

ANTITRUST MODERNIZATION COMMISSION

PUBLIC HEARING

Thursday, November 3, 2005

Federal Trade Commission Conference Center
601 Pennsylvania Avenue, N.W.
Washington, D.C.

The hearing convened, pursuant to notice, at 1:21 p.m.

PRESENT:

DEBORAH A. GARZA, Chairperson
JONATHAN R. YAROWSKY, Vice Chair
BOBBY R. BURCHFIELD, Commissioner
W. STEPHEN CANNON, Commissioner
JONATHAN M. JACOBSON, Commissioner
DONALD G. KEMPF, JR., Commissioner
JOHN H. SHENEFIELD, Commissioner
DEBRA A. VALENTINE, Commissioner

ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director and General
Counsel

WILLIAM F. ADKINSON, JR., Counsel

TODD ANDERSON, Counsel

HIRAM ANDREWS, Law Clerk

KRISTEN M. GORZELANY, Paralegal

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- TIMOTHY J. MURIS, O'Melveny & Myers LLP
- JOHN M. NANNES, Skadden, Arps, Slate, Meagher & Flom LLP
- JOE SIMS, Jones Day
- MICHAEL N. SOHN, Arnold & Porter LLP

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity, and each witness has been given an opportunity to clarify or correct his/her testimony.

PROCEEDINGS

CHAIRPERSON GARZA: We would like to open the Antitrust Modernization Commission hearings for this afternoon.

I thank all our witnesses for agreeing to appear and for the submission of their statements. This afternoon one of the issues—one set of issues that the Commission agreed to consider initially was the issues of multiple enforcement institutions, and previously, we have had hearings on the issues relating to state enforcement of federal antitrust law. This afternoon we are looking at issues relating to the dual enforcement worlds of the Federal Trade Commission and the United States Department of Justice.

Let me just briefly tell you how we will proceed this afternoon. Our habit is to allow each of the witnesses five minutes to summarize their testimony. Following that, and I will go from left to right, starting with Bill and ending with Michael—following that, Commissioner Valentine will take the lead for the Commission in putting questions to you all. She will take about 20 minutes for that, and then we will allow the other Commissioners to take five minutes for their own questions, and we hope to then keep to our one-and-a-half-hour schedule.

So with that, Mr. Blumenthal, I'll start with you if you would like to summarize your testimony for us.

Panel I: Harmonizing FTC and DOJ Injunction Procedures

MR. BLUMENTHAL: Chairperson, thank you, and Commissioners. We appreciate the opportunity to join the discussion this afternoon.

We have submitted to the staff copies of a written statement on some of the federal enforcement issues identified in the AMC's Federal Register notice, and what I would like to do here is take a few moments to touch on the main points that are in our prepared statement.

Before I do, let me offer the customary disclaimer, with which I know you are familiar on FTC matters: the comments I am about to offer are my own, and reflect the view of a number of colleagues on FTC staff.

The Federal Trade Commission has authorized us to appear today and deliver these remarks, but the remarks do not necessarily reflect the views of the Commission or of any individual Commissioner.

Turning to the question of whether we need two enforcement agencies, there seems to be general agreement that, putting aside the handful of clearance disputes that arise each year among the several thousand transactions—if you put those to the side, there appears to be general agreement that there is not a compelling case for any particular changes in the status quo. Most of the comments that have been received by the Commission I believe reflect that view. The ABA is one.

I don't want to dwell on the subject, but I would

like to highlight for you two other observations from different ends of the political spectrum.

The first is that of Judge Posner, who this year grudgingly recanted some of the bad things he had said about the FTC in 1969, and has come around to the view that indeed having a separate FTC as well as a DOJ Antitrust Division would be a wise thing.

The second would be the comments of Bob Pitofsky, who, in his confirmation hearings, while Chairman designate commented that, while you might not have set it up this way in the first place, the fact of the matter is that it works rather well—

I think that that view is one that we share.

Turning now to the question on merger enforcement, and in particular, is there a difference in the standards that the DOJ and the FTC must meet to obtain preliminary injunctions in Section 7 cases—I think our view would be this: As we discuss in greater detail in my written comments, we believe the answer is no, that there is not a practical difference in the standard that the two agencies face in court.

Whatever difference in articulation may have been offered over the years, where we are now, in our view, is that both agencies face what is effectively a public interest standard, and not the traditional private party equity standard.

The true concern in the area, in our view, is that neither the DOJ nor the FTC is getting the benefit of a true preliminary injunction in merger cases. And by that I mean that, as a practical matter, we have been forced to rush into something that is pretty close to a full trial, in a way that one doesn't see in other areas of American jurisprudence.

This is in any case an area of judge-made law where the courts are exercising equitable jurisdiction, and in large part control the appropriate standard and the way it is implemented. And, based on that, I think our view is that these are considerations that cannot meaningfully be addressed through legislation, nor should they be.

I do want to spend a moment on the question of what happens after the PI ruling because the issue is one that has drawn substantial commentary.

First, we think it is important to keep in mind that few cases will still be alive at that point, either because they will have been abandoned by the parties, in our view typically for good reasons, or because the challenge would have been abandoned by the agency.

As to the few remaining cases, those are typically ones that we elect to proceed with only after applying the factors in our 1995 policy statement. We believe that those are appropriate factors. We believe that the statement has been applied with discretion.

And as to those few remaining cases where we proceed, we believe it serves a valid public purpose, either for the DOJ or the FTC, as the case may be, occasionally to have a merger case litigated to full conclusion so that the agency or the courts have an opportunity adequately to address cutting-edge Section 7 issues.

The *Dairy Farmers* litigation is one that we would offer up as an example in providing useful guidance, even though it takes some time to go through the appellate process. We believe it would be dubious policy to develop merger law solely through what are effectively PI motions.

In conclusion, seeing that my red light is on, while we at the agency are constantly reevaluating our procedures to look for room for improvement, and we welcome discussions with the private bar on what those improvements might be, at the moment we see no issue regarding merger enforcement for which, in our view, legislative intervention would be warranted or useful.

I will be glad to take your questions after the rest of the presenters have spoken. Thank you.

CHAIRPERSON GARZA: Thank you.

Mr. Conrath?

MR. CONRATH: Thank you for the opportunity to appear here on behalf of the Department of Justice. The Commission asked the Antitrust Division to provide testimony about our application of the preliminary injunction standard

in merger cases, and this testimony will discuss two topics: 1) What the standard is that we apply; and 2) How we use our prosecutorial discretion in deciding whether to ask for a preliminary injunction.

So, first, the standard we apply. The standards apply for both statutes that we enforce, the Clayton Act and the Sherman Act. Both statutes expressly reference the courts' equitable powers, and expressly authorize us to seek preliminary relief.

So we are applying courts' traditional equity powers to grant preliminary relief. At least that is how it starts. That test is normally described as four factors: 1) the likelihood that the plaintiff will prevail on the merits; 2) the possibility of irreparable harm if there is no injunction; 3) the balance of that harm against harm to the defendant; and 4) the public interest.

As applied, it is often said that the plaintiff faces two threshold requirements—those are the likelihood of success, and irreparable injury. And then there is a balancing of the equities, including the public interest, after that.

In an Antitrust Division merger case, if the government establishes likelihood of success on the merits, then irreparable injury is normally assumed because of the importance of the merger laws, and the court moves on to balancing of the equities.

So effectively, we face—we have to prove likelihood of success on the merits, and then move the court to a balancing of the equities, and of course we strongly argue it's in the public interest to require that, if there is a threat, that the merger not go ahead.

So that's the standard that we apply.

The second topic I want to talk about is how we use our prosecutorial discretion to decide when to ask for a preliminary injunction, and this is really quite simple. We ask for it when we think we need it in order to preserve the possibility of meaningful relief.

So, for example, if the merger is likely to close shortly after we file a case, if we don't get preliminary relief, then we ask for preliminary relief.

For example, in the label stock merger case (UPM), there was nothing standing in the way of the closing of the transaction except the termination of the Hart-Scott waiting period, which was going to happen shortly after we filed the case, so we asked for a preliminary injunction.

By contrast, if we don't need to, then of course we don't. So, for example, in the *EchoStar DirectTV* merger litigation, that was a transaction that could not be finished until the FCC approved it, and there was no way that was going to happen before we got to a trial on the merits in the case, if that had been necessary, so we didn't seek a preliminary injunction.

And of course, both parties, recognizing these realities—what often happens is that we negotiate an agreement with the parties that they will not try to close a transaction pending the court's decision.

And, just a word—I think it will be transparent to everyone on this panel why meaningful relief—why stopping a merger temporarily is important to meaningful relief. It's simply all the reasons we have a Hart-Scott Act. Congress looked at what happens if you try to litigate mergers after the fact and found that assets are scrambled, it's hard to reestablish a competitively significant company if it's been merged once, and of course there may be anticompetitive harm in the interim.

So basically, the message to you is, we seek a preliminary injunction when to do so is an important part of effective enforcement of the laws against anticompetitive mergers.

I would be happy to take questions once we get to that point. Thank you.

CHAIRPERSON GARZA: Thank you.

Mr. Sims?

MR. SIMS: Well, I'm going to be very brief and try to help you meet your schedule, although I'm still sitting here trying to get my mind around a picture of the FTC being forced to rush into a full litigation on the merits; "rush" and "FTC" are not really words that commonly go together.

I think I can summarize my views on this subject in four points: 1) the standards are different, perhaps only marginally, but they are different; 2) they shouldn't be different; they ought to be the same; 3) the right standard is the normal preliminary injunction standard that the DOJ has to meet; and 4) 13(b) ought to be adjusted to make that happen.

I'd be glad to answer any questions.

CHAIRPERSON GARZA: Okay.

Mr. Sohn?

MR. SOHN: Thank you. I am delighted to be here and delighted, Madam Chairperson, that you would place me to the right of Joe Sims. I haven't been characterized that way before.

[Laughter.]

MR. SOHN: I appreciate it.

