risky business behavior based on the assumption that, in the event of a crisis, the government will have no choice but to provide financial assistance to avoid destabilization of the financial system.

Federal Reserve Chairman Ben Bernanke has argued that "many of [the Fed's] actions [to stabilize systemically important financial institutions] might not have been necessary in the first place had there been in place a comprehensive resolution regime aimed at avoiding disorderly failure of systemically critical financial institutions."[31] FDIC Chairman Sheila Bair stated that the "current crisis has clearly demonstrated the need for a single resolution mechanism for financial firms that will preserve stability while imposing the losses on shareholders and creditors and replacing senior management to encourage market discipline. A timely, orderly resolution process that could be applied to both banks and non-bank financial institutions, and their holding companies, which would prevent instability and contagion and promote fairness."[32]

ii. Danger of Moral Hazard

Turning on its head the argument that a lack of resolution authority would create moral hazard, others contend that the Lehman bankruptcy, rather than being illustrative of bankruptcy law's limitations, demonstrates the moral hazard that arises with the *availability* of a non-bankruptcy resolution mechanism for "too big to fail" financial institutions. In testimony before the House Judiciary Committee's Subcommittee on Commercial and Administrative Law, Professor David Skeel contended that the government's financial assistance to Bear Stearns and AIG prior to Lehman's collapse led Lehman's management and its creditors to believe that it, too, would be "bailed out" by the federal government.[33] In relying on the assumption that Lehman would not have to file for bankruptcy no matter how dire its financial situation, Lehman's management and creditors failed to take the necessary actions to prepare for an orderly sale or restructuring that could have avoided its collapse.[34] Retaining the prospect of bankruptcy for interconnected non-bank financial firms would "discourage excessive risktaking in the first instance, encourage creditors to monitor the institutions they have invested in, and if dark clouds

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[31]Hearing on An Examination of the Extraordinary Efforts by the Federal Reserve Bank to Provide Liquidity in the Current Financial Crisis Before the H. Comm. on Financial Services, 111th Cong. (2009) (statement of Ben Bernanke, Federal Reserve Chairman).
[32]Hearing on Establishing a Framework for Systemic Risk Regulation Before the S. Comm. on Banking, Housing and Urban Affairs, 111th Cong. (2009) (statement of Sheila C. Bair, Chairman, FDIC).
[33]Hearing on Too Big to Fail: The Role of Bankruptcy and Antitrust Law in Financial Regulation Reform Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 111th Cong. (2009) (statement of David A. Skeel, University of Pennsylvania Law School); see also, David A. Skeel, Jr., Give Bankruptcy a Chance, The Weekly Standard, June 29, 2009, available at http://www.weeklystandard.com/Content/Public/Articles/000/000/016/658hmvhc.asp.
[34]*Id.*

do develop, encourage managers to make plans for an orderly bankruptcy."[35] Critics of resolution authority would leave the Bankruptcy Code in place to insure that shareholders, creditors, and counterparties of non-bank financial institutions suffer appropriate losses if such companies fail.

iii. Limitations of FDIA Model for Certain Claims, Benefits of Bankruptcy Code, and Suggestion of a "Hybrid" Approach

Despite widespread agreement among the relevant federal agencies on the importance of having a new resolution authority regime for interconnected non-bank financial institutions, some have criticized the idea of a non-bankruptcy resolution regime for such institutions. For example, some have questioned the appointment of the FDIC as receiver/conservator rather than allowing courts to select a receiver and then supervise it.[36] According to the Heritage Foundation, while "the FDIC has broad experience with resolving failed banks, it has no experience with the broader financial activities which will almost certainly be part of failing large financials."[37]

Among proponents of resolution authority, there is general agreement that a federal agency should have resolution powers modeled on the FDIA, especially the power to transfer to another entity certain assets and associated liabilities critical to ensuring the stability of the financial system and to take other steps to stabilize the financial system at the onset of a potential financial crisis. Some proponents, however, believe that the FDIA process may be a poor model for the resolution of claims concerning the assets and liabilities that have not been transferred out of a failing financial firm. Under H.R. 3996 as introduced, these "left behind" claims are subject to an administrative claims process modeled on the FDIA rather than the regular bankruptcy process for determining claims.

Some believe that the FDIA administrative claims resolution process lacks the transparency, due process, and judicial review contained in the bankruptcy process. Moreover, the resolution of these "left behind" claims are not critical to any systemic stabilization efforts, obviating the need for the speed and flexibility of a non-bankruptcy resolution at this stage. In addition, the FDIA model was designed to reinforce the priority of deposit creditors over unsecured non-deposit creditors, who account for only 2% of creditors of most banks. In contrast, non-bank financial institutions have no deposit creditors. The risk that secured claims could be swept aside under an FDIA-based system increases the risk that secured credit could be difficult to obtain for non-bank financial institutions. More generally, the lack of transparency,

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[35] *Id.* For a more detailed discussion, see Kenneth M. Ayotte and David A. Skeel, Jr., *Bankruptcy or Bailouts?*, (Scholarship at Penn Law, Paper 268, 2009), available at http://lsr.nellco.org/upenn_wps/268/.
[36] David C. John, *The Lehman Brothers Collapse: Financial Regulation One Year Later*, The Heritage Foundation, Sept. 14, 2009, available at http://www.heritage.org/Research/Economy/wm2610.cfm.
[37] *Id.*

judicial review, or neutral rules governing the creditors' rights can have the effect of making credit more costly and less available for borrowers.[38]

Use of the Bankruptcy Code can promote market stability, which ultimately eases the flow of credit. For instance, with respect to the adjudication of claims, Michael Rosenthal, a bankruptcy attorney, testified before the Subcommittee on Courts and Competition Policy that:

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[38]Hearing on Too Big to Fail: The Role of Bankruptcy and Antitrust Law in Financial Regulation Reform, Part II Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary, 111th Cong. (2009) (statements of Edwin E. Smith, National Bankruptcy Conference and Michael Rosenthal, Gibson, Dunn & Crutcher, LLP).

Bankruptcy courts adjudicate claims . . . in a transparent, predictable and expedited fashion, pursuant to established procedures and governed by an already well developed body of case law. Market participants understand, and have structured and priced their transactions on their expectations about these procedures and precedents. ... This ability to foresee, plan and reserve for unknown risks is crucial to overall market stability. Absent being able to rely on those expectations, markets are likely to contract in the face of uncertainty, as we saw after the bankruptcy of Lehman Brothers, and market stability will take longer to restore, in part because market participants will have to plan for a more uncertain regime . . . in terms of determining pricing and other terms for new transactions.[39]

[39]Id. (statement of Michael Rosenthal, Gibson, Dunn & Crutcher, LLP).

Some commentators have suggested a hybrid approach, combining elements of the FDIA process with elements of the bankruptcy process. Generally speaking, these proposals would grant the FDIC or some other federal agency the authority and discretion to act quickly in transferring assets of a failing financial firm that are critical to maintaining the stability of the financial system while relying on the well-established creditor protections and judicial review features of the bankruptcy process to determine claims remaining once the stabilizing actions have been taken.[40]

b. Resolution Authority and Antitrust Concerns

The process by which the U.S. government would sell or transfer the assets or liabilities of a seized institution under the proposed authority raises a number of antitrust concerns. The purpose of the federal antitrust laws is to promote competition in the marketplace, not to protect individual competitors.[41] The philosophy underpinning this approach is that when competitors compete vigorously in a free and open market, the consumer will ultimately benefit, in the form of lower prices, enhanced service, and/or increased variety.

The seizure of banks and/or bank assets by a duly authorized federal agency is a regulatory matter that would fall outside of the purview of traditional antitrust enforcement. Generally, the federal government, acting within the scope of its constitutional authority, is immune from antitrust suit. However, the disposition of those assets, to the extent that they involve the sale of those assets to competitors, raises competitive concerns, an area squarely within traditional antitrust enforcement. Depending upon which remaining competitors receive which assets, market concentration could increase and competition could decrease, resulting in higher prices, lower service, and fewer options for consumers.

The federal antitrust enforcement agencies (the Antitrust Division of the Department of Justice and the Federal Trade Commission, collectively, the Agencies) have more than 100 years of precedent and practice that shape their approach to protecting competition in the marketplace. A federal agency exercising resolution authority would be operating within an alternate framework, taking into account alternate considerations, some of which may ultimately decrease competition in the marketplace to the detriment of the consumer.

This issue is further complicated by the fact that the proposed resolution authority language leaves unclear the degree to which the Agencies will have antitrust enforcement authority as part of the process. The parceling of the assets of a seized institution to its former competitors is the functional equivalent of a merger or acquisition by the remaining banks.

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[40] See, e.g., id.
[41] Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

Under existing law, the Agencies have had a strong oversight role in bank mergers and acquisitions, particularly when non-bank assets are involved.

i. The antitrust enforcement agencies have oversight authority over traditional bank mergers and acquisitions.

With respect to consolidation, most domestic bank mergers and acquisitions undergo a two-agency review process.[42] Approval is required from one of four federal banking entities, and the Department of Justice, conducting a separate investigation and evaluating the merger by separate standards, can sue to block the transaction from consummating.

Under the Bank Holding Company Act[43], the Bank Merger Acts of 1960 and 1966[44], and the Gramm-Leach-Bliley Financial Services Modernization Act of 1999[45], mergers and acquisitions involving banks, bank holding companies, financial holding companies, and savings and loans holding companies require approval from the federal entity[46] overseeing that category of institutions. The federal banking entity then forwards the application to the Department of Justice.[47]

The Department of Justice applies Section 7 of the Clayton Act (prohibiting mergers and acquisitions that tend to lessen competition) in evaluating the competitive effects of the transaction. The federal banking entity is instructed to take into account Section 7 of the Clayton Act as well as "the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served."[48] In other words, the federal banking entities use a different standard in evaluating the impact of a banking merger or acquisition.[49]

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[42] While bank mergers and acquisitions are exempt from the reporting requirements of the Hart-Scott-Rodino Act, bank holding company acquisitions of non-banking operations and financial holding companies are not. 15 U.S.C. §§18a(c)(7) and 18a(c)(8).
[43] Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841, 1843 (2006), *amended by* Bank Holding Company Act Amendments of 1970, 12 U.S.C. § 1972 (2006).
[44] Bank Merger Act of 1960, 12 U.S.C. §1828 (2006); Bank Merger Act of 1966, 12 U.S.C. §1828 (2006).
[45] Pub. L. No. 106-102 (1999).
[46] The Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation (FDIC), or the Office of Thrift Supervision.
[47] "Bridge banks" are financial institutions created by the FDIC to hold the assets of one or more banks that are in default or in danger thereof. The mergers and acquisitions approval process under the Bank Merger Act as described *supra*, including notification of the Department of Justice, applies to transactions involving bridge banks. 12 U.S.C. §1821(n)(8)(A).
[48] 12 U.S.C. § 1828(c)(5)(B).
[49] That defense has been applied by a district court to a bank merger challenged by the Department of Justice. United States v. Central State Bank, 564 F. Supp. 1478 (W.D. Mich. 1983).

After preliminary approval has been granted by the federal banking entity, the Attorney General has thirty days in which to file an injunction to block the transaction.[50] If no injunction is filed, the transaction is immunized from all further attack under any antitrust law except for section 2 of the Sherman Act (attempted monopolization).[51]

ii. The resolution authority legislation as drafted is ambiguous as to the extent that the antitrust agencies will have enforcement authority.

H.R. 3996 would imbue the FDIC and Securities and Exchange Commission (SEC) with the authority to seize and resell the assets of certain business entities. This automatically raises a host of competitive concerns, made worse by the fact that the draft legislation is ambiguous as to the extent that the Agencies will have antitrust oversight over the process.[52] Asset transfer among competitors would normally be reviewed by the Agencies in accordance with traditional analyses of mergers and acquisitions. Not only is the legislation unclear as to the extent of the antitrust oversight over the disposition of seized assets, but it is also unclear how conflicting directives would be resolved, and by whom.[53]

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[50]If the federal banking entity has not received any adverse comment from the Attorney General, the federal banking entity and Attorney General can agree to a shorter time frame, provided that a bank merger may not be consummated any earlier than the fifteenth calendar day after the federal banking entity's approval. 12 U.S.C. §1828(c)(6). Under certain emergency circumstances, where immediate action is necessary to prevent the probable failure of one of the depository institutions involved, the transaction may be consummated more quickly.

[51]12 U.S.C. §1828(c)(7)(C). In addition, the Federal Trade Commission can use its own guidelines in evaluating transactions with financial holding companies that are not subject to Federal Reserve approval under Sections 3 and 4 of the Bank Holding Company Act.

[52]*E.g.,* see Section 1204(a)(6) in the draft of Title XII posted on the Treasury Department's website (www.ustreas.gov) as of September 3, 2009. This subsection empowers the FDIC to sell or transfer acquired assets in toto or in part. It is unclear whether the Department of Justice will have oversight over the disposition of these assets. Presumably, this disposition takes place within the framework described within Section 1209 (see below).

Section 1209(a)(1)(G)(ii) outlines the process for antitrust review of the merger or transfer of assets of a covered bank holding company by the designated federal regulatory agency. This subsection is silent as to whether the Department of Justice retains the right to file an injunction to block a proposed transaction either during the specified 30-day waiting period or after. Subsection II ("Emergency") seems to eliminate certain antitrust filing requirements in particular circumstances, but here again, it is unclear whether the Department of Justice retains its ability to file an injunction after the fact.

Section 1209(h)(10) mirrors the language in 1209(a)(1)(G)(ii) with respect to bridge bank holding companies, and raises the same concerns described above.

[53]*E.g.,* see Section 1209(a)(10)(E) in the draft of Title XII posted on the Treasury Department's website (www.ustreas.gov) as of September 3, 2009. This subsection enumerates factors that the appropriate regulatory agency must take into account when disposing of the assets of a covered bank holding company. Two of these, (i) and (iv), could contradict one another. The factor listed in (i) is "[maximizing] the net present value return from the sale or disposition of such assets" and the one in (iv) is "[mitigating] the potential for serious adverse effects to the financial system and the U.S. economy." A market-dominant competitor could be in a position to maximizing the NPV from the disposition of assets by offering more than any smaller competitors could for them. But it could lead to further market concentration that would be detrimental to the financial system and the U.S. economy, as well as

Proponents of the legislation have argued that the bill is no more restrictive with respect to antitrust oversight than the FDIA[54]. However, the legislation differs in several key respects that potentially limits antitrust oversight to a far greater degree than does the FDIA. First, the FDIA applies to a limited set of transactions, that is, mergers and acquisitions by federally insured depository institutions involving banking assets.[55] Even under the FDIA, however, the normal merger review process applies to acquisition of non-banking assets by these institutions. Conversely, the proposed resolution authority would apply to the disposition of the assets of any systemically significant entity in the United States, not just banks, and seeks to immunize asset transfers of banking and non-banking assets alike.

A second key difference is that the FDIA "turns off" the relevant portions of the antitrust laws. As a general matter, the antitrust laws were written to apply by default; immunities and exemptions must be actively carved out. Section 7A of the Clayton Act specifically exempts mergers and acquisitions that fall under 18(c)of the FDIA from the normal merger review process.[56] Furthermore, the FDIA explicitly states when antitrust challenges to covered transactions may occur, when they become exempt, and that the antitrust immunity does not include challenges brought under Section 2 of the Sherman Act.[57] The resolution authority legislation contains no such language.

B. Prior Committee Consideration

The Committee has held four hearings at the Subcommittee level concerning the bankruptcy, antitrust, and other implications of the proposed resolution authority. On October 22, 2009, the Subcommittee on Commercial and Administrative Law held a hearing on "Too Big to Fail: The Role for Bankruptcy and Antitrust Law in Financial Regulation Reform." The witnesses on the first panel included Michael S. Barr, U.S. Department of the Treasury, Assistant Secretary for Financial Institutions, and Michael H. Krimminger, Special Advisor for Policy to the Chairman of the FDIC. Witnesses on the second panel included Professor David Moss, Harvard Business School; Harvey Miller, Partner, Weil, Gotshal & Manges LLP, bankruptcy counsel for Lehman Brothers Holdings Inc.; Professor Christopher L. Sagers, Cleveland-Marshall College of Law; Professor David Skeel, University of Pennsylvania Law School; and Robert Weissman, President of Public Citizen. On September 26, 2008, the Subcommittee held an oversight hearing on "Lehman Brothers, Sharper Image, Bennigan's, and Beyond: Does Chapter 11 Bankruptcy Still Work?" Witnesses at the hearing included Professor Jay

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competition in general. Under these circumstances, it is unclear how the respective interests would be balanced, and whether any final decision would be decided by a representative of the Treasury Department or one of the Agencies.

[54] 12 U.S.C. §1811 et seq.

[55] 12 U.S.C. §1828(c)(1)-(2).

[56] 15 U.S.C. §18(c)(7) (exempting from Hart-Scott-Rodino reporting requirements "transactions which require agency approval under...section 1828(c) of title 12").

[57] 15 U.S.C. §1828(c)(7).

Westbrook, University of Texas, School of Law; Professor Barry E. Adler, New York University School of Law; and Lawrence Gottlieb, Esq., Cooley Godward Kronish LLP.

The Subcommittee on Courts and Competition policy has held two hearings on resolution authority. On November 17, 2009, it held a hearing on "Too Big to Fail: The Role for Bankruptcy and Antitrust Law in Financial Regulation Reform, Part II." The witnesses were: (1) Professor Christopher L. Sagers, Associate Professor Law, Cleveland-Marshall College of Law; (2) Edwin E. Smith, Partner, Bingham McCutchen, LLP, on behalf of the National Bankruptcy Conference; (3) Michael A. Rosenthal, Partner, Gibson, Dunn & Crutcher LLP; and (4) Professor Charles Calomiris, the Henry Kaufman Professor of Financial Institutions, Columbia Business School. On March 17, 2008, the Courts Subcommittee held a hearing on "'Too Big To Fail?': The Role of Antitrust Law in Government-Funded Consolidation in the Banking Industry" with the following witnesses: Albert A. Foer, President, American Antitrust Institute; C.R. "Rusty" Cloutier, President & CEO, MidSouth Bank; William Askew, Senior Policy Advisor, Financial Services Roundtable; Deborah Garza, Former Assistant Attorney General, Antitrust Division of the U.S. Department of Justice; and Mark Cooper, Director of Research, Consumer Federation of America.

We expect to distribute the text of a possible Conyers amendment later today.

II. H.R. 1064, the "Youth Prison Reduction through Opportunities, Mentoring, Intervention, Support, and Education Act"

A. Background

A hearing was held in the Subcommittee on the Youth PROMISE Act on July 15, 2009 to examine provisions of the bill. The bill is designed to prevent youth street gang violence, crime and delinquency, and to effectively intervene to redirect youth already involved in the juvenile or criminal justice system toward law-abiding and productive lives. The bill currently has 232 co-sponsors, including 11 members of the Crime Subcommittee and 24 members of the Full Committee. On October 29, 2009, the Subcommittee held a markup and reported the bill favorably to the full Judiciary Committee on a voice vote. The bill has also been referred to the Committee on Education and Labor and the Committee on Energy and Commerce. This markup will only address the areas within the Committee's jurisdiction.

1. The Need for H.R. 1064

Across the country, residents of our most distressed, impoverished communities are confronting violent crimes. Such crimes force them to live in fear and destroy the lives of many young people. There is now a substantial body of knowledge developed by researchers and experts around the country, establishing that violence and crime can be prevented in a cost-effective manner.

Experts around the country have argued that to prevent violent crime, policymakers must support community-based strategies that can reach all young people, especially those who are disconnected from school, work, and family and those who are from distressed and impoverished neighborhoods.[58]

Extensive research on youth violence, child development and education is now available and reveals that well-tested education- and community-based prevention and intervention strategies can work to prevent and curtail youth crime, and redirect children and teens away from gang involvement and on to paths of productive membership and participation in society.[59]

For decades, however, we have moved away from prevention as elected officials have opted for "get tough" policies that translate into expanded police and prosecutorial power. This approach generally yields more arrests, more trials, and more incarceration.

"Getting tough" may have seemed logical or at least politically expedient at the time, but research demonstrates that choosing enforcement over prevention produces flawed, costly policies that often inflict incalculable harm to the very communities elected leaders are trying to protect. Today in the United States, too many of our poorer, urban communities produce staggeringly low high school graduation rates, especially for male students of color. At the same time, our nation records the highest incarceration rates in the world. There are now 2.3 million people behind bars in the United States.[60] Incarceration rates are even higher in poor communities and communities of color.[61] The problem is so severe that the Children's Defense Fund has launched an entire campaign to fight what it refers to as the problem of the "Cradle to Prison Pipeline."[62]

The social and economic costs to the nation are staggering.[63] According to some estimates, we spend 55 billion dollars annually on incarceration in the United States.[64] Preventing young people from joining gangs in the first place would save millions of dollars that are currently spent to arrest, convict and imprison them later as lawbreakers.

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[58] *See e.g., New Evidence on the Monetary Value of Saving a High Risk Youth*,
Mark A. Cohen, Vanderbilt University and University of York (U.K.) and Alex R. Piquero,
John Jay College of Criminal Justice & City University of New York Graduate Center, December 2007.
[59] *See generally,* the Annie E. Casey Foundation, *A Road Map for Juvenile Justice Reform* (cataloguing research and best practices of "what works" in juvenile justice reform):
http://www.aecf.org/~/media/PublicationFiles/AEC180essay_booklet_MECH.pdf
[60] US Department of Justice, Bureau of Justice Statistics, 2009. See also, One *in 100: Behind Bars in America*, Pew Center on the States, 2008. http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf
[61] Id.
[62] http://www.childrensdefense.org/helping-americas-children/cradle-to-prison-pipeline-campaign/
[63] See Pew Center on the States,
http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf
[64] Pew Center on the States, One in 100: Behind Bars in America 2008,
http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf

Experts from across the country have argued that a sustained investment in prevention and intervention is essential to addressing the gang problem, and constitutes smart crime policy.[65] Most young people "age out" or desist from delinquency and crime when they reach adulthood, and research from the Department of Justice indicates that "gang-membership tends to be short-lived, even among high-risk youth…with very few youth remaining gang members throughout their adolescent years."[66]

Law enforcement officials around the country have also emphasized repeatedly that we "cannot arrest our way out of the problem" of youth gang crime.67 They have also indicated that sufficient federal sanctions exist to prosecute gang crime and exact severe penalties; the Racketeer Influenced and Corrupt Organizations Act (RICO) is a prime example.68Rather than calling for additional or duplicative sanctions, law enforcement officers have urged Congress to provide support for programs in local communities to prevent problems from occurring in the first place. In February 15, 2007, in a hearing before the House Judiciary Committee, Subcommittee on Crime, Terrorism and Homeland Security, "Making Communities Safer: Youth Violence and Gang Interventions that Work," Paul Logli, then Chairman of the National District Attorneys Association, testified:

> "I don't need any more laws. I've got all the criminal laws I need in the state of Illinois. I don't need any more sanctions, the sanctions are plenty tough …. What I need is … programs on the street that have staying power and that have credibility and that will work with people that I can refer people to. Because what I do have is the hammer. I have the coercion that might just make that person stick to a program. Whether you call it pulling levers or anything else, we make that decision whether they're worth working with or it's just time to warehouse them, and that's a real loss to society….
>
> What helps us make those decisions is if we have available to us programs, many of which have been described here this morning, that give us alternatives, that show us that this person can be put in that anti-truancy program, if we can work

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[65] *See Smart on Crime: Recommendations for the Next Administration and Congress,* Juvenile Justice Reforms Chapter, available at: http://2009transition.org/criminaljustice/index.php?option=com_content&view=article&id=24&Itemid=21

[66] Juvenile Offenders and Victims: 2006 National Report. Office of Juvenile Justice and Delinquency Prevention Statistical Briefing Book. Department of Justice.

[67] Willam J. Bratton, Chief of the Los Angeles Police Department, made this point again on June 11, 2009 in his testimony before the Senate Judiciary Committee, Subcommittee on Crime and Drugs, hearing "Exploring the National Criminal Justice Commission Act of 2009."

[68] In *Boyle v. United States* (U.S., No. 07-1309, 6/8/09), the United States Supreme Court adopted a more expansive interpretation of the scope of the Racketeer Influenced and Corrupt Organizations Act, making it easier to apply RICO to informal "Association-in-Fact Enterprises." The Court held that prosecutors and civil plaintiffs can now use the statute to go after an "association-in-fact enterprise" without proof that it has some structure separate from that inherent in the pattern of racketeering activity in which it engaged.

> with that family to get that person to go to school and to learn how to read and write, and how to develop job skills so that they can get a job. The most important thing for many of these people is to have a job so they can support a family and make their mortgage payments. But if we don't have programs that can bring them there, then my job is much tougher."

The US Department of Justice National Criminal Justice Reference Service has also found incarceration does little to disrupt the violent activities of gang-affiliated inmates. Research reveals that prisons and detention centers can in fact strengthen gang affiliations and become a breeding ground for potential gang activity.[69]

Insofar as youth in the community form gangs for protection and family-like relationships, incarcerated youth have an even greater need for protection.

Despite overwhelming evidence that incarceration is not the answer, punitive criminal justice policies in this country have continued to increase incarceration rates, disproportionately impact poor youth and youth of color, exacerbate the problem of gang-related crime, funnel a disproportionate number of youth who have a cognizable mental health and/or substance abuse disorder into the justice system, and make communities less safe.[70]

According to top scholars in a variety of fields including economics, educational psychology, and public health, public dollars spent on effective prevention and education programs are far more effective in stemming violence, curtailing crime and delinquency, and discouraging gang affiliation than broadening prosecutorial powers or stiffening criminal penalties for young people accused of crimes.[71] Public opinion polling studies also reveal that taxpayers overwhelmingly favor paying for prevention, education, and rehabilitation programs than prosecution and incarceration of youthful offenders.[72]

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[69] *See* Judith Greene and Kevin Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies,* Justice Policy Institute 2007 http://www.justicepolicy.org/content-hmID=1811&smID=1581&ssmID=22.htm

[70] *See generally,* Charles Hamilton Houston Institute for Race and Justice, *No More Children Left Behind Bars,* http://chhi.podconsulting.com/assets/documents/publications/NO MORE CHILDREN LEFT BEHIND.pdf. A number of other organizations have commissioned or conducted related research reaching similar conclusions, including the American Psychological Association, the Washington State Institute for Public Policy, the Social Development Research Group of Seattle, Washington, the Justice Policy Institute, the National Council on Crime and Delinquency, and the Department of Justice, Office of Juvenile Justice and Delinquency Prevention.

[71] In recent years, a wide range of organizations have commissioned or conducted research in this area and reached similar conclusions. These organizations include the American Psychological Association, the Washington State Institute for Public Policy, the Social Development Research Group of Seattle, Washington, the National Council on Crime and Delinquency, the Justice Policy Institute, and the Department of Justice, Office of Juvenile Justice and Delinquency Prevention. For more information, see http://chhi.podconsulting.com/assets/documents/publications/NO MORE CHILDREN LEFT BEHIND.pdf

[72] Models for Change, Systems Reform In Juvenile Justice, Rehabilitation Versus Incarceration of Juvenile Offenders: Public Preferences in Four Models for Change States www.modelsforchange.net/pdfs/WillingnesstoPayFINAL.pdf

B. The Legislative Solution

In the 110th Congress, Congressman Robert C. "Bobby" Scott introduced the Youth PROMISE Act. He reintroduced the bill in the 111th Congress with Rep. Mike Castle (R-DE), and the bill, H.R. 1064, now has 232 bi-partisan co-sponsors in the House of Representatives.

The Youth PROMISE Act addresses the issue of gang crime by implementing the advice of over 50 crime policy makers, researchers, practitioners analysts, and law enforcement officials from across the political spectrum concerning evidence-based and promising strategies to prevent and reduce gang violence and crime.

Rejecting "one size fits all" approaches that will funnel more youth into the criminal justice system, the Youth PROMISE Act supports evidence-based and promising local community efforts to prevent youth from entering the justice system in the first place. Under the Youth PROMISE Act, communities facing the greatest youth gang and crime challenges come together and form a local council. This council includes all of the stakeholders in the juvenile and criminal justice systems, including law enforcement leaders and practitioners, educators and representatives from the school system, community-based and social service organizations, including faith-based organizations, health and mental health providers, court services, prosecutors and public defenders, and housing. The council will develop a comprehensive plan for implementing evidence-based and promising prevention and intervention strategies. These strategies will be targeted at young people who are at-risk of becoming involved, or involved in, gangs or the criminal justice system to redirect them toward productive and law-abiding alternatives.

The Youth PROMISE Act also promotes effective law enforcement techniques through Youth Oriented Policing Services (YOPS) that provide training, hiring and support for officers to implement strategic and age-appropriate community-based activities that minimize youth crime and victimization, and reduce the long-term involvement of youth in the juvenile and criminal justice systems. The Act also provides for thorough evaluation and analysis of the financial savings sustained through investment in prevention and intervention, and the resulting reductions in incarceration and criminal justice costs.

C. Section-by-Section Analysis

Sec. 1. Short Title. Section one sets forth the short title of the bill as the "Youth Prison Reduction through Opportunities, Mentoring, Intervention, Support, and Education Act" or the "Youth PROMISE Act".

Sec. 2. Table of Contents. Section 2 sets for the table of contents for the bill.

Sec. 3. Definitions. Section 3 defines seven terms used in the bill.

Sec. 4. Findings. Section 4 identifies 27 findings of the Congress.

Title I - Federal Coordination of Local and Tribal Juvenile Justice Information and Efforts. Sec. 101 creates a PROMISE Advisory Panel. This Panel will help the Office of Juvenile Justice and Delinquency Prevention select PROMISE community grantees. The Panel will also develop standards for the evaluation of juvenile delinquency and criminal street gang activity prevention and intervention approaches carried out under the PROMISE Act. Sec. 102 provides for specific data collection in each designated geographic area to assess the needs and existing resources for juvenile delinquency and criminal street gang activity prevention and intervention. This data will then facilitate the strategic geographic allocation of resources provided under the Act to areas of greatest need for assistance.

Title II - PROMISE Grants. Sec. 201 establishes grants to enable local and tribal communities, via PROMISE Coordinating Councils (PCCs) (Sec. 202), to conduct an objective assessment (Sec. 203) regarding juvenile delinquency and criminal street gang activity and resource needs and strengths in the community. Based upon the assessment, the PCCs then will develop plans (Sec. 204) that include a broad array of evidence-based prevention and intervention programs. These programs will be responsive to the needs and strengths of the community, account for the community's cultural and linguistic needs, and utilize approaches that have been shown by research to be effective in reducing involvement in delinquent conduct or criminal street gang activity. The PCCs can then apply for federal funds, on the basis of greatest need, to implement their PROMISE plans (Sec. 211, 212, 213). Title II also provides for national evaluation of PROMISE programs and activities (Sec. 222), based on performance standards developed by the PROMISE Advisory Panel.

Title III - PROMISE Research Centers. Sec. 301 establishes a National Center for Proven Practices Research. This Center will collect and disseminate information to PCCs and the public on current research and other information about evidence-based and promising practices related to juvenile delinquency and criminal street gang activity prevention and intervention. Sec. 302 provides for regional research partners to assist PCCs in developing their assessments and plans.

Title IV - Youth-Oriented Policing Services. Sec. 403 provides for the hiring and training through the Office of Community Oriented Policing Services (COPS) of Youth Oriented Policing (YOPS) officers to address juvenile delinquency and criminal street gang activity. Sec. 404 also establishes a Center for Youth Oriented Policing, which will be responsible for identification, development and dissemination of information related to strategic policing practices and technologies to law enforcement agencies related to youth.

Title V - Enhanced Federal Support of Local Law Enforcement. Sec. 503 authorizes PCCs to apply for designation as a High-Intensity Gang Activity Area, and directs the Administrator of OJJDP to establish criteria for reviewing such applications. Sec. 504 establishes

an Interagency Gang Prevention Task Force to coordinate federal assistance to High-Intensity Gang Activity Areas and directs the Task Force to prioritize the needs of High-Intensity Gang Activity Areas for funding under specified federal community assistance and grant programs. Sec. 511 authorizes the COPS Office to make grants to states, local and tribal governments, and private entities to develop community-based programs that provide crime prevention, research, and intervention services designed for gang members and at-risk youth. Sec. 522 authorizes the Secretary of Health and Human Services to award grants to partnerships between a state mental health authority and one or more local public or private entities to prevent or alleviate the effects of youth violence in urban communities with a high or increasing incidence of such violence by providing violence-prevention education, mentoring, counseling, and mental health services to children and adolescents. Priority is given to grant applicants that agree to use the grant in communities that lack the resources to address youth violence.

Title VI - Precaution Act. Sec. 604 establishes the National Commission on Public Safety through Crime Prevention to: (1) carry out a comprehensive study of the effectiveness of certain crime and delinquency prevention and intervention strategies; and (2) make initial and final reports on such strategies to specified federal and state officials. Sec. 605 authorizes the Director of the National Institute of Justice to make three-year grants to public and private entities for the implementation and evaluation of innovative crime or delinquency prevention or intervention strategies.

Title VII - Additional Improvements to Juvenile Justice. Sec. 701 provides additional improvements to current laws affecting juvenile delinquency and criminal street gang activity, including support for youth victim and witness protection programs. Sec. 702 amends the Juvenile Justice and Delinquency Prevention Act of 1974 to direct the Administrator of the Office of Juvenile Justice and Delinquency Prevention to expand the number of sites receiving juvenile delinquency reduction grants from 4 to 12. Sec. 703 directs the U.S. Sentencing Commission to study and report to Congress on the appropriateness of sentences for minors in the federal criminal justice system. Authorizes the Commission to establish or revise sentencing guidelines and policy statements relating to the sentencing of minors, based on study results.

Authorization: The bill makes a substantial and sustained investment in evidence-based prevention and intervention practices, authorizing such sums as may be appropriated. Research shows that such investments in youth will yield tremendous savings through reductions in violence, delinquency and crime, welfare, prison and other criminal justice costs.

III. H.R. 3190, the "Discount Pricing Consumer Protection Act of 2009"

A. Purpose

This markup will also consider H.R. 3190, the Discount Pricing Consumer Protection Act of 2009. The bill's intent is to undo the harm to consumers posed by the Supreme Court's 2007

decision in Leegin Creative Leather Products, Inc. v. PSKS, Inc.[73] In Leegin, the Supreme Court overturned 95 years of antitrust jurisprudence by reversing its 1911 decision in Dr. Miles Med. Co. v. John D. Park & Sons, Co.[74], which had expressly prohibited agreements between manufacturers and distributors establishing a minimum retail price for the manufacturers' products. Critics of the Leegin decision expect it to raise prices for consumers.[75] H.R. 3190 would negate the Leegin decision by again making any such agreements a violation of Section 1 of the Sherman Act. A hearing was held on this issue by the Subcommittee on Courts and Competition Policy on April 24, 2009, and the bill was passed out of Subcommittee on July 30, 2009, by voice vote.

B. Background

1. Retail price fixing and the Leegin decision

a. Antitrust offenses are generally evaluated by one of two standards, "rule of reason" analysis or *per se* prohibition.

Alleged antitrust offenses are generally subject to one of two classes of reviews, either a 1) *per se* or 2) rule of reason analysis. Whether an antitrust violation is subject to rule-of-reason analysis or a *per se* prohibition is significant both in terms of a policy judgment and as an evidentiary burden of proof.

Per se offenses[76] consist of a limited number of business practices deemed so harmful to competition that proof of the practice itself establishes an antitrust violation on its face without further analysis. *Per se* prohibitions are generally limited to "conduct that is manifestly anticompetitive,"[77] that would "always or almost always tend to restrict competition and decrease output."[78]

On the other hand, rule-of-reason offenses reflect a recognition that some types of business practices are not always anticompetitive, and may be, on balance, either procompetitive or anticompetitive depending upon the factual circumstances.

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[73] 551 U.S. 877 (2007), 127 S. Ct. 2705 (2007).
[74] 220 U.S. 373 (1911).
[75] 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. 127 S. Ct. at 2736.
[76] The Supreme Court first crafted the *per se* standard in the context of horizontal agreements, i.e., agreements among competitors. See e.g., United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899).
[77] Continental T.V. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977).
[78] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979).

Rule-of-reason analysis requires a more in-depth look at the practice in question in order to weigh the competitive effects.[79] Such an analysis generally involves expensive and time-consuming research and analysis.

b. Until 2007, it was illegal for manufacturers to set a threshold price at the retail level.

In its 1911 decision in Dr. Miles,[80] the Supreme Court held that an agreement between a manufacturer of proprietary medicines and its dealers to fix the minimum price at which its medicines could be sold was illegal under section 1 of the Sherman Act.[81] For the next 96 years, Dr. Miles stood for the proposition that agreements between manufacturers and retailers that established a minimum price for the manufacturers' products were illegal on their face. In antitrust parlance, the case established a *per se* prohibition on vertical minimum price restraints, alternately referred to as "resale price maintenance," or minimum retail price fixing.

The decision was intended to apply narrowly to retail price fixing, and not restrict other legitimate business practices. Eight years after Dr. Miles, the Court clarified the reach of that opinion by holding, in United States v. Colgate & Co.,[82] that a manufacturer remained free to terminate a discounting retailer as long as the decision to do so was *unilateral*. The Court reasoned that firms should be free to choose with whom they will do business; therefore, a manufacturer who unilaterally refuses to continue dealing with retailers who discount its product does not violate section 1 of the Sherman Act.

Separately, what constituted an "agreement" in violation of section 1 of the Sherman Act was narrowed by the Supreme Court in 1984 to exclude activities coordinated between a company and its officers, employees, agents, and wholly-owned or -controlled affiliates and subsidiaries. In Copperweld, the Supreme Court held that "the coordinated activity of a parent and its wholly-owned subsidiary must be viewed as that of a single enterprise for purposes of §1 of the Sherman Act"[83] because "[a] parent and its wholly owned subsidiary have a complete unity of interest."[84]

Thus, for 96 years prior to Leegin, manufacturers were free to launch nationwide sales campaigns, using manufacturer's *suggested* retail prices, or set uniform prices in their wholly-owned retail outlets. It was only the attempt of a manufacturer (e.g., Hitachi) to set the minimum

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[79] Factors to be considered in a rule-of-reason analysis include the facts peculiar to the business to which the restraint is applied, the condition of the business before and after the restraint was imposed, and the nature of the restraint and its actual and probable effects. The history of the restraint, the threat posted, the reasons for adopting the remedy, and the ends sought to be obtained are also to be taken into consideration. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).
[80] 220 U.S. 373 (1911).
[81] The Sherman Act, 15 U.S.C. §§ 1-7, prohibits contracts, combinations, and conspiracies in restraint of trade, as well as acts of monopolization.
[82] 250 U.S. 300 (1919).
[83] *Id.* at 771.
[84] *Id.*

retail price of a good (e.g., a television) being sold through an independent retailer (e.g., Best Buy) that was prohibited.

c. Leegin overturns the *per se* prohibition set by Dr. Miles

In its 2007 Leegin decision, the Supreme Court overturned Dr. Miles, holding that minimum retail price fixing would henceforth be judged under the rule of reason on a case-by-case basis. In a 5-4 decision, Justice Kennedy, writing for the majority, acknowledged that setting minimum retail prices could have anticompetitive effects, but concluded that it could also have procompetitive benefits, and that a *per se* prohibition could not be justified, as it could not be "stated with any degree of confidence that retail price maintenance 'always or almost always tend[s] to restrict competition and decrease output.'"[85] The Federal Trade Commission and the Department of Justice (DOJ) filed a joint amicus brief in favor of overturning Dr. Miles' *per se* prohibition; 37 State attorneys general filed one in favor of affirming it.[86]

The effect of Leegin is that minimum retail price agreements are no longer prohibited by law. This does not mean that these agreements are now necessarily always legal; they are instead subject to a case-by-case rule of reason analysis.

d. Minimum retail price fixing has increased in the wake of Leegin.

Approaching the two-year anniversary of Leegin, there are a number of indications that required minimum retail price policies are becoming more common.[87]

- Edgar Dworsky of ConsumerWorld.org, which provides price comparisons for consumers, has found numerous minimum retail price policies imposed upon retailers by manufacturers of baby goods, consumer electronics, home furnishings, and pet foods.[88]

- BabyAge.com reports that 100 of its 465 suppliers dictate minimum retail prices.[89] As a result, the Internet retailer has had to increase prices 20 to 40 percent on several popular products.[90]

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[85] Leegin, 127 S. Ct. at 2708, quoting Business Electronics, 485 U.S. at 723.
[86] The State attorneys general who filed the amicus brief were from AK, AR, CT, DE, FL, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MI, MN, MI, MO, MT, NV, NH, NJ, NM, NY, NC, OH, OK, OR, PA, SC, SD, UT, VT, WA, WV, and WY.
[87] Joseph Pereira, *Price-Fixing Makes Comeback after Supreme Court Ruling*, WALL ST. J., Aug. 18, 2008, at A1.
[88] *Id.*
[89] *Id.*

[90] *E-Tailers Take on Price Fixing*, CONSUMER ELECTRONICS DAILY, Dec. 5, 2008.

- Demand Inc., an Internet-only retailer of ergonomic office accessories, reports that at least 50 percent of its products now have a manufacturer-imposed minimum retail price, compared to 10 percent in 2006.[91]

- Seventy-five percent of eHobbies' products now have a manufacturer-imposed minimum retail price.[92]

- HomeCenter.com claims to have lost millions of dollars in sales because of minimum retail price policies by manufacturers such as lighting manufacturer L.D. Kichler that have made the Internet-based retailer less competitive than it used to be.[93]

- Two lawsuits have been brought against eBay by manufacturers for selling their products below a manufacturer-dictated minimum price.[94]

e. For the past 40 years, Congress has supported a prohibition on minimum retail price fixing.

Congress has involved itself directly in the formulation of enforcement policy in the area of minimum retail price fixing on a number of occasions.

First, during the Depression, a number of States, as part of a general move toward price controls in response to the distressed business climate, enacted so-called "fair trade" laws permitting a manufacturer to enter into agreements with retailers stipulating the minimum price at which its products could be sold. Congress passed the Miller-Tydings Act[95] in 1937 to exempt agreements permitted under the State fair trade laws from the antitrust laws, followed by the McGuire Act[96] to extend coverage of the exemption to imposition of a "fair trade" price agreement even on retailers who had not signed it.

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[91] Don Davis, *How the Supreme Court Fractured Online Pricing*, InternetRetailer.com, Nov. 2008, http://www.internetretailer.com/article.asp?id=28293.

[92] *Id.*

[93] *Id.*

[94] Greg Beck, *Companies Claim Right to Interfere with eBay Auctions for Charging Too Little*, CONSUMER LAW & POLICY BLOG, July 17, 2007, http://pubcit.typepad.com/clpblog/2007/07/leegin-and-ebay/comments/page/2/

[95] 50 Stat. 693 (1937).

[96] 66 Stat. 632 (1952).

By the 1970's, State fair trade laws had come under increasing disrepute as anticompetitive and unwarranted by any legitimate business purpose.[97] Studies conducted by the DOJ under President Nixon indicated that retail price fixing sheltered by State fair trade laws inflated prices for the affected goods by between 18 and 27 percent, and that eliminating the fair trade laws would save consumers $1.2 billion.[98] The Ford Administration's DOJ called for repealing the fair trade laws, as did the Federal Trade Commission. Former president Ronald Reagan, then a columnist for the Copley News Service, condemned retail price fixing in a column reprinted in the Congressional Record, arguing that it stifled competition, added to inflation, and was bereft of consumer benefits.[99]

In the Consumer Goods Pricing Act of 1975, Congress repealed the Miller-Tydings Act and the McGuire Act.[100] In doing so, it examined and rejected various asserted justifications for minimum retail price fixing, including assertions that it helped encourage provision of additional services, helped protect small businesses, and helped new businesses enter the market. Congress concluded that minimum retail price fixing served little purpose other than to inflate prices.

Congress strongly reaffirmed its bipartisan support for the *per se* prohibition against minimum retail price fixing during the 1980s. After the DOJ filed an amicus brief in Monsanto Co. v. Spray-Rite Service Co.[101] urging the Supreme Court to overturn Dr. Miles, Congress, as part of the FY 1984 appropriations bill that included DOJ funding, expressly prohibited the DOJ from using any funds to advocate overturning the *per se* prohibition.[102] The prohibition was reinstated as part of the FY 1986 appropriations resolution[103] and remained in every DOJ-funding appropriations bill thereafter until FY 1992, when the prohibition was dropped only after personal assurances from the Assistant Attorney General for Antitrust that the Department would not revive its effort to undermine the *per se* prohibition.

With the change of Administration in 1993, the Department quieted the issue by reaffirming its support for the *per se* prohibition and its intent to actively enforce it.[104] Only 2.5 years before the Court decided Leegin, the Antitrust Modernization Commission, tasked in legislation sponsored by House Judiciary Committee Chairman James Sensenbrenner to conduct

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[97] In the interim, many States had repealed or curbed their fair trade statutes; in four States, the statutes had been declared unconstitutional; and in five States, "non-signer" clauses had been declared unconstitutional. See P. Areeda, Antitrust Analysis, 517 (1974).
[98] S. Rep. No. 94-466, 94th Cong., 1st Sess., pp. 1-3 (1975).
[99] 1212 Cong. Rec. 1268 (Jan. 23, 1975).
[100] 89 Stat. 801 (1975).
[101] 465 U.S. 752, 762-63 (1984).
[102] Departments of Commerce, Justice, and State, the Judiciary, and Related Appropriations Act, 1984, § 510, Pub. L. No. 98-166, 97 stat. 1102-03 (1983).
[103] Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1986, § 605, Pub. L. No. 99-180, 99 stat. 1169-71.
[104] Antitrust Enforcement, Some Initial Thoughts and Actions, Address by Assistant Attorney General Anne K. Bingaman before Antitrust Section of the American Bar Association,
August 10, 1993.

a comprehensive review of the state of the antitrust laws,[105] declined to examine retail price fixing because there was "a relatively low level of controversy on the subject."[106]

2. Overview of H.R. 3190

a. Effect of the bill

H.R. 3190 restores the "state of play" as it existed with respect to threshold price agreements among manufacturers and retailers prior to the Supreme Court's Leegin decision. It restores the *per se* prohibition set forth in Dr. Miles, declaring any agreement between a manufacturer and a retailer, wholesaler, or distributor setting a minimum price for the sale of a product or service to violate section1 of the Sherman Act.

b. Legislative History of the Bill

The House Committee on the Judiciary Subcommittee on Courts and Competition Policy held a hearing on April 24, 2009, examining the impact of the Leegin decision on consumer prices. H.R. 3190 was introduced by Chairmen Conyers and Johnson on January 7, 2009. A companion Senate bill, S. 148, was introduced on January 6, 2009, by Senators Kohl, Kaufman, Whitehouse, and Wyden.

On July 30, 2009, H.R. 3190 was passed out of the Subcommittee on Courts and Competition Policy by voice vote.

C. Section-by-Section of Analysis

Sec. 1. Short Title. This section designates the short title of the bill as the "Discount Pricing Consumer Protection Act of 2009."

Sec. 2. Prohibition of Minimum Resale Price Maintenance. This section makes any agreement between a manufacturer and a retailer, wholesaler, or distributor establishing a minimum price for the manufacturer's product or service a violation of Section 1 of the Sherman Act.

Sec. 3. Effective Date. This section establishes the bill's effective date as 90 days after the date of enactment.

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[105] Pub. L. No. 107-273, §§ 11051-60, 116 Stat. 1856.

[106] *The Leegin Decision: The End of the Consumer Discounts or Good Antitrust Policy? Before the Subcomm. On Antitrust, Competition Policy and Consumer Rights of the H. Comm. On the Judiciary*, 110th Cong. 6 (statement of Richard M. Brunell, Director of Legal Advocacy, American Antitrust Institute), *available at* http://www.antitrustinstitute.org/archives/files/aai-%20Leegin,%20Senate%20test%20by%20RB,%207-30-07_080120071016.pdf (quoting Memorandum from the Antitrust Modernization Comm. Single-Firm Conduct Working Group 16 (December 21, 2004)).

IV. H.R. 569, the "Equal Justice for Our Military Act of 2009"

A. Purpose

H.R. 569 proposes to amend the federal judicial code[107] to expand United States Supreme Court jurisdiction to review courts-martial decisions. Current law does not grant Supreme Court jurisdiction to review courts-martial decisions that were not first reviewed by the Court of Appeals for the Armed Forces (CAAF). Similarly, current law does not grant Supreme Court jurisdiction to review decisions by the CAAF that deny relief to a writ for extraordinary relief or interlocutory appeal. In other words, if the CAAF refuses to review a court-martial decision, or if the CAAF denies relief to a writ for extraordinary relief or interlocutory appeal, a service member is foreclosed from seeking direct review by the Supreme Court. The government, however, has no comparable barriers to Supreme Court review. H.R. 569 thus attempts to correct this inequity by granting Supreme Court jurisdiction over courts-martial decisions that were not reviewed by the CAAF, or decisions by the CAAF to deny relief to a writ for extraordinary relief or interlocutory appeal.

B. Background

1. Courts-Martial and Appellate Review

The Uniform Code of Military Justice (UCMJ)[108] lays out a comprehensive military justice system, which includes a penal code consisting of traditional offences (e.g., theft) and military-only offences (e.g., desertion), establishes the trial-like procedure called a court-martial as the primary mechanism to determine the guilt or innocence of service members accused of a crime, and creates a multi-level military court appellate procedure. All active duty service members in the Army, Navy, Marine Corps, Air Force, and Coast Guard, regardless of where they are, are subject to the UCMJ[109].

Court-martial decisions that provide a sentence that includes dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, confinement of one year or longer, or death, must be referred to a Court of Criminal Appeals for review[110]. Further review of a court-martial decision may be made by the military's highest court, the Court of Appeals for the Armed Forces (CAAF). The CAAF is required to hear cases involving the

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[107] Specifically, H.R. 569 as amended by the Manager's amendment adopted by the Subcommittee on Courts and Competition Policy on July 30, 2009, proposes amendments to sections 1259 and 2101(g) of title 28, United States Code.

[108] Uniform Code of Military Justice (UCMJ), 64 Stat. 109 (1950), *codified* at 10 U.S.C. § 801, *et. al.*

[109] 10 U.S.C. § 802.

[110] 10 U.S.C. § 866(b). The Courts of Criminal Appeals include the Army Court of Criminal Appeals (ACCA), the Air Force Court of Criminal Appeals (AFCCA), the Navy-Marine Corps Court of Criminal Appeals (N-MCCA), and the Coast Guard Court of Criminal Appeals (CGCCA). Referral to a Court of Criminal Appeals is accomplished when the Judge Advocate General (JAG) (the military's legal office) for the relevant service branch certifies the court-martial to the Court of Criminal Appeals.

sentence of death or cases in which the government has referred the case to the CAAF for review[111]. The CAAF has discretion to hear all other appeals[112]. The Supreme Court may further review a court-martial decision by writ of certiorari,[113] but only under limited circumstances.

Specifically, section 1259 of Title 28, provides the Supreme Court with jurisdiction to consider writs of certiorari to review cases from the CAAF in four specific circumstances: 1) cases in which a death sentence has been affirmed by a Court of Criminal Appeals; 2) cases that the government referred to the CAAF; 3) cases in which the CAAF granted a petition for review; and 4) cases that do not fall in the other categories but in which the CAAF has granted relief. The first two categories represent the two circumstances in which the CAAF must grant appeals. The third category represents the cases in which the CAAF has exercised its discretion to grant an appeal. And the final category is a catch-all provision for other cases in which the CAAF might grant relief and is generally considered to refer to writs for extraordinary relief and interlocutory appeals that are ordinarily sought by an accused service member.

2. Overview of H.R. 569

a. Purpose of the Bill

The purpose of H.R. 569 is to broaden the scope of courts-martial decisions that may be reviewed by the Supreme Court by writ of certiorari. This broadening of Supreme Court jurisdiction is meant to correct an inequity in the opportunity to directly appeal courts-martial decisions to the Supreme Court that favors the government over service members.

As discussed above, the government has the right to appeal to the Supreme Court any case that it has referred to the CAAF, thus effectively giving the government the right to have any case it chooses eligible for Supreme Court review. However, service members convicted in a court-martial have no parallel right unless the sentence imposed is death. The CAAF has full discretion to decline to review all other courts-martial decisions that are appealed by service members. Statistics show that the vast majority of court-martial decisions appealed to the CAAF by service members were in fact not taken up by the CAAF.[114] In declining to review these appeals, the CAAF has foreclosed the possibility of direct review by the Supreme Court.[115]

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[111] 10 U.S.C. § 867(1)-(2). Again, it is the JAG acting on behalf of the government who certifies courts-martial decisions for CAAF review.
[112] 10 U.S.C. § 867(3)
[113] A writ of certiorari is an order to review a decision of a lower court.
[114] Between fiscal years 2001 and 2005, only about 16% of appeals made to the CAAF were granted. Letter from Daniel J. Dell'Orto, Acting General Counsel, U.S. Dept. of Defense, to Senator Carl Levin, Chairman, Comm. on the Armed Services, U.S. Senate (Jun. 27, 2008) (on file with Subcommittee on Courts and Competition Policy) [HEREINAFTER "Dell' Orto Letter"].
[115] Service members may attempt to collaterally attack a court-martial decision in a federal court, however the scope of review that federal courts apply to court-martial decisions are generally narrow and only look to whether the military courts simply addressed each constitutional claim made.

Also under current law, CAAF decisions that grant relief to petitions for extraordinary relief or interlocutory appeals may be appealed to the Supreme Court, but CAAF decisions that deny relief in these cases may not. As mentioned above, granting of relief in these cases generally benefit an accused service member. Here then the government is again advantaged, since it can appeal the CAAF's grant of relief to an accused service member by writ of certiorari to the Supreme Court, but a service member who has been denied relief is not permitted to any further appeal of the CAAF's decision.

The American Bar Association has noted that "this statutory framework creates a disparity in our laws governing procedural due process whereby the government has far greater opportunity to obtain Supreme Court review of adverse courts-martial decisions than is afforded convicted service members," and recommended that a broad remedial approach similar to H.R. 569 is needed "to provide service members with due process access to discretionary Supreme Court review similar to that which is permitted the government."[116] The District of Columbia Bar Association, the Fleet Reserve Association, the Jewish War Veterans Association, the Military Officers Association of America, the National Association of Criminal Defense Lawyers, and the National Institute for Military Justice have all echoed the American Bar Association's concerns in their written letters of support for H.R. 569.

b. Effect of H.R. 569

H.R. 569 will give the Supreme Court jurisdiction to hear appeals of courts-martial decisions that were denied review by the CAAF. H.R. 569 will also give the Supreme Court jurisdiction to hear appeals of CAAF decisions that denied relief to a writ for extraordinary relief or an interlocutory appeal.

Concerns have been raised that granting Supreme Court jurisdiction to these cases will impose unwarranted costs and strain on the military justice system, since the UCMJ already provides a robust appeal process.[117] In scoring a similar measure last Congress, the Congressional Budget Office (CBO) noted that while the bill did not involve any direct expenditures that would raise a pay-go issue, it did estimate that the increased workload of government attorneys and Supreme Court clerks would cost $1 million per year.[118]

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[116] David Craig Landin, *Standing Committee on Federal Judicial Improvements Report to the House of Delegates*, American Bar Association Annual Meeting, Report No. 116, 5-6 (2006) [HEREINAFTER "ABA Report"].

[117] The Department of Defense under the Bush Administration wrote two letters to Congress opposing measures similar to H.R. 569, citing the additional costs it would mean for the military justice system and the more than appellate review procedures service members already benefit from. Dell' Orto Letter, supra note 6; Letter from Department of Defense General Counsel William J. Haynes II to Representative Lamar Smith, Chairman, Subcomm. on Courts, the Internet and Intellectual Property (Feb. 6, 2006). The Obama Administration has not yet taken a position on H.R. 569.

[118] Congressional Budget Office, Cost Estimate for S. 2052, Equal Justice for United States Military Personnel Act of 2007 (Oct. 22, 2008).

It was pointed out during the legislative hearing on H.R. 569 that the CBO has significantly overestimated the costs of the bill, since most courts-martial decisions will likely not be appealed, and most of those decisions that are appealed will not have the benefit of government provided attorneys. These points were also raised by the ABA in its written testimony regarding H.R. 569, which concluded "[w]e believe that the CBO cost estimate is erroneously predicated on an assumption that several hundred cases will be filed, when in fact the number of petitions that will be prompted by enactment of this legislation is likely to be minimal . . ."[119] Furthermore, according to the Counselor of the Chief Justice of the United States Supreme Court, if historical experience concerning the rate of appeals from CAAF decisions is any guide, there should at most 120 additional Supreme Court petitions.[120] This represents a tiny fraction of the thousands of appeals the Supreme Court receives every year.

c. Legislative History of H.R. 569

In the 109th Congress, H.R. 1364 was introduced by Rep. Susan Davis. H.R. 1364 sought to amend paragraph (4) of 28 U.S.C. § 1259 to grant Supreme Court jurisdiction over writs for extraordinary relief or interlocutory appeals that have been granted or denied by the CAAF. The bill was referred to the Judiciary Committee, but no action was taken on it.

In 110th Congress, H.R. 3174 was introduced by Rep Susan Davis. H.R. 3174 sought to amend paragraphs (3) and (4) of 28 U.S.C. § 1259 to grant Supreme Court jurisdiction over any case that the CAAF granted or denied review in, as well as over writs for extraordinary relief or interlocutory appeals that have been granted or denied by the CAAF. H.R. 3174 was passed by the House of Representatives under suspension of the rules on September 27, 2008. An identical measure, S. 2052, was introduced in the Senate and was reported without amendment by the Senate Committee on the Judiciary on September 12, 2008, but was not considered by the full Senate.

On January 15, 2009, H.R. 569, The Equal Justice for our Military Act of 2009, was introduced in the 111th Congress by Rep. Susan Davis and currently has 19 co-sponsors.[121] The Senate introduced a companion bill, the Equal Justice for United States Military Personnel Act of 2009, S. 357, on January 30, 2009. On June 11, 2009, the House Committee on the Judiciary's Subcommittee on Courts and Competition Policy held a hearing on H.R. 569. H.R. 569 was

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[119] Legislative Hearing on H.R. 569, The Equal Justice for Our Military Act of 2009, Before the Subcomm. on Courts and Competition Policy of the H. Comm. On the Judiciary, 111th Cong. 6 (2009) (statement of H. Thomas Wells, Jr., President, American Bar Association).

[120] Letter from Jeffrey P. Minear, Counselor of the Chief Justice of the United States Supreme Court to Representative Henry Johnson, Chairman, and Howard Coble, Ranking Member, Subcomm. on Courts and Competition Policy (June 18, 2009).

[121] Co-sponsors of H.R. 569 include Rep. Ackerman, Rep. Berman, Rep. Bordallo, Rep. Brady, Rep. Frank, Rep. Grijalva, Rep. Hinchey, Rep. Holt, Rep. Loebsack, Rep. Massa, Rep. McDermott, Rep. Ortiz, Rep. Schakowsky, Rep. Scott, Rep. Sestak, Rep. Skelton, Rep. Tauscher, Rep. Wexler, and Rep. Woolsey.

reported out of the Subcommittee on Courts and Competition Policy on July 30, 2009, as amended by a Manager's amendment in the nature of a substitute.

C. Section-by-Section Analysis

Sec. 1. Short Title. This section sets forth the short title of the bill as the "The Equal Justice for our Military Act of 2009."

Sec. 2. Certiorari to the United States Court of Appeals for the Armed Forces. Section 2 amends paragraphs (3) and (4) of 28 U.S.C. §1259 to give service members the right to appeal to the Supreme Court any case that the CAAF granted <u>or denied</u> review in, as well as any decision by the CAAF concerning any petition for extraordinary relief or an interlocutory appeal. Section 2 also authorizes a technical and conforming amendment to be made to 10 U.S.C. § 867(a), which presently prohibits Supreme Court review, by a writ of certiorari, any action of the CAAF in refusing to grant a petition for review

D. Manager's Amendment

On July 30, 2009, the Subcommittee on Courts and Competition Policy held a markup for H.R. 569 and adopted a Manager's amendment by voice vote. The manager's amendment makes a technical change to section 2 of the bill, and adds a new section 3 which provides an effective date. Specifically:

1. Section 2 is amended to add a provision amending section 2101(g) of title 28 of the United States Code to clarify the statutory authority of the Supreme Court to write rules governing deadlines for certiorari petitions following a decision by the CAAF.

Explanation: Under 28 U.S.C. 2101(g), the Supreme Court is authorized to establish by rule how much time a petitioner has to submit an application for a writ of certiorari following a decision by the CAAF. However, it is not clear whether a decision by the CAAF to not review a case is a decision for purposes of 28 U.S.C. 2101(g). To eliminate any ambiguity, this amendment will explicitly permit the Supreme Court to establish rules regarding the time in which a petitioner has to submit a writ for certiorari following the CAAF's denial of review.

2. A new section 3 is added to provide that the amendments made by the Act shall take effect after 180 days from the date of enactment of the Act and that the changes made by this act shall apply to any petition granted or denied by the CAAF after that effective date. An exception to that effective date is made such that the authority of the Supreme Court to make rules regarding the deadline for petitioning for certiorari will take effect on the date of enactment of the Act.

Explanation: H.R. 569 does not currently provide an effective date and in its current form would go into effect on the date of enactment. This is problematic since the Supreme Court will need time to establish rules governing the timeliness of applications for a writ of certiorari. Delaying the date the bill goes into effect by six months will give the Supreme Court time to amend its rules concerning timeliness of applications. It also specifies that CAAF decisions made on or after the effective date will be eligible for appeal to the Supreme Court.