MEMORANDUM

To: Members of the House Judiciary Committee
From: Chairman Jerrold Nadler
Date: February 6, 2019
Re: Markup of Resolution authorizing issuance of a subpoena to Acting Attorney General Matthew G. Whitaker to secure his appearance and testimony at the hearing of the Committee regarding oversight of the U.S. Department of Justice; and H.R. 948, the "No Oil Producing and Exporting Cartels Act of 2019" or "NOPEC".

On Thursday, February 7, 2019, at 10:00 a.m., the Committee on the Judiciary will meet to mark up a resolution authorizing the issuance of a subpoena to Acting Attorney General Matthew G. Whitaker to secure his appearance and testimony at the hearing on the Committee concerning oversight of the U.S. Department; and H.R. 948, the "No Oil Producing and Exporting Cartels Act of 2019" or "NOPEC".

I. RESOLUTION AUTHORIZING ISSUANCE OF A SUBPOENA TO ACTING ATTORNEY GENERAL MATTHEW G. WHITAKER TO SECURE HIS APPEARANCE AND TESTIMONY AT THE HEARING OF THE COMMITTEE REGARDING OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

A. Background and Need for the Resolution

On Friday, February 8, 2019, at 9:30 a.m., the Committee on the Judiciary will hold an oversight hearing on the Department of Justice (DOJ or Department). The sole witness will be Acting Attorney General Matthew Whitaker. This will be the Committee's first oversight hearing of the 116th Congress and the first DOJ oversight hearing since 2017.

The DOJ has been reluctant to allow the Acting Attorney General to testify before the Committee.[1] Even after the Acting Attorney General made a verbal commitment to appear before Congress, several weeks passed before Department officials were willing to confirm a hearing date.[2] In a public statement, I explained the purpose of the resolution:

> For the first two years of the Trump Administration, Congress allowed government witnesses to dodge uncomfortable questions. That era is over. In an

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[1] Letter from Assistant Attorney General Stephen E. Boyd, U.S. Dept. of Justice, to Chairman Jerrold Nadler, H. Comm. on the Judiciary, Jan. 11, 2019.

[2] Letter from Ranking Member and Chairman Designate Jerrold Nadler, H. Comm. on the Judiciary, to Acting Attorney General Matthew Whitaker, U.S. Dept. of Justice, (Dec. 21, 2018); *see also* letter from Chairman Jerrold Nadler, H. Comm. on the Judiciary, to Acting Attorney General Matthew Whitaker, U.S. Dept. of Justice, Jan. 15, 2019.

> abundance of caution—to ensure that Mr. Whitaker both appears in the hearing room on Friday morning and answers our questions cleanly—I have asked the Committee to authorize me to issue a subpoena to compel his testimony.
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> To be clear, I hope never to use this subpoena. Weeks ago, we gave Mr. Whitaker a list of questions we hope to ask him about his communications with the White House and his refusal to recuse himself from oversight of the Special Counsel's investigation. If he appears on time and ready to answer those questions, the subpoena will be entirely unnecessary.
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> I intend to be fully transparent about this process. I shared my plans with Ranking Member Collins last week and, when he expressed reservations, we scheduled this authorizing resolution for a markup. There need not be surprises here. We have been quite public about our intention to get this information from Mr. Whitaker.

On January 22, 2019, I provided the Acting Attorney General with a list of questions I intend to ask "about certain communications [he] may have had with the White House."[3] I wrote further:

> I am providing these questions to you in advance because your responses may implicate communications with the President of the United States. Please take any steps that may be necessary for the White House to consider these communications and for the President to determine whether he will invoke executive privilege.
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> The Committee will not accept your declining to answer any question on the theory that the President may want to invoke his privileges in the future. The President should consider any matter involving assertion of privilege prior to your testimony. Short of a direct and appropriate invocation of executive privilege, I will expect you to answer these questions fully and to the best of your knowledge.[4]

I asked that Mr. Whitaker inform us no later than 48 hours prior to the hearing if President Trump planned to invoke executive privilege to cover any of the questions provided. To date, we have received no response to this letter from the Department of Justice.

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[3] Letter from Chairman Jerrold Nadler, H. Comm. on the Judiciary, to Acting Attorney General Matthew Whitaker, U.S. Dept. of Justice, Jan. 22, 2019.

[4] *Id.*

On February 6, I wrote again to Mr. Whitaker: "Because you have not provided any notification to the Committee regarding executive privilege—or, indeed, any communication in response to the January 22 letter—my understanding is that you will provide full and complete answers to these questions when they are asked at your hearing this Friday."[5]

Per my commitment to Ranking Member Collins at the Committee's organizational meeting last month, I consulted with the Ranking Member about this proposed subpoena on January 29, 2019—well in advance of the two business days required by Committee rules. After the Ranking Member stated an objection to my use of the Committee's unilateral subpoena authority, I took steps to schedule this markup.

B. Section-by-Section Explanation

The resolution states "that upon the adoption of this resolution, the Chairman of the Committee on the Judiciary is authorized to issue a subpoena to Acting Attorney General Matthew G. Whitaker to secure his appearance and testimony at the hearing of the Committee regarding oversight of the U.S. Department of Justice."

Approval of the resolution by the Committee does not cause the subpoena to issue. Rather, the resolution authorizes me to issue a subpoena for Mr. Whitaker's testimony at a later date, up to and including on the scheduled day of the hearing.

II. H.R. 948, THE "NO OIL PRODUCING AND EXPORTING CARTELS ACT OF 2029" OR "NOPEC"

H.R. 948, "No Oil Producing and Exporting Cartels Act of 2019" or "NOPEC", was introduced on February 4, 2019 by Representative Steve Chabot (R-OH), together with Subcommittee on Antitrust, Commercial and Administrative Law (ACAL) Chairman David N. Cicilline (D-RI); Full Committee Chairman Jerrold Nadler (D-NY); Full Committee Ranking Member Doug Collins (R-GA); and ACAL Subcommittee Ranking Member F. James Sensenbrenner, Jr. (R-WI) as original cosponsors.

H.R. 948 amends the Sherman Antitrust Act[6] by adding a new section 7A that makes it illegal for foreign states, and their agents and instrumentalities, to engage in collusive behavior with any other foreign state, agent or instrumentality, to limit the production or distribution, set or maintain the price, or otherwise act in restraint of trade with regard to oil or petroleum

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[5] Letter from Chairman Jerrold Nadler, H. Comm. on the Judiciary, to Acting Attorney General Matthew Whitaker, U.S. Dept. of Justice, Feb. 6, 2019.

[6] 15 U.S.C. § 1 (2019).

products. It also makes certain changes to procedural law to facilitate enforcement, by: (1) amending the Foreign Sovereign Immunities Act so that nations are subject to U.S. jurisdiction for violations of new section 7A; (2) making clear that the "act of state doctrine" is not a basis for the U.S. courts to refrain from considering cases brought under new section 7A; and (3) authorizing the Department of Justice to prosecute OPEC nations for entering into such collusive agreements.

On May 18, 2018, the ACAL Subcommittee[7] held a hearing on a substantially similar discussion draft of this legislation.[8] The Majority witnesses were Seth Bloom, Bloom Strategic Counsel, PLLC, former Chief Antitrust Counsel to Senator Herb Kohl (D-WI (retired)); Dr. Ariel Cohen, nonresident senior fellow, the Atlantic Council's Global Energy Center; and Phillip Brown, Specialist in Energy Policy, Congressional Research Service. The Minority witness was Dr. Mark Cooper, Senior Fellow, Consumer Federation of America. During the hearing, proponents of the bill argued that the legislation would address "blatantly anti-competitive conduct by the member nations of the oil cartel to fix the price of oil by limiting supply."[9] Although Dr. Cooper agreed that it would be a positive development to "sue the members of the oil cartel, break their ability to administer oil prices, and stop the drain of hundreds of billions of dollars of monopoly rents out of our economy," he questioned whether these benefits could be achieved solely through antitrust enforcement, and concluded that addressing America's consumption of oil may be a more complete strategy to addressing the market power of the Organization of Petroleum Exporting Countries (OPEC).[10] On June 13, 2018, the Full Committee marked up the bill and ordered it to be reported favorably by voice vote, as amended.

H.R. 948 is substantively identical to prior versions of NOPEC that have been introduced in prior Congresses. In the 110th Congress, for example, Representative John Conyers, Jr. (D-MI), then Full Committee Chairman, introduced a substantially identical version of H.R. 948, which the House thereafter passed with strong bipartisan support by a vote of 345 to 72 on May 22, 2007. The Senate Committee on the Judiciary unanimously passed identical legislation on that same date.

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[7] At the time, the Subcommittee was called the Regulatory Reform, Commercial, and Antitrust Subcommittee.

[8] *Accountability for OPEC: Hearing on H.R. ___, the "No Oil Producing and Exporting Cartels Act," Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary,* 115th Cong. (2018).

[9] *Id.* (prepared testimony of Seth Bloom, Bloom Strategic Counsel, at 3).

[10] *Id.* (prepared testimony of Dr. Mark Cooper, Consumers Federation of America, at 1).

A. Background

1. Organization of Petroleum Exporting Countries (OPEC)

OPEC, which produces approximately 40% of the world's petroleum, is comprised of Algeria, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, the United Arab Emirates, and Venezuela.[11] OPEC states that its mission "is to coordinate & unify the petroleum policies of Member Countries & ensure the stabilization of oil prices in order to secure an efficient, economic & regular supply of petroleum to consumers, a steady income to producers & a fair return on capital to those investing in the petroleum industry."[12]

To fulfill its stated mission, OPEC has taken steps throughout the years to control the supply and price of crude oil, which it claims are intended to "stabilize" prices and secure "a steady income to producers."[13] OPEC has undertaken numerous actions, as a matter of routine, to fix supply and prices.[14] Even though OPEC controls "only" 40% of the world's production, its influence over prices is substantial in two respects. First, the OPEC countries have substantial reserves and can easily increase supply and lower prices.[15] Second, many of the non-OPEC oil producing countries—such as the United States—have large private oil producing sectors. These companies have very little spare production capacity and cannot easily increase production in the event of shortages or otherwise expand to increase market share.[16]

2. Applicable Law

If the anticompetitive conduct of OPEC countries to control supply and rig prices were done by private actors, there is no question that the conduct would be illegal as a *per se* violation of the Sherman Act, and would thereby subject the actors to criminal and civil liability.[17] NOPEC extends the reach of the antitrust laws to nations in their role as commercial actors, engaging in such collusion, where such conduct affects competition in the United States.

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[11] ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES (OPEC), *Member Countries*, https://www.opec.org/opec_web/en/about_us/25.htm (last visited on Feb. 3, 2019).

[12] *See* ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES (OPEC), *Our Mission*, http://www.opec.org/home (last visited on Feb. 3, 2019).

[13] *Id.*

[14] H.R. Report No. 110-160, pt. 1, at 3 (2007).

[15] U.S. ENERGY INFORMATION ADMINISTRATION, OPEC Revenues Fact Sheet, (Aug. 21, 2018).

[16] See generally *Prices at the Pump: Market Failure and the Oil Industry: Hearing Before the Antitrust Taskforce of the H. Comm. on the Judiciary,* 110th Cong. (2007).

[17] 15 U.S.C. § 1 (2019); *Accountability for OPEC: Hearing on H.R. ___, the "No Oil Producing and Exporting Cartels Act" Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary,* 115th Cong. (2018) (prepared testimony of Seth Bloom).

Under current law, foreign states are typically immune from suit in federal court. Section 1604 of title 28 of the United States Code provides: "[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States [with specific exceptions]."[18] One exception to sovereign immunity is where the suit "is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[19]

Although it is arguable that the actions of petroleum producing countries are "commercial activities"—thus waiving their sovereign immunity—a district court in 1979 held otherwise. The court concluded that the acts of an OPEC country "establishing the terms and conditions for removal of natural resources from its territory" as a "governmental activity" were not commercial activities within the meaning of the exception to the principles of foreign sovereign immunity.[20] Although the Ninth Circuit subsequently affirmed the dismissal of this case,[21] it premised its decision not on the ground that sovereign immunity precluded the suit, but on the "act of state doctrine." In essence, this doctrine commands courts to avoid review of the actions of foreign governments and to defer certain disputes with foreign government to the political branches of the government.[22]

Most recently, the U.S. Court of Appeals for the Fifth Circuit in 2011 affirmed the decision of the United States District Court for the Southern District of Texas to dismiss an antitrust lawsuit filed by a class of retailers alleging that OPEC members had engaged in a conspiracy in violation of the Sherman Act.[23] The Fifth Circuit premised its decision on grounds that the action presented nonjusticiable political questions and failed to state a claim for relief that could be granted under the act of state doctrine.[24]

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[18] 28 U.S.C. § 1604 (2019).

[19] 28 U.S.C. § 1605(a)(2) (2019).

[20] International Ass'n of Machinists v. Organization of Petroleum Exporting Countries, 477 F. Supp. 553, 568 (C.D. Cal 1979). The district judge reasoned, "This Court agrees that this 'commercial activity' should be defined narrowly. . . . From the evidence presented to this Court, it is clear that the nature of the activity engaged in by each of these OPEC member countries is the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource to wit, crude oil from its territory." *Id.* at 567.

[21] *See* Int'l Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir.1981).

[22] Spectrum Stores, Inc. v. Citgo Petroleum Corp., 632 F.3d 938, 954 (5th Cir. 2011) ("Under the act of state doctrine, the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.") (internal quotes omitted).

[23] *Id.* at 942.

[24] *Id.*

In consideration of these concerns, the NOPEC Act authorizes only the Department of Justice to enforce the antitrust laws, thereby specifically entrusting to the Executive Branch the discretion whether to pursue enforcement. The Executive Branch necessarily will consider the foreign policy implications of such a suit before bringing charges. Moreover, a judge's concern that he or she should avoid determining matters that are more properly determined by the political branches is mitigated when Congress, by passing this legislation, explicitly authorizes enforcement, and the Executive Branch exercises its prosecutorial and enforcement discretion in deciding when to bring a legal action.

3. Prior Consideration

NOPEC has been introduced in every Congress from 2000 to 2012 and has passed the Senate Committee on the Judiciary unanimously four times.[25]

In the 110th Congress, H.R. 2264, "No Oil Producing and Exporting Cartels Act of 2007 (NOPEC)," was introduced by House Judiciary Chairman John Conyers, Jr. (D-MI) with Representatives Steve Chabot (R-OH) and Zoe Lofgren (D-CA) as original cosponsors of the bill. It was reported favorably by voice vote on May 17, 2007. Chairman Conyers said in support of the bill that "[f]or years now, OPEC's price-fixing conspiracy—and that's what I call it - a conspiracy—has unfairly driven up the costs of imported crude oil to satisfy the greed of oil exporters."[26] On May 22, 2007, H.R. 2264 passed the House under suspension of the rules by a bipartisan vote of 345 to 72.

An identical bill, S. 879, was introduced on March 14, 2007, by Senator Herb Kohl (D-WI), together with Senators Arlen Specter (R-PA), Patrick Leahy (D-VT), Chuck Grassley (R-IA), Charles Schumer (D-NY), Richard Durbin (D-IL) as original cosponsors, among others. Senators Bernie Sanders (I-VT), Hillary Clinton (D-NY), Sherrod Brown (D-OH) and others cosponsored the bill after introduction.

Prior thereto, the Senate passed this legislation by voice vote in 2005 as an amendment to the then-pending Energy Bill. It was subsequently dropped from the bill during the House-Senate conference on that bill.[27]

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[25] *See, e.g.*, H.R. 2264, 110th Cong. (2007); S. 879, 110th Cong. (2007); S. 555, 109th Cong. (2005); H.R. 695, 109th Cong. (2005); S. 2270, 108th Cong. (2004); H.R. 4106, 108th Cong. (2004); S. 665, 107th Cong. (2001); S. 2278, 106th Cong. (2000); H.R. 5241, 106th Cong. (2000).

[26] *Prices at the Pump: Market Failure and the Oil Industry: Hearing Before the Antitrust Taskforce of the H. Comm. on the Judiciary,* 110th Cong. (2007) (statement of the Honorable John Conyers, Jr.).

[27] *Accountability for OPEC: Hearing on H.R. ___, the "No Oil Producing and Exporting Cartels Act," Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary,* 115th Cong. (2018) (prepared testimony of Seth Bloom).

B. Section-by-Section Explanation

Sec. 1. Short Title. Section 1 sets forth the bill's short title as the "No Oil Producing and Exporting Cartels Act of 2019" or "NOPEC".

Sec. 2. Sherman Act. Section 2(a) establishes a new section 7A in the Sherman Act to prohibit any foreign state, or instrumentality or agent of any foreign state, to act collectively to: (1) limit the production of, (2) set or maintain the price of, or (3) otherwise restrain trade for oil, natural gas or other petroleum product, when such action has a direct, substantial and reasonably foreseeable effect on the market, supply, price, or distribution of oil, natural gas, or any petroleum product. In substance, this extends the Sherman Act to international state actors in the petroleum production business.

Subsection (b) provides that a foreign state engaged in conduct under subsection (a) is not immune under the doctrine of sovereign immunity from the jurisdiction or judgments of the courts of the United States, and clarifies that a court shall not decline to make a determination on the merits of the case as a result of state, foreign sovereign compulsion, or political question doctrines regarding the merits of an action.

Subsection (c) states that the Attorney General of the United States has the sole authority to bring an action to enforce this section. It also provides that any such action may be commenced in the district court of the United States in accordance with the antitrust laws.

Sec. 3. Sovereign Immunity. Section 3 amends the foreign sovereign immunity statute, 28 U.S.C. § 1605(a), to make it explicit that sovereign immunity does not protect a country for actions brought under new section 7A of the Sherman Act.

Sec. 4. Severability. Section 4 clarifies that if any provision of the Act is held invalid, the remainder of the Act shall not be affected.