I think the stakes are high, obviously, when either agency tries to enjoin a merger. From the agency perspective—and you've heard it, and it's correct—if the merger is not enjoined preliminarily, the eggs are scrambled, assets are rationalized, and it's hard to conceive of post-merger remedies that are effective. But, from the perspective of merging firms, the stakes are equally high.

Contrary to the cynicism expressed by some courts, particularly the court of appeals here, the deal is dead

once it's preliminarily enjoined. I don't know anyone who practices on either side of the fence who really believes otherwise. No firm as a seller can stand the destabilizing effect of a year's worth of administrative or judicial litigation and survive. I have never had a client in more than 20 years that I've been practicing at the antitrust bar who even contemplated that kind of option.

So the stakes are high both ways. The substantive law is the same. The preliminary injunction standards ought to be the same.

It is hard to disagree that, on paper, the preliminary injunction standards are different. They are different. There is a standard in Section 13(b) of the FTC Act that omits irreparable harm; the statute under which the Justice Department proceeds has no substantive standard, and courts usually apply the usual preliminary injunction standard, which includes irreparable harm.

But I also agree with Bill that in practice, it hasn't worked out all that differently. Although one court, which I cite, *Gillette*, makes much of the fact that the standards are different in the way identified, I think the Justice Department is not really held to the same irreparable harm standards that private parties are, and I disagree with Joe Sims that it ought to be. I think the public interest stake is considerable in enjoining those mergers that should be enjoined.

Having said that, there is a persistent view among practitioners at the bar that the FTC gets more latitude than Justice does, and that's not something I can pin down. I can tell you that when you see decisions like *FTC v. Libbey*, which was a 2002 decision in the District Court here, where the court said, and I quote, "The Court is not convinced that the acquisition as presented will in fact violate the antitrust laws; however, the facts as presented to the Court make the FTC's concerns plausible and therefore sufficient to establish its prima facie case."

"Plausible." That's watering things down too far, and I wonder whether they aren't watered down too far because of the view expressed in *Libbey*, following the Court of Appeals in *Heinz*. That much is not happening here; it's just a preliminary injunction, and if the parties want to do the deal after the trial on the merits, there's no reason that the court can see that they can't do that.

That's just not the real world.

But the real thing I think is not the difference between preliminary injunction standards applicable to the two agencies, but what really goes on. At the Justice Department, increasingly—and I don't know; I could be corrected on this by Craig—but I think almost uniformly now, where there is a preliminary injunction proceeding brought by the Justice Department, and the parties work out a reasonable schedule, it's consolidated with a trial on the

merits.

Now, once that happens, from the parties' perspective, before they lose their deal by virtue of a preliminary injunction, they get a trial on the merits, and no one can disagree that the standard of proof is very different.

And so in that sense, there is a real difference between the two agencies. You can't consolidate at the FTC under Rule 65 because there's an administrative proceeding.

What I suggest in my testimony is that this Commission ask the FTC to consider why in at least some merger cases it can't decide that a trial on the merits or a "permanent injunction", to use the section 13(b) lingo, can't be sought at the same time that a preliminary injunction is sought under 13(b). That would make things more comparable as between the two agencies.

CHAIRPERSON GARZA: Thank you.

Commissioner Valentine?

COMMISSIONER VALENTINE: Okay, let's see. One second. I need my magic stuff here--

MR. SIMS: If I could just, while she's getting her papers together--can I make just one clarifying point? Because Mike obviously misunderstood my brief summary, and so maybe somebody else did as well.

MR. SOHN: That's because you're so brief.

[Laughter.]

MR. SIMS: It's possible. That's the problem with brevity.

CHAIRPERSON GARZA: Commissioner Valentine, are you alright with this?

COMMISSIONER VALENTINE: He can go ahead; that's fine. He didn't use near his five minutes, quite frankly, so he is more than welcome.

MR. SIMS: I was not arguing that the DOJ ought to be held to some different standard than it is held to now. I was arguing that the FTC ought to be held to the same standard that the DOJ is currently held to.

So I wouldn't argue for applying an irreparable harm standard over and above what exists in the jurisprudence today to the DOJ.

COMMISSIONER VALENTINE: Okay, so we can get to this. So, what you are saying is, there is a DOJ traditional equity standard that is different from a private party traditional equity standard

MR. SIMS: Right.

COMMISSIONER VALENTINE: Okay. Fair.

Why don't we start--well, first of all, thank you all for being here; thank you all for your wonderful papers, and I am very bad at this stuff, so we're going to move to the real stuff.

I think what I am hearing is that, as a practical matter the DOJ and the FTC standards are not really that

different, and if someone wants to argue that they somehow are outcome determinative—that, had the FTC brought a case, they would have gotten an injunction when the DOJ didn't, or, conceivably, even that parties accede to more onerous consent terms from the FTC because they are more afraid that they may lose a PI proceeding. I would be open to hearing it, but I think I am ultimately not that interested in it, because I don't think it's that likely.

I am more interested in going after the normative question, which is, should the agencies operate pursuant to the same PI standard? After all, they are reviewing mergers under the same HSR Act, and under the same Clayton 7 standards.

Is there any one of the four of you who thinks they shouldn't be held to the same PI standard?

MR. CONRATH: Well, let me just be clear that I'm not expressing any view on that. I've got experience with the Department of Justice standard, but I am certainly not in a position to have an opinion on exactly the subject that you have asked.

COMMISSIONER VALENTINE: Well, do you have an opinion on whether parties should be subject to a different standard before the DOJ and the FTC simply because one industry—they happen to be in an industry that's done by the DOJ as opposed to the FTC? There's nothing inherent about airplanes or telecoms, as opposed to pharmaceuticals or

coal, that is a basis for a different PI standard, is there?

MR. CONRATH: I'm only trying to stay within the terms of what I'm in a position to discuss, which is—I can talk about what our policy is and the standard that we apply, but you are asking questions that are probably better addressed to people who have had experience on both sides, which probably covers everybody on this panel except me.

COMMISSIONER VALENTINE: Okay.

MR. SOHN: Well, I'm pretty clear about that. I can't imagine a defense of the proposition that the PI standards should be different.

COMMISSIONER VALENTINE: Mr. Sims?

MR. SIMS: I would certainly be interested in hearing the argument. I do think that you may have dismissed the practical implications a little too quickly, because I think they do exist. I think it is the fact that people at the FTC believe they have an easier burden and act accordingly, and it certainly is open for a court to apply an easier burden than they would be open to apply in a DOJ action.

I don't think that happens a lot, but it certainly is available, and if you look at some of these cases, it's hard to tell whether they applied an easier burden or not, because the language sounds like they applied an easier burden.

So I think there is a difference that is

measurable. It may not be enormous, but it is measurable. I don't see how you can justify that difference.

COMMISSIONER VALENTINE: Mr. Blumenthal?

MR. BLUMENTHAL: Well, I'm not sure that we accept the proposition that there is a measurable difference.

COMMISSIONER VALENTINE: That wasn't actually my question to you. My question to you is, should parties be subject to a different PI standard simply because they end up before one agency as opposed to-

MR. BLUMENTHAL: Oh, no, no, I'm coming around to that.

COMMISSIONER VALENTINE: Okay.

MR. BLUMENTHAL: Bear with me. But let me just first take on Joe's point, which is that we would not acquiesce in the view that there is a different standard. We think that if you look at *Kymmene* on the DOJ side, and if you look at *Arch Coal* recently from our side, one ends up concluding pretty quickly that effectively what is going on in the courthouse is the same standard is applied to both agencies.

COMMISSIONER VALENTINE: Okay. I read your testimony; I've heard that-

MR. BLUMENTHAL: Slightly different terminology.

COMMISSIONER VALENTINE: I want an answer to my question, please, Mr. Blumenthal.

MR. BLUMENTHAL: I'm getting there.

COMMISSIONER VALENTINE: Okay.

MR. BLUMENTHAL: Slightly different terminology, but the same standard, and we think that's appropriate. That's your answer.

COMMISSIONER VALENTINE: You're not going to answer the question I posed?

MR. BLUMENTHAL: The answer is yes; we think it's appropriate that the standard be the same. And we believe it is.

COMMISSIONER VALENTINE: Okay. Thank you.

Oh, you think it is?

MR. BLUMENTHAL: We believe it effectively is.

COMMISSIONER VALENTINE: If there is a perception in the world that the two statutes are written in different languages, what would be wrong with having one statute with the same language govern both agencies?

MR. BLUMENTHAL: The question is directed to me?

COMMISSIONER VALENTINE: Yes.

MR. BLUMENTHAL: We don't know that there is anything inherently wrong with that so long as, in our view, the 13(b) standard is the one that's applied.

COMMISSIONER VALENTINE: Okay.

MR. BLUMENTHAL: But they're the same.

MR. SIMS: Why would it make any difference what standard was applied as long as it was the same standard?

COMMISSIONER VALENTINE: And let's take that

question next. If there should be one standard, what should that standard be? And why don't we start down here.

MR. SOHN: I actually think it should be the 13(b) standard. I think there is a public interest that's different and discernible when a government agency—either government agency in this case—seeks an injunction. It is not defending any private rights; it's defending public rights, and so I think an irreparable-harm test is not the right test.

And if we are going to change the statute, the test should not hold in a government-initiated preliminary injunction proceeding.

My concern is different, and I'll wait till you ask an appropriate question. Hopefully.

[Laughter.]

COMMISSIONER VALENTINE: I'll get to that, I hope, too.

Okay, Mr. Sims?

MR. SIMS: Well, I don't have any problem with the government not having to meet an irreparable-harm test. I agree with Mike on that. I would not accept the notion that the 13(b) standard as written is necessarily the proper standard, because it reads to me like a pretty damn weak standard. And after a full-fledged investigation of the kind that the agencies do before they file a complaint, they ought to be prepared to meet the same basic standard that

the DOJ meets, which, as I read 13(b), isn't required by that language.

COMMISSIONER VALENTINE: Mr. Conrath, to the extent you can or want to say anything—

MR. CONRATH: We apply the standard we have, and we are comfortable with that, and a comparison is really beyond what I can talk about.

COMMISSIONER VALENTINE: Okay.

Mr. Blumenthal?

MR. BLUMENTHAL: Same answer.

COMMISSIONER VALENTINE: You like your standard.

MR. BLUMENTHAL: The 13(b) standard is the one that we like.

COMMISSIONER VALENTINE: Okay. Let me just actually clean up one thing here. If one were not to pick the 13(b) standard and to pick a standard that might be more DOJ-like, I would assume that no one would have any problem leaving 13(b) as is for all other cases, non-HSR cases, cases which do not have the same sort of immediacy, time sensitiveness. Certainly, consumer protection could continue under 13(b) standards, and I would assume even non-merger conduct cases and even non-HSR merger cases or consummated mergers.

Does anybody have any issues with that?

MR. SOHN: I don't, but I would just like to clarify something I said earlier. The problem I have with

the way 13(b) is administered by some courts could be solved with or without legislative language. The problem I have is that there are public equities when a merger is enjoined that are not sufficiently taken into account in all cases. Specifically, what the court pointed out in *Arch Coal*, that if the transaction is enjoined preliminarily—but in the real world as a final matter—and there were merger-specific efficiencies and cost savings and synergies, those are lost, and not lost simply to the merging parties, but also to consumers.

I worry that some court cases dealing with 13(b) don't sufficiently take that into account.

COMMISSIONER VALENTINE: Okay. Fair enough.

MR. BLUMENTHAL: And permit me to respond to the question as well, if I may—I don't know that we, on our side, have fully thought through the implications of changing the 13(b) standard uniquely-applicable to mergers and leaving in place—

COMMISSIONER VALENTINE: And that would be mergers under time pressure, et cetera.

MR. BLUMENTHAL: As you know, the 13(b) standard is something that is invoked in numerous other circumstances.

COMMISSIONER VALENTINE: That's what I was just talking about.

MR. BLUMENTHAL: There have been ripple effects from, say, the consumer protection cases into merger cases

and vice versa. I don't know that we have fully thought through whether separating the standard for purposes of Hart-Scott-Rodino-reportable mergers from all other purposes would be a significant complicating factor or not. I think one would have to look at those ripple effects.

COMMISSIONER VALENTINE: I understand. Okay.

And, Mr. Sims, did you have any -

MR. SIMS: I like what Mike said.

COMMISSIONER VALENTINE: Okay. Fine. We like succinctness, too.

Now let's try to pick up on Mike's idea, which I think is pretty interesting, and I guess I would like to try to think about how one could encourage wise practice here. Because I think all sides would say that, in mergers, the injunction proceeding is the whole game. You either get the injunction and the agency wins, or the parties manage to survive the challenge and the deal goes ahead. And I really—I don't think there should be that much debate about that being the whole ball of wax.

So if the whole game is, do we get an injunction or not—and, well, quite frankly, I think the fact of the HSR Act being enacted is saying it's very hard, Craig, you said this: it's hard to undo deals after they are done. And Bill, you sort of complained that you don't get the benefit of a pure preliminary injunction proceedings, but it is the whole game. And we are effectively having mini-trials on

the merits, whether we are talking *Staples* for five days or *Arch Coal* for however many or *Drug Wholesalers* for six months, or at least eight weeks, let's say.

How—what is the most fair and appropriate standard to use? Should both agencies in fact have to get a permanent injunction before a court? Would that be a fair standard?

We will obviously start with Mr. Sohn, since this is his baby.

MR. SOHN: Thank you, and I appreciate the question.

Let me illustrate what I think the problem is, taking two mergers in the same industry, hospital mergers, a favorite of both agencies.

United States v. Long Island Jewish Medical Center, a case brought by the Antitrust Division. The Court said, consolidation provides a means of ensuring prompt consideration of the full merits of plaintiff's claim, rather than the likelihood of their success.

Compare that to *FTC v. University Health*, where, in reversing the District Court, again in a hospital merger, the Court of Appeals emphasized, and I quote, "Our present task is not to make a final determination on whether the proposed acquisition violates section 7, but rather to make only a preliminary assessment of the acquisition's impact on competition."

Now, why, given the extensive discovery afforded at least to the government under Hart-Scott-Rodino, should that be outcome determinative, whether the Justice Department challenges a hospital merger or the FTC does?

It clearly is a different standard, which could be outcome determinative, and I think that's wrong. It seems to me, with all respect, the notion that either agency is "rushed to a trial on the merits"—when these days, with a second request, the time from filing until the Commission or the Justice Department has to make a decision to challenge, is six or nine months of pretrial discovery—that's not a rush to trial, and whether you do it by legislation or whether you do it by admonition to the FTC, I believe the Antitrust Division follows a sound practice when it agrees under a reasonable trial schedule to consolidate. And the FTC can get there without any change in its statute in appropriate cases. And, indeed, while it certainly will proclaim the virtues of an administrative trial and its expertise on appeal, and that may be warranted in some merger cases, it clearly is not warranted at all—by the Commission's own admission it wasn't warranted in *Arch Coal*, where, after an extensive preliminary injunction proceeding, the FTC actually concluded that it had nothing to add by administrative trial.

I don't think that is an isolated case.

COMMISSIONER VALENTINE: Mr. Sims?

MR. SIMS: We are kind of caught in the middle here. We don't really have a true PI proceeding because we have a hell of a lot more investigation pre-proceeding than would go on in a normal PI circumstance. And yet we don't really have a true proceeding on the merits because we don't have that standard and we don't have reciprocal discovery in these circumstances.

We are kind of caught in this weird middle ground. It seems to me it ought to be one or the other. I despair, quite frankly, of ever getting away from lots of discovery before the agencies initiate an action. I have been on record as saying there is a different way to do this and a better way to do it, but nobody else seems to agree with that, so I guess we're not going to go there.

If we are going to have a lot of discovery pre-complaint, then you ought to at least give the parties to the transaction the option of saying, okay, let's have another couple of months and have a full trial on the merits. I don't see how the agencies are disadvantaged by that. We are not really talking—we shouldn't be talking about tactical disadvantage. I don't see how they are disadvantaged in their mission goals. And we would get a complete resolution of the matter as opposed to this sort of half-assed thing that we have now.

COMMISSIONER VALENTINE: Okay.

Mr. Conrath?

MR. CONRATH: Well, I just would pick up on one part of what Mike had to say, which is that the Department frequently agrees to a consolidated proceeding if it can negotiate a reasonable schedule. And that is obviously a huge "if" for us, and the government, no less than any other litigant, is entitled to a fair chance to put on its case, and we have to carry the burden of proof on a lot of difficult issues.

Obviously, we have what can be a short or a long pre-complaint investigation period, where the timing for that is primarily in the control of the parties who are merging, of course, so there is no guarantee that we have had a long time.

And you ask yourself, how long does it take a typical complicated civil case to come to trial in the average federal court in this country, and I don't know the answer, but I'd be surprised if it's as short as 18 months, and I think two or two and a half years might be a better guess.

And in the merger area, we commonly go to a full trial on the merits in something like four or six months, but it is possible to make that time so short that the government doesn't get a fair chance to try its case.

I was involved in a case in which, for example, we took or defended nearly 30 depositions in two weeks that included Thanksgiving. Now, if there is anybody here who

thinks we had a fair chance to prepare for that trial, I would be interested in hearing it.

In that same matter the expert reports were due before fact discovery was done. Does that make sense to anyone?

So the basic point that our agency is prepared to move very fast is right, but please keep in mind that the government is entitled to a fair chance to litigate its case as well.

COMMISSIONER VALENTINE: But assuming you don't have a document dump, which causes then the 20 days to run, and you are able to negotiate a reasonable pretrial schedule, I assume the Justice Department doesn't find seeking a permanent injunction unduly burdensome or unfair. It's not as if it's a world of difference from when you just do a PI proceeding.

MR. CONRATH: It is I think maybe important to put it this way: it's our experience that, regardless of which way we get to a factual hearing before the court, a pure preliminary injunction hearing as in the *UPM* label stock case—a trial on the merits as in, say, *Oracle* or a consolidated proceeding like *Long Island Jewish*—the courts are very focused, just as we are, on the substance, and the exact standard is not a high focus. Courts are very focused on asking, have you proved that there is a relevant product market; have you proved that there is a competitive

likelihood of anticompetitive effect, and the focus on the process is a lot less significant, I would say.

COMMISSIONER VALENTINE: Thank you.

Mr. Blumenthal?

MR. BLUMENTHAL: Well, there are a number of things that my co-panelists say that I agree with, co-panelists even other than Craig Conrath. So let me point out a few of the—at least the nuanced differences and then flag one other thing that I hope that the Commission will focus on.

The first thing I would observe is that, even though the agencies obviously receive substantial information in connection with the Hart-Scott-Rodino process, there are steps that are taken subsequent to the Hart-Scott-Rodino process prior to a full trial on the merits that are not embedded within the Hart-Scott-Rodino process itself as practiced.

And to the extent that one wanted to shift to a system that would involve expedited plenary hearings, one would need to take account of that. And Craig referred to one of the examples: for example, expert reports, and how you deal with experts. It is one thing to deal with inside economists and even outside economists on the question of, do we think that this is a case that is fit for litigation? It is something different to engage in the sort of expert work that would be done in anticipation of a full trial on the merits.

And that's not necessarily something that can be compressed into two months. One can try to do it, but that's going to have consequences, and I see that Craig is shaking his head in agreement.

And there are other steps that would be taken as well.

A second observation is that, in fact—and this picks up on a point that Mike Sohn raised—under the 1995 policy statement where the preliminary injunction hearing is such that it is effectively a plenary hearing, the agency's policy and practice, as you know, has been not to proceed afterwards.

And where things in fact have been truncated in a way that the agency believes would require a full trial on the merits, it is only in those circumstances where the agency would elect under the policy statement to proceed.

The third thing that I very much want to focus attention on, because it relates not to this panel today but to some of the other panels that are coming up, would be the interaction between this issue and the issue you are going to be hearing about in a few weeks, I suspect, on the Hart-Scott-Rodino second-request process itself.

Because we are, of course, mindful that there had been proposals that would substantially scale back Hart-Scott-Rodino and truncate the volume of information made available to the agencies—and it seems to me that this issue

and that issue can't be viewed in isolation—to the extent any consideration is being given of possible truncation, it would be perilous to combine that with a mandate to expedite.

COMMISSIONER VALENTINE: That is absolutely fair, and I think my time is up, so this is going to be my last response to you in terms of thinking about this, which is, rather than some of the easier proposals that people may be making to us, the FTC should adopt a strong presumption that it never goes into Part III, or the FTC should commit not to go into Part III after it loses a PI—maybe it would make sense to actually realize that we really are doing expedited mini-trials. And I don't think we have seen one. I'm about to ask Rhett behind you.

Staples—John, you litigated the smoking one. *Heinz* was many weeks. *Drug Wholesalers* was many—I can't think of one that wasn't effectively—where the court didn't want to know what the merits issue was, and make the decision based, as Craig says, ultimately on the substance.

MR. BLUMENTHAL: Well, I would simply respond this way, that a five-day mini-trial, or even a three-week mini-trial, would still be less than one might sometimes see in a full antitrust trial on the merits.

COMMISSIONER VALENTINE: Okay. I'm done.

CHAIRPERSON GARZA: Commissioner Burchfield?

COMMISSIONER BURCHFIELD: I will be brief, taking

Mr. Sims's example.

My question ties into the point that Mr. Blumenthal and Mr. Conrath were just discussing, and it is, is the willingness of the respective enforcers—the FTC on the one hand and the Antitrust Division on the other—to go directly to a merits hearing as opposed to having a preliminary injunction hearing and a merits hearing later—is that influenced or dictated at all by the perceived difference in the standards that you are confronting? Or is that a matter more of an agency, institutional, historical, or another preference?

MR. BLUMENTHAL: I'll respond because the answer from our perspective would be the latter. In particular, the FTC has available to it the administrative mechanism that the DOJ doesn't have, and that is a factor, but the difference in standards I would submit is largely irrelevant, perhaps completely irrelevant.

MR. CONRATH: I think for—every case is different, and the decision of whether we are proceeding to a preliminary injunction hearing or a consolidated proceeding, trial on the merits, is a function of, in part, how much evidence has already been collected, how many issues came up at the last moment in the pretrial—pre-complaint discovery, how many witnesses, what the parties' needs and desires are, because we are trying to accommodate that, and of course ultimately the schedule, and in some way there is a—the

schedule of the court. We are negotiating among those three to come to a resolution in which everybody has to make compromises.

But there is no principled way to say that it's driven one way or the other in every case.

COMMISSIONER BURCHFIELD: Mr. Sims, is there something that you want to add to that?

MR. SIMS: I would just make the point that we ought to remember this is an effort to find an appropriate balance between a whole bunch of different factors.

This is a quasi-regulatory process that uses the judicial branch. It's an odd beast. It involves economic activity, which in large part is desirable. Merger transactions—most of them are not anticompetitive, and it is a fact that the outcome of whatever you call the proceeding is, in virtually every case, determinative.

So if you put all those things together, while I am fully conscious that, in any particular case involving a particular matter and particular parties, it might not work out exactly right to the benefit of either side or one side or the other. What you ought to be looking at is what is best overall on balance in the long run to strike the right balance in this area.

MR. SOHN: Commissioner, I don't think the difference in terms of attitude towards consolidation have much to do with any perceived difference in preliminary

injunction standards. I suspect the difference has more to do with the FTC's feeling that there is often something to be gained through an administrative trial on the merits, an option before an expert agency, an option obviously not available to the antitrust division.

And that may well be true in some cases, but I submit to you that in horizontal merger cases, the law is pretty clear, and I would think if the Justice Department can negotiate with parties in good faith and reach agreements on such things like how long it takes to prepare the testimony of economic experts and increasingly, as it has, consolidated the trial on the merits of a preliminary injunction, the FTC ought to consider doing that as well.

COMMISSIONER BURCHFIELD: Thank you. I concede the rest of my time.

CHAIRPERSON GARZA: I actually expected somebody to argue that there was a different PI standard for the FTC, reflecting deference in its role as an expert administrative agency, in which case I was all prepared to ask you whether, before recommending that the standard be revised, we had to conclude that administrative proceedings are an inappropriate tool to look at an unconsummated merger.

But since everybody thinks apparently that there is—I think this is what you were saying—no difference or no intended difference between the PI standards, it seems like a pretty easy thing to do something, if we chose to, that

would assure everybody and clear up any misperceptions that the standard is the same.

But I still have a question about whether it is ever appropriate really to use an administrative proceeding to look at a merger pre-consummation.

Mr. Blumenthal, you said that you thought it was a dubious policy to develop merger policies solely through preliminary injunction hearings, and I wanted to get a better sense of what you meant by that.

It seems as though the FTC develops merger policy indeed through mechanisms other than PI hearings. There are not very many of those, but you have the Merger Guidelines, your ability to hold hearings, your ability to collect evidence, to look at industries, and your ability to study the effects of consummated transactions. Indeed, your ability to actually go and try to unwind a merger, like you have done recently in the *Evanston Hospital* case—

So I wanted to get a better sense of what you mean when you say in your statement, it would be dubious policy to develop merger policy solely through PI hearings. And what would be, if it's possible to say, an instance in which the FTC might, under that 1995 policy, choose to look at a merger, pre-consummation, through the administrative proceeding?

MR. BLUMENTHAL: Well, I think the key word—and you did pick up on it—was "solely." The notion is that there is

value to using full trials on the merits, full plenary hearings—administrative hearings in our case—to deal in some instances with cutting-edge issues, with novel issues, or with issues that have not otherwise been fully addressed.

CHAIRPERSON GARZA: Are you thinking in the merger context?

MR. BLUMENTHAL: I'm thinking in the merger context. I'm trying to think through some particular examples because I hadn't focused on the particular question until you posed it, but one that would come to mind, for example, in the hospital merger area was some of the work in *HCA*, for example. In Terry Calvani's era, in the mid '80s, a number of what became fairly standard aspects of analysis for hospital merger transactions grew not out of the courts, but out of the administrative work of the FTC.

My colleagues remind me that we have had some recent developments in, for example, *Evanston*, which you mentioned, which is still not finally resolved; it's simply an ALJ decision at this point.

The *B.F. Goodrich* case, the *Chicago Bridge* case—are all ones that have afforded opportunity for greater detail, greater examination of some of the policy issues that arise.

CHAIRPERSON GARZA: Now, my colleagues are up here are whispering the words, "those are consummated mergers." So the issue is—and that is, I suppose, a separate issue, a policy decision to go after a merger post-consummation, but

just focusing on pre-consummation-

MR. BLUMENTHAL: I'm not sure that whether the merger is consummated or not should bear on this particular question of whether administrative vehicles are appropriate vehicles-

CHAIRPERSON GARZA: Even given the effect of the time delay?

MR. BLUMENTHAL: Yes, even given that.

CHAIRPERSON GARZA: And why do you say that? You don't think it is significant that-I can't imagine having an administrative hearing without imposing substantial additional waiting time on the parties to close their transaction, and then you run into the preliminary injunction dilemma.

MR. BLUMENTHAL: Well, if it's unconsummated, presumably that's-I assume the hypothetical is one where it's unconsummated because the parties have not prevailed at the PI hearing, and where the court has found that there is a sufficient likelihood of adverse competitive effect-that the court, taking the public interest into account, sees that-to hold the transaction.

So we are dealing here with the instance in which the parties, notwithstanding that fact, are electing to proceed, and what I am suggesting is that, in that context, if we are going to keep doing it, yes, that is still an appropriate circumstance in which to develop that.

CHAIRPERSON GARZA: I take your point. And I think my question does make more sense if one assumes that there indeed is a different PI standard.

I am going to Commissioner Jacobson.

COMMISSIONER JACOBSON: Thank you.

I am going to take as my premise, which you are free to disagree with—but if you do, please say so—that there should be no procedural or substantive difference in the consummation of a merger based on whether it's cleared to the FTC or the DOJ. So that's the premise.

Given that premise, shouldn't we provide for uniformity of procedure such that the FTC can try a PI or a full trial on the merits in federal court, or less plausibly, the DOJ could do its PI in court and then go into Part III?

Why does that not make sense? And I know this is a harder question institutionally for Bill, but I'm going to ask him to answer it first.

MR. BLUMENTHAL: Well, in terms of the working assumption, I think it's a fair assumption. And I think that there is some significant merit to the basic intuition, yes. But you're right, procedurally, in terms of the mechanisms we have available, in terms of our ability as an agency to go forward in court, not on the PI basis, this starts getting into some of the detailed issues on the full scope of 13(b).

Now, I think our view is that 13(b) is available for permanent injunctions and permanent relief, even in competition cases.

COMMISSIONER JACOBSON: Just to make this clear, what I am saying is that whatever the rules are, they would be equal for the Justice Department and the Federal Trade Commission, so if one could go into Part III, the other could equally—if one were prohibited statutorily from having that power, the other would be as well.

What is wrong with pure equality?

MR. BLUMENTHAL: To the extent the question is pure equality, fine, assuming away all other issues—I don't have any problem with that.

What I haven't fully thought through is what the full ripple effects would be if we were to start changing—either if we were to start denying the FTC a Part III mechanism or if we were to try to craft a statute that made a Part III mechanism available to the DOJ.

But to the extent the question is, is there a conceptual problem with parallel approaches—not on my part, there's not.

COMMISSIONER JACOBSON: Craig?

MR. CONRATH: Obviously it would be in—the prospect of the Department litigating effectively, Part III proceedings would be a very substantial change. I think, in general, we can protect the public interest, given enough

time in current proceedings.

If I reach far back in my memory, I can recall the Department litigating some mergers before the Civil Aeronautics Board, the Interstate Commerce Commission. I'm not necessarily volunteering for that duty again.

[Laughter.]

MR. SIMS: I think this is part of the balancing that I talked about earlier in the great scheme of things, denying or eliminating the theoretical option of the FTC using a Part III proceeding in a matter where they have obtained preliminary relief, but the parties still choose to hold the merger open and not moot the Part III proceeding is pretty trivial because that never happens.

I can't think of a proceeding—maybe Bill can enlighten me—where that's happened, at least since 1995.

So, all this stuff about, you can't really homogenize these processes because we have this special technique that we don't want to lose in this limited area—pre-consummated mergers—is baloney. It's not a relevant process except in giving them a little extra leverage from a tactical sense, which is not something that ought to be given much value.

COMMISSIONER JACOBSON: So are you agreeing with the proposition—

MR. SIMS: I do agree entirely with your proposition, and the right way to do that would be to make

the FTC try cases in the federal courts just like the DOJ does.

MR. SOHN: Commissioner, I would hate to think that an idea I had led to expansion of Part III proceedings at other agencies.

[Laughter.]

MR. SOHN: I do agree with that, at least to the extent that there should be a strong presumption of consolidation in horizontal merger cases. I think there is a role for the Commission's expertise, even in merger cases, but it should be areas of merger law, which are less developed than I think most horizontal merger cases will present.

I thought the court in *Arch Coal* did a fine job analyzing the issues in a complicated market definition case, and the FTC agreed. So I don't think the sky would fall if the Justice Department's way of proceeding by consolidation was adopted in most horizontal merger cases by the FTC.

Thank you.

COMMISSIONER JACOBSON: I'm done.

CHAIRPERSON GARZA: Okay.

Commissioner Shenefield?

COMMISSIONER SHENEFIELD: Thank you, Madam Chair.

I know it is not chic in this town to get into the messy realities of the every-day world, but I would like to

call the panel's attention to a sentence that's in Mr. Sims's written statement and ask them whether they also would agree with this statement. And let me just quote: "No sensible person would design a federal government with multiple, independent, overlapping sources of the same regulatory power."

I assume you still adhere to that view.

Mike?

MR. SOHN: Well, like many of the things that Joe says, one wants to immediately stand up and salute, but I think there are—upon further reflection, I think there are benefits that an expert agency can bring to the enforcement of the antitrust laws that the Antitrust Division cannot bring.

COMMISSIONER SHENEFIELD: You are assuming something that isn't in the sentence, which is that the Antitrust Division would be the survivor. I am just assuming that the two worlds being compared are two agencies and one agency.

MR. SOHN: Sure. Yes. I was assuming something because of the source, but -

[Laughter.]

MR. SOHN: —perhaps that was an unwarranted assumption.

I actually think you could think of lots of divisions. You could think of a division in which the FTC

had all civil enforcement power and you left criminal enforcement to the Justice Department because it has expertise in that area beyond antitrust that's useful.

I don't know how to put this: I don't spend much time and energy thinking about that, because I think it's not simply that it's not chic to ask it; it's just that I think it's a waste of energy to ask it. I think this Commission can do a number of terribly valuable things in connection with the subject matter of this panel and others, and I just would hesitate to think it ought to tilt at windmills.

COMMISSIONER SHENEFIELD: I'm sorry for creating windmills for you to tilt at, but it doesn't take much time and energy to think that it might be more efficient just to have one agency. That's a fairly easy reflexive response, I would have thought.

MR. SOHN: I don't respond reflexively to it. I do think there is a significant role for an expert agency in the field of antitrust. It's least obvious in horizontal mergers.

COMMISSIONER SHENEFIELD: And I suppose the logical question would be, would three be better than two, or would four be better than three, or-

MR. SOHN: Well, we have 52, so I would be happy to see you start with eliminating 50 and leaving two.

COMMISSIONER SHENEFIELD: Craig, do you have a

view? Are you able to say anything about this?

MR. CONRATH: It's probably not a fair question to me.

COMMISSIONER SHENEFIELD: I understand.

Bill?

MR. BLUMENTHAL: Well, the lack of sensibility to which Joe is referring is not, of course, limited to the competition field. There are other fields in which there are multiple agencies where there is overlapping jurisdiction or dual jurisdiction or redundant jurisdiction.

COMMISSIONER SHENEFIELD: That doesn't sound like a complete defense, actually.

MR. BLUMENTHAL: No. Let me respond this way, by pointing to--well, both to my statement where I do address this, but also to some of the things that we have been known to say in the technical assistance context, when the issue is put to us by new jurisdictions that are thinking of how should they design their systems.

What we sometimes have been known to say is that we don't specifically urge that they adopt a system quite like ours. In fact, we would recommend that if they are doing it from scratch, they probably should design it differently and design it with one agency and one independent agency.

But from our perspective, with 90 years of track record, you sort of look at the transition costs associated with doing anything differently, and you ask how significant

are the inefficiencies with the current system that is in place, and our view is that the system works pretty well. It works well enough; we don't think that there is a lot of true redundancy or overlap.

COMMISSIONER SHENEFIELD: Good. Okay. Thank you.

Let me just try a possible statement or a proposition out on each of you. If this Commission were to say that, in all pre-consummation horizontal merger cases, there should be mandatory consolidation, the agency would be required to call its first witness within six months of the conclusion of the process, there would be the possibility of appeal, and there would not be the possibility of any administrative follow-on process—

Would that, if compared to the status quo be something any of you would sign onto?

MR. SOHN: Did you limit it to horizontal mergers?

COMMISSIONER SHENEFIELD: I did.

MR. SOHN: Yes, I think that's a plausible approach.

MR. CONRATH: Let me make sure I have all the conditions. Consolidation, six months before the proceeding begins. That's not far from our actual practice, I suspect, and when it's longer than that, it's usually because the parties have chosen to delay. Although—

COMMISSIONER SHENEFIELD: Well, you guys can get ready for a trial in three months, easy, I'm sure.

MR. CONRATH: Well, if I can take one moment, because we have kind of passed this topic a couple of times, and one is that you have to remember that part of the discovery process is us getting information from sometimes unwilling defendants and even sometimes unwilling third parties, and we know how to do that, but it takes time, and so one of the potential problems with rigid, especially shorter deadlines is that decision-maker, the court, may not get the benefit of all of the procedures that our system has built in to ensure that both sides come to the table with all the information that is ready.

COMMISSIONER SHENEFIELD: A limit of six months unless a federal judge can be persuaded to vary from that for good cause shown--

MR. CONRATH: That's not that different from where we end up today.

COMMISSIONER SHENEFIELD: So in your private capacity, you think that's not--

MR. CONRATH: It's not crazy.

MR. BLUMENTHAL: I think I would probably want to take that back to the office to talk to four or five people and see what they thought.

COMMISSIONER SHENEFIELD: Okay. Let us know if you do that.

CHAIRPERSON GARZA: You're only going to talk to four of those people?

MR. SOHN: I thought it was just his testimony.

[Laughter.]

COMMISSIONER SHENEFIELD: All right, that's all I have, Madam Chair.

CHAIRPERSON GARZA: All right.

Vice Chair Yarowsky?

VICE CHAIR YAROWSKY: Yes. Well, by around five or six, we're kind of in that consolidation period ourselves, and I think John was number five, and I think that's usually the time during these panels when we try to see if we can get some consensus. I think you did a great job.

I just want to keep following up on that, and that's really all I want to do.

There is an issue about any time limit because I think what we are talking about now are statutory recommendations, telling the federal courts that they have to prioritize on any time limit and deal with a civil docket that way.

But if one could do it, I take the six months—if one could do that and navigate those problems with the mandates they have with the Speedy Trial Act and other kinds of cases, you would think six months is adequate. That's kind of where you're ending up, everybody except William? You wanted to go take it back?

MR. BLUMENTHAL: Yes. I won't express a principled opposition to it personally, but I'm just not sure what the

institutional view would be.

VICE CHAIR YAROWSKY: Okay.

MR. CONRATH: And let me say, obviously, that's the kind of thing that you would think seriously about. I'm expressing to John—looking statistically at what we've done, that's not far from cases we have been able to try.

Obviously, the effect of having a rule is something that you have to think about; how does that change the incentives of everybody involved? So that requires some careful thought.

VICE CHAIR YAROWSKY: But with judicial discretion to be able to modify that.

Mr. Sohn mentioned in his testimony the word "perception," and in the context, there's a perception that the FTC may have a little bit more latitude than DOJ. I know perceptions seem very loosey-goosey, but I think it is incredibly important for this subject and the next panel's subject, because I think the perception that we have been talking about this afternoon really fades into the next subject, which is the perception on the Hill or other places about allocation and clearance issues. And if there were more harmonic convergence on standards, and on procedures, then I think there would be less talk of original sin about why we have two agencies.

I think quite the contrary—this is just my view, but I think if they thought there was some concordance going on, there would be less worry about different agency

practices and what that means. And then we saw the consummation of what that means a couple of years ago with a lot of paranoia about what it meant.

So I think the perception point is a critical one. In the patent area, the same debate is raging in Congress right now. It turns out that the standard for injunctive relief that the federal circuit set—and they are almost the Supreme Court in that area—is different.

Now these are private actors; this isn't public interest. But irreparable harm is assumed. So Congress now is kind of at a point more sensitized about these PI issues than I have ever seen them, really, in 10 or 20 years.

So to the extent that we can find some agreement, I think there might be some receptivity up there.

In terms of tactical advantage, any rule that one would write, you want to select out, I would think, tactical advantage for anyone, even the government. Is there anything we are missing about what we have talked about so far that would in a sense bestow some tactical advantage on one side or the other? Because I think we can't do a legitimate job if we do that.

Is there any aspect that we are missing in terms of the standard—eliminating the administrative proceeding? I know you didn't agree to that at all. Or do you think we are close to having this done?

MR. BLUMENTHAL: Well, again, I would focus back on

what other steps are taken with respect to the Hart-Scott-Rodino process because even with six months, six months is tight for true discovery in an antitrust case. It means that one really is going to need to front-end-load some significant discovery in a way that is roughly consistent with the current Hart-Scott-Rodino framework.

I was going to ask—I don't want to intrude too much on the limited time that you have, but I was hoping I could respond to the perception point as well.

The first observation I would make is that, to the extent the perception does differ from the reality, I don't know that I would say the perception ought to be viewed as irrelevant, but I would say it ought not be given significant weight.

But the second and more significant point is that the perception on the issue of which agency one would rather be before—and I'm speaking here as somebody who was outside the government eight months ago—that is a perception that varies, if not year to year, then at least two or three times in my experience over the course of a decade. And it may well be that the perception du jour is that people would rather be before the DOJ. I don't know that I would say that, but I don't know that I would dispute it, either.

But that certainly has not invariably been the case.

MR. SIMS: If I could just make one small codicil

to that. It seems to me it would be completely unacceptable to have it be either true, or believed seriously by serious people to be true, that whichever agency one got stuck with, through whatever process, could be outcome determinative, or could change the outcome. That would be a terrible; that is an unacceptable result.

That has been at least a perception from time to time, and that perception is aided—I don't think you can ever completely eliminate that possibility, but it is aided by these disparities in process and standards. To the extent that you can homogenize these disparities, you can probably go a long way toward ending the fact and, as importantly, I think, unlike Bill, the perception that it does make a real difference which agency you get to. It ought to be irrelevant which agency you get to except for the fact that you're dealing with different people, and that's a fact, and you've got to deal with that.

But in terms of the standard and the likely outcome of an objective analysis, where you want to be is—it doesn't make any difference which agency you're at.

MR. SOHN: I wanted to agree with the Commissioner's observation. During the very brief half life of the agencies Clearance Agreement, Bob Skitol, who is a very experienced practitioner, wrote an article that I cited, which was entitled "How the Agencies Clearance Agreement Can Affect Merger Review Outcomes."

And one of the things he cited was his own belief, his own perception, as you put it, that the FTC got more slack in a preliminary injunction proceeding.

Now, I personally have said here, and I will repeat, that I think, in reality, the difference in the statutory language boils down to irreparable harm being in the standard that the Justice Department is supposed to be held to and not on the FTC side. But I don't think the courts really impose that on the Justice Department.

But I think that article and its title prove that your point is correct, Commissioner. There is an interrelationship between these things, and it's a reason that both agencies ought to think hard about convergence in this area.

CHAIRPERSON GARZA: Commissioner Kempf—oh, I'm sorry. Go ahead.

MR. CONRATH: If I could just be very brief. I apologize. But your question was with the sort of outlines of the kind of changes you have talked about, what effect would that have on the incentives of people, and that's—I have given an off-the-cuff reaction to a relatively concrete proposal, but it is certainly something that I would be willing to take back and suggest you might put the more concrete proposal to the agencies, who have had a lot of experience because a little more thought might give a more reasoned and perhaps informative answer.

CHAIRPERSON GARZA: All right.

Commissioner Kempf?

COMMISSIONER KEMPF: Let me just make a few observations as someone who has been in the trenches a lot in these things.

Joe, you said that you weren't sure how the Commission could be rushed into making some of these decisions. The *FTC Watch* publishes sort of this timetable. Some of them have been a year that they're still pending. But, in a sense, that's self-inflicted by the merging parties' delay. There is a statutory timetable, and the concern I have with the timetable is that you get the call that says, you can rush us into a decision if you want, but Lord knows how that will come out for you.

But you can always tell them, yes, I'm rushing you into a decision. There are three examples: When *International Harvester* sold its farm equipment business—the *Tenneco* case—the staff thought they had Chrysler as a less restrictive alternative purchaser and recommended suit, and the higher-ups asked for more time, and we said no. And they didn't sue, and we closed.

My instinct was that they would not sue.

In *FTC v. Great Lakes Chemical*, they asked for more time, and I said there's a 100-percent chance they're going to sue here, and if we give them more time, they're just going to get better prepared to sue us; let's tell them no.

And in each case—the first one was a DOJ case, and the second one was an FTC case—the staffs were both shocked when we didn't give them more time.

But you can say to them, no, the statute provides that we can close in 20 days. It's been 20 days; game over.

And then in the third one, where I came to the tea party late with *Staples*, and I had wanted to shut it off at that point, it was already past the delay, the 20 days, but I had said, I think you ought to shut it off for two reasons: one, they're going to sue, staff wants to sue us, and they're just going to get better prepared; and two, we had a possible curative divestiture that was just horsing around with us, and I said, this guy will horse around with us forever, and our chances of getting something done are probably better if we just put a deadline.

So you can rush it in that sense.

Secondly, Michael, on rolling the PI trial into the merits in the FTC proceedings, 13(b) expressly provides that the Commission may seek and, after proper proof, the court may, issue a permanent injunction. So the statute provides that.

Now, the FTC has always taken a position that's a one-way street, and that neither the court nor the defendant has any say in that.

I did have one that would have been a precedent had the transaction not gone away. That was *FTC v. Gulf Oil*.

It was was filed in front of Judge Ritchie, and the first day, not knowing of any of the statutory differences, he just announced—and I had tried a number of cases before him, and I had done things like this in some prior cases—and he said, Mr. Kempf, we are going to do here what we did in a case involving General Motors. We are going to roll the preliminary injunction hearing right into a trial on the merits, so let's set the schedule for a trial on the merits.

And he announced that right out of the box on our first day in front of him, and then we had about an hour-long hearing, and afterwards, the staff said, he can't do that. And in our next session they said that to him, and I said, no, Judge; when you announced it, and they didn't oppose it, I take it that you can, as a judge, fairly say that they concurred in it.

Now, he told me afterwards—after the transaction was abandoned that he was going to rule that in fact, but it never came to that. He said that.

So you have those examples.

I was particularly interested in your two hospital quotes where you had one way and the other the other way because as I was thinking about it, I said, I'll bet you I can find cases where the quotes are identical but the FTC is on one side and the DOJ is on the other side.

I'm not sure of that, but that's my instinct.

MR. SOHN: No, let me, if I could, just respond on

the latter point. Is that all right?

COMMISSIONER KEMPF: Yes.

MR. SOHN: The quotes I read were quotes in which both courts drew a distinction between the preliminary injunction standard, one being likelihood of success on the merits; and the other being the ultimate burden of proof that prevails on a trial on the merits or a permanent injunction. You won't find that distinction drawn the other way.

COMMISSIONER KEMPF: Okay. My instinct is it would. But I'll look on my own.

We talked about two standards. I've always thought of three--DOJ and FTC, but also private actions. You referred to the *B.F. Goodrich* case, which is one I was involved in, and there was a case that Nynex and Bell Atlantic brought against the *AT&T-McCaw* merger, and both of those I had to wrestle also with. Well, what is the private standard? So I'm looking at those two, and the other one, and as a litigator you are always looking for any slight nuance that you can hang your hat on, and one that nobody has commented on so far, which was sort of a bizarre ruling--"bizarre" is the wrong word; "sound" would be the right word--and that was the *FTC v. Weyerhaeuser* case where the thing got all hung up on the equities component of the standard, and in that one the judge said, I'm just making an initial ruling. I think this is illegal 'til the cows come

home, but I could be wrong.

The equities case is really good here, so the balancing I'm going to do—all the other cases said they point this way or they point that way. He came out and said, they point in opposite directions, and so I have to balance the two on different sides of the scale, and lo and behold, even though I think the transaction is illegal, I think the equities case is so good I'm going to let this illegal transaction close anyway.

COMMISSIONER JACOBSON: And they were reversed.

COMMISSIONER KEMPF: No, no, then Judge Ginsburg affirmed. It was a two-to-one opinion—

COMMISSIONER JACOBSON: But not on that rationale.

COMMISSIONER KEMPF: Yes, it was; it was on that rationale. I could be wrong, but I did argue the case.

[Laughter.]

COMMISSIONER KEMPF: And then there's an explication of that that's even longer in Judge McGarr's ruling on the *FTC v. Great Lakes Chemical*, and it was in my mind because I just tried the other one immediately before that.

So does anybody have any comments on that aspect of it, on the equities component and how that might differ as between the various statutes, the various standards?

Okay, I had one other thing I was going to ask about—just an observation.

CHAIRPERSON GARZA: This is going to be a question?

COMMISSIONER KEMPF: No, it's just a quick comment, and that is, the six months that Commissioner Shenefield asked you about in seeing whether that is satisfactory time, I would trust the agency would bear in mind that that six-month shot clock starts after--most likely in these cases--an already two-month period during which, as a result of the initial HSR filing and a second request you, had an opportunity to do that. So a six-months thing is really an eight-months process.

That's all I have.

CHAIRPERSON GARZA: Well, thank you very much to the witnesses. Thank you for your thoughtful statements and for subjecting yourselves to us this afternoon. Two of you may go, and two of you must stay. And thank you very much.

MR. HEIMERT: We'll take a brief break, and begin the next panel at 3:00.

[Recess.]

Panel II: The FTC-DOJ Clearance Process

CHAIRPERSON GARZA: I would like to begin the second panel for this afternoon, which is focusing again on issues relating to dual enforcement authority at the federal level, with the Federal Trade Commission and the Department of Justice, and specifically on the issue of clearance of merger investigations.

Thank you to the panelists for being here. At

least three of you know from prior experience what our procedures are, but for the benefit of John Nannes, at least, I will go through it very quickly again.

I will ask each of you, starting with Tim Muris and ending with Michael Sohn, to summarize in about five minutes your written testimony, and I ask you to try to keep it to about five minutes at most. And Joe, if you could keep yours to two minutes, that would be probably preferable to you.

MR. MURIS: Is this taking time back from him or-

CHAIRPERSON GARZA: No, no; he likes to keep things short and sweet.

MR. MURIS: Joe is such a sweet guy.

CHAIRPERSON GARZA: But then after that, I actually will be taking the lead for the Commission initially on questioning for 20 minutes, and then each of the Commissioners who are here will follow that with five minutes of their own questioning.

The box on each of the tables has red, green, and yellow lighting on it to guide you. Red means you should try to wind it up as quickly as you can. I am unlikely to interrupt you during your statement, so I ask you to self-police.

With that, Mr. Muris, can I ask you to summarize your testimony?

MR. MURIS: Sure. Thank you, Madam Chairperson.

This is a topic that I accidentally know a lot about. When I went to the FTC, I honestly had no intention of doing anything about clearance until Bob Pitofsky sat me down and said, guess what we've tried to do for the last two years. It produced many interesting and entertaining moments.

Christine Wilson, who is behind me, was my chief of staff at the time. Her favorite moment at the FTC was when Senator Hollings threatened to "eliminate" me.

[Laughter.]

MR. MURIS: She thought it was very funny.

Having dealt with Senator Hollings at great length, John Dingell had the best statement ever about Senator Hollings. He said, I've been with him and I've been against him, and I can't tell you which is worse.

[Laughter.]

MR. MURIS: But there was a serious clearance problem. Whether there is a serious clearance problem now would depend on evidence that only the agencies can give you. If they do give it to you, I would implore that you ask them to give it to you on an apples-to-apples basis with what we did before and what is in this testimony.

As my testimony discusses, and as I discussed in a public statement I made in my last appearance before the ABA as Chairman, there are many problems. Obviously, the problem of delay that clearance causes is one. The problem

of second requests being issued at the last minute is another—or having filings pulled.

I think the problem of distorted incentives is in some ways the worst problem. I can't prove it, as I've said, and no one else will ever say what I did from a public platform as Chairman of the FTC, but I do believe that clearance distorts incentives.

What do you do in the future depends obviously on the congressional reaction—my testimony makes clear that the problem in 2002 wasn't a congressional reaction; it was one Senator. Because of 2002, however, I think there will be a need to consult, and it would be a consultation with six committees. The way Congress works, the probability of someone asking for something that the agencies might not want to give is an issue.

In some ways even a bigger issue is the problem of the alumni. As I mentioned in my testimony, I received numerous calls from FTC and DOJ alumni making the same point from opposite directions—the DOJ people saying, how in the world could you have swindled the Division, and the FTC alumni saying how in the world could you have given so much away.

Not everyone had these reactions, but overwhelmingly, from the two alumni, those were the reactions.

Those alumni reactions explained the virtually

nonexistent support from the business community. In the future, why in the world would anyone who is Chairman or head of the Antitrust Division want to do something that is going to bring them opprobrium from their peers?

Because I worked in the Reagan Administration—being Chairman was my sixth government job—I had a many friends, particularly in the House of Representatives. They were relishing the opportunity to fight with Senator Hollings because of past battles. I'm not sure we would have won, but we wouldn't have lost either. We probably would have had to compromise. I floated a compromise with Charles in which the FTC would do some media cases. Although we didn't agree on it, I do think something like that could have happened eventually.

Given the environment that we are now in, I doubt that future heads of the two agencies will engage in an overall clearance reform. I do know, and I'm sure individuals on the panel can tell you, of recent clearance problems. There was a clearance dispute that went to the 29th day recently, and a second request promptly issued on the 30th day. The *Whirlpool* dispute was publicized.

I don't know, and none of us here can know, if you are not in the agency, how serious and to what the extent the problems exist. Problems continued toward the end of my Chairmanship. I even at one stage told the Department of Justice that we were issuing a second request, and I didn't

care what they did on a particular matter. They cleared the matter to us. I was prepared to repudiate the clearance agreement if they did not, which would have had interesting ramifications. But I'm sure no one in the future will even consider such a radical course.

In defense of the agencies, I also know that recently they had a period, like I mentioned in my written testimony, where Bob Jones said there were no clearance disputes. I was told recently there was such a period where there were absolutely no clearance disputes.

We have a serious issue here, at least at times. I think you could advance the ball by supporting a clearance reform and doing it wholeheartedly without being tepid—avoid commenting on industry allocations, and follow what Joe says in his testimony, namely that industry allocations and turf aren't the points. The current system is simply no way to run a railroad.

CHAIRPERSON GARZA: Thank you.

Mr. Nannes?

MR. NANNES: Thank you, Madam Chairperson.

I was struck when I read the statements of the various panelists that there seems to be such a consensus that significant improvements are needed, and I was also struck by the fact that those two of the panelists who were closest to the efforts to address the issue in 2002 seemed to be the least optimistic about the possibility that there

can be some meaningful reforms.

But since I was not, I tend to be more optimistic.

The statistics cited principally in Tim's statement, I think, offer up the prospect of what could be achieved if we are able to make some improvements in the system, and I think those changes are more than marginal, I think they are significant.

We came up here to the table and were sharing a few comments before the panel began the presentation, and we asked, well, how many transactions are you aware of that went down to the 30th day in the last couple of weeks, and I said, I know one, and someone said, I know two, and someone said, well, I know three, and they were different transactions, and so the suggestion is there may be more of these going on than immediately reach the public consciousness.

I just want to offer up kind of "mini-suggestions" to see ways that we might be able to work some improvement. I think re-upping a variation of the 2002 agreement is something that ought to be considered because I think it was good not only in concept, and although I agreed, as Tim suggested, that I thought the Division lost more than it would have gained, I actually thought that was not a reason not to go forward with the agreement. And so I think a reasonable compromise ought to enjoy broad support because of its systemic improvement in the system.

If that is not feasible or possible, I still think a lot can be done by the atmosphere that is created and engendered between the heads of the two agencies. I think if they are reluctant to go forward with a new agreement but believe that improvements ought to be made, there is a way of transmitting to the clearance officers and to all the litigating sections that the administration expects these decisions to be made on the merits and to eliminate gamesmanship to the maximum extent possible.

That will take some active pursuit of those objectives by the heads of the agencies or their designees. And I am fully cognizant of the fact that this may be more problematic to deliver on at the Commission than the Antitrust Division.

I was not directly involved in many clearance battles when I was at the Division, but a couple of times I had to talk to the Chairman of the Federal Trade Commission. Every once in a while he would trot out this argument that said, oh, I understand your position, but Commissioner X really is interested in this industry, and I just can't cede this matter over to you because of his or her interest, and I need the vote.

MR. MURIS: And you fell for that?

MR. NANNES: And I was never sure whether I was being fed a line or not, but I think we would all agree that those considerations ought to be extraneous to a process

that's merits-driven.

I think the decisions that the agency heads make about the people who are the clearance officers can also say a lot. If those people understand that an effort is being made genuinely to minimize differences and to resolve disputes amicably, I think that that is likely to have some carryover effect.

It may be possible to assign the angriest, most difficult person to the process. That sends one message to the agencies. But if you want to send a different message to the agencies, there might be an occasion where you would assign somebody who is known for their collegiality and for their efforts in working things out.

And finally, I think that there is more interagency collaboration and understanding that may contribute to some benefits in the clearance process. There certainly was, at the Division, suspicion on particular clearance matters that the claims being put in by the Commission were intended to increase turf, and I'm willing to assume, although I wasn't there, that reciprocally there were times at the Commission where the suspicion was that claims the Division was putting in were really motivated by turf building.

I think that if the agencies got together more frequently, if there were occasions where they found ways to even detail staff from one to the other, when there were transactions of a mixed nature that involved industries

where both had some expertise, that that might foment a more positive and constructive relationship between the agencies and a better willingness to try to work things out, rather than exacerbate the differences.

So I come back to where I was before. I think the statistics that Tim cited about how well the agencies were working during the short honeymoon period of the 2002 Agreement really ought to be aspirations that we all have for antitrust enforcement.

Thank you.

CHAIRPERSON GARZA: Thank you.

Mr. Sims?

MR. SIMS: I am by nature a more cynical person than John, so I doubt very seriously that you can do anything, nor can the heads of the agencies do much to eliminate the bureaucratic competition between the two agencies. That is going to exist because there are two agencies, and they are going to be competitive to some extent.

What you can do is eliminate the opportunity for that to make a difference in at least some cases, probably not in all cases, because there are some things that are too close to the line and too gray to be able to solve in advance—but in many cases you can eliminate it.

That's what we tried to do in 2002. I think that the evidence is that it would likely have worked at least

for some time based on what happened in the three months it was in existence.

So if we could get back to something like that—and that particular allocation is pretty close to irrelevant; it's just that you need an allocation. What we tried to do in that case was allocate categories of matters based, to the extent possible, on prior experience and with an eye toward trying to balance out the workload roughly, as best we could, under the circumstances.

Trying to do anything more precise than that is I think probably impossible, but you could do something like that, and if you did it, it would be a good thing. Because it doesn't matter, or it shouldn't matter, which agency does the antitrust work of the nation, as long as the antitrust work of the nation gets done.

I have, quite frankly, no confidence that that is going to happen or could happen, no matter what this Commission does, because I think the embedded interests and invested interests are such that the only way to get it done would be the way that Tim and Charles tried to get it done, which is to do it by fiat. And I don't think either agency has any appetite for anything remotely approaching that, given what happened in 2002.

So I think it is a great idea for you folks to look at it. I think it would be great if you could figure out a way to fix it. But I'm dubious.

CHAIRPERSON GARZA: Thank you.

Mr. Sohn?

MR. SOHN: Well, like John Nannes, I'm struck by the pessimism of the two members of this panel who know most about it, and I am not as good at prognosticating as they are because they lived more closely with it.

I will tell you this. The FTC and the Antitrust Division had it right in 2002. Senator Hollings had it wrong, and regardless of the likelihood of success, this Commission should urge both enforcement agencies to try again.

Let me just give you the statistics that have been alluded to so they are on the transcript of this day's hearings.

The statistics released by the FTC in February 2002 were as follows: During a 28-month period between October 1999 and February 2002, there were 300 matters where clearance was delayed either due to an actual clearance contest or because of delay from one agency in deciding whether to assert clearance.

On average, those 300 matters were delayed by approximately 15 days, which is half the initial waiting period.

In contrast, during the short period of time that the memorandum of agreement that Tim and Charles drafted was in effect, the average time for a clearance decision was

reduced to 1.5 days. That is a dramatic difference.

Now as Tim has pointed out, if you are not inside, you don't know whether the problem is closer to one end of the spectrum or the other. I can tell you this. It's not gone, and I know that because I just experienced it. I experienced a clearance fight that went down to day 30, leaving the parties no practical choice but to pull the filing or face a second request of extraordinary proportions. And everyone here who practices knows what that means, not only in terms of time but in terms of cost. So we pulled and we paid again and we re-filed, and the 30-day waiting period in which the agency that gets clearance is supposed to be trying to figure out what is worth pursuing, if anything, and what is not, had to start on day 32. We can do better than that.

This FTC alumnus supported the clearance agreement that Tim and Charles reached when it was drafted. I think this time around we would hear Tim's message and organize perhaps better than we did, and try and change that dynamic. Because, frankly, from the outside, I thought it was such a sensible thing to do that I didn't think it needed a whole lot of defending from the members of the bar.

We have learned that lesson, Tim, and I think we ought to try again.

CHAIRPERSON GARZA: Thank you. I understand that none of you before us today advocates a general reallocation

of enforcement authority to one agency or the other, or advocates putting either agency out of the business of antitrust enforcement. But before we talk about clearance procedures and matters specifically, I wondered if I could get you briefly to comment on an issue that has been put to us concerning multiple antitrust enforcement agencies with overlapping jurisdiction.

Some witnesses and commentators on the issue of state enforcement of federal antitrust laws, for example, have told us that competition between and among enforcement institutions is a good thing because it encourages enforcement and policy innovation and it increases output.

They have pointed to legislative history that they say shows Congress intended for state enforcers to serve as a check on lax federal enforcement, and for the FTC specifically to serve that function versus the DOJ, prosecuting cases where DOJ "falters."

What are your views, to all the panelists, what are your views on the merits, if any, of competition among enforcement agencies? Is there significant value to gain considering the associated costs? And in particular, does it make sense for an independent administrative agency to compete with an executive branch agency in enforcing federal antitrust law generally, particularly in the case of merger review?

MR. MURIS: I have written twice on this issue that

I will try to summarize very briefly. One is in a book called "State and Federal Regulation in National Advertising," which involves the same kind of issue, though in some ways worse. The other is a speech I made at Brookings in December 2001.

The answer really depends on at least two things: It depends on the procedural cost, and it depends on whether you get the substantive standard right. Thus, it is very hard to know the correct answer. Another key point is, does the lowest common denominator rule? The fact that we have multiple merger enforcers is not nearly the serious problem you might think it is, because mergers are divisible. Multiple review raises costs, but it doesn't stop mergers from occurring.

When the states, for a brief period, were very active against national advertising, a different result occurred—advertisements aren't divisible. A few of the big states usurped the national advertising role, because they had more aggressive standards than the FTC.

Then the question becomes, who had the right test, the FTC or the states? So there are multiple factors at work here.

On the factual question, my experience was that the states were not a problem. They were a tremendous partner in consumer protection and in antitrust. I realize the *Microsoft* case may be one exception to this, and I wasn't

involved in the *Microsoft* case—in terms of my tenure at the Federal Trade Commission, the states were helpful partners in area of prescription drug cases. Where the states might tend to disagree—every time we had such a disagreement or potential disagreement, we persuaded the states to follow us. That occurred only two or three times, but the potential for problems exists. And of course costs increase by the presence of the states and the European Union, and all that.

But the more serious consequences that people have discussed, I just didn't see.

MR. NANNES: I'm intrigued to some extent by the question because I think it goes into a little bit of the issues raised by the clearance dispute process.

If you look at the rationale for a number of the proposals and thoughts that have been advanced regarding the clearance process that all transactions in a single industry go to a single agency, the notion underlying that is consistency in application of the law, and uniform interpretation of the law.

It is hard for me to see how you can advance those principles if the number of persons doing the investigating is, if not unbounded, then exceedingly substantial.

Now I'm not sure where this takes you in any particular matter. Are we talking about FTC versus DOJ? Are we talking about the federal versus the state? Are we

talking about antitrust enforcement agencies versus federal regulatory agencies like the FCC or FERC?

But as a general proposition, I would think that uniformity and consistency of application of the law ought to be goals to which we subscribe, and the mechanism best designed to achieve that end ought to be the one that we pursue.

MR. SIMS: I don't see any value in competition between enforcers. As a matter of fact, I see lots of potential disadvantages to that. Think about it not in antitrust terms, but in terms of prosecutors generally. I don't think you want prosecutors competing with each other. You want prosecutors using their judgment to make discretionary judgments about how to enforce the laws.

So I don't think this says much about whether it's a good idea to have two agencies versus one agency. You could have two agencies and they could not compete with each other and cooperate with each other, and you could at least imagine that might be better in some circumstances than having one agency.

So I don't think it's a numbers thing, but the concept that there is some value in competition I think is ludicrous in this area, and the notion that the FTC, or the even more silly notion that the states are there to be the final savior to take up the cudgels of antitrust when everybody else has abandoned them—given what we know about

the rationales under which the states typically make their merger decisions—is particularly unpersuasive.

MR. SOHN: I think I come out pretty much where Joe does. I think there are strong arguments for having both an FTC and a Justice Department at the federal level. As I said at the earlier session we had, I think those arguments are least obvious in the case of most horizontal merger cases because the law is so well developed.

With respect to state enforcement of merger laws, I am more dubious. I worry, as do the other panelists, about consistency of application of the law. I worry about whether state antitrust resources are up to the task in any significant merger. You certainly can make an argument that in some retail mergers where the impacts are mostly local, there might be occasions for a role, but surely in a case like *Microsoft*, whatever you think about that conduct and whatever you think about the ultimate disposition of the Justice Department's case, the notion that 15 states should have two or three different positions in a case clearly national in scope remains very troublesome to me.

CHAIRPERSON GARZA: Thank you.

The Clearance Agreement that was reached between the FTC and the DOJ in 2002, I guess can be looked at as at least governing a kind of competition between the agencies. I want to talk about that agreement specifically.

One feature of the agreement, and an important

feature, obviously, was the updated and public allocation of industries to the agencies based on prior experience. There were other features as well, obviously: deadlines for clearance, and milestones for passing disputes up the ladder; regular meetings; criteria for clearing matters not covered by the list; and processes for resolving dispute by reference to a neutral third party.

It is not completely clear how different the 2002 Agreement was from existing practice, but we have heard from at least Tim and I think Michael that their belief is, for the short time that the Agreement was in place, it did have a positive effect. And many, many observers thought the agreement was an example of good government.

So one question I have is, how important was the industry allocation itself to the success of the Agreement and to efficient and effective enforcement?

MR. MURIS: That was the heart of the agreement; it was the hardest part. It was the part that Joel Klein and Bob Pitofsky spent a lot of time on—an enormous exchange of memos, some of which I buried back in the FTC files, which is another story. I buried the ones that were unfavorable to the FTC in future clearance disputes, to be accurate

[Laughter.]

MR. MURIS: For some reason, the Justice Department didn't have copies of all these memos, and neither did the FTC. It got so convoluted that nobody knew for sure what

the rules were. There were so many memos and side deals flying back and forth about this counts and that doesn't count, and we'll give you one, and we'll do this, and you'll do that, that when you put it all together, neither Joel nor Bob could describe the situation accurately to us, and no one else knew. It was very strange.

Thus, having an industry allocation was extremely important.

MR. SIMS: The most important thing in a clearance process is a way to get decisions made fast. Exactly what the decision is, is a far distant second place. And so the industry allocations were a device to try to get fast decisions made in not all but a lot of matters.

The other features of the agreement were designed to try to get faster-than-current-practice decisions made in the matters where the industry allocation didn't really solve the problem.

I would just emphasize one point that the agreement did not include but that the four of us recommended as an important part of what we thought was a complete solution, and that was that we urged the agencies that the clearance process ought to be neutralized. It should not be a fight between the DOJ and the FTC. There ought to be a separate independent office. You could put it in the FTC or the DOJ, but it's jointly staffed with people who do that, who don't do litigation for either agency, and who don't expect to do

litigation for either agency. All they do is run the clearance process.

I think the four of us concluded that, to the extent you could get FTC and DOJ people out of it and put clearance people in—people who thought of themselves as clearance people—that would neutralize the process to a great extent.

Now there are some other features we had in there like common databases and common terminology. All that kind of stuff was designed to just make it faster because they each talked about it in different ways, and when they talked to each other, the language would get in the way sometimes. And there was no common database, so nobody knew what the other guy was doing or where the process was.

So those were sort of common-sense ways to just again try to speed up the process. But I agree with Tim; the allocation was the heart of it because that would have taken care of 80 percent—I don't know what the number is, but some significant number of the decisions, and then you would have left the rest to be dealt with with this more expedited process.

MR. SOHN: Looking in from the outside, the allocation is right at the heart of it. In the case that I recently experienced, which went to the 30th day, one agency claimed jurisdiction because of an old consent decree. The other agency claimed jurisdiction because of more recent

experience in that industry sector.

Under the allocation agreement, it would have been decided on day one and not on day 30. It's all the difference.

CHAIRPERSON GARZA: Well, one of the questions I had, Joe, you anticipated, which was that the group of private advisors had included some other things, some of which you mentioned, and I wanted to ask you whether you thought those were important to adopt. We don't have a witness from the FTC or the DOJ here to ask to what extent any of those things have been implemented or whether there are particular obstacles to doing so.

But, Tim, you might—I don't know if you have any sense of why those things didn't end up in the memorandum of understanding, or maybe, even though they didn't appear there, they were things that were worked on.

MR. SIMS: Well, I'm going to have to defer to Tim on this, because the facts are that we gave our recommendations to Tim and Charles. And correct me if I'm wrong on this, Tim, but I think this is right: the next thing we heard was they announced the agreement, and there was a lot of back and forth between the two agencies, between those two events.

So we really weren't involved in the actual decision-making between the two agencies. That was the agencies, probably appropriately so. So I don't really know

what the thinking process was there.

I am not aware that a common database or consistent language has been adopted, but I don't know that it hasn't. I'm just not aware of it.

MR. MURIS: Let me talk about the role of the advisors generally in the specific question. It was extraordinarily helpful, and I think it was probably essential to what we did. We didn't simply turn around and rubberstamp what they had recommended, partly because there are a lot more industries than the industries they listed. We had to go through and, in some cases, make changes or amplifications.

In terms of the specific issues of the question, we were adopting a common way to look at clearance. The FTC had a more formalized process with a clearance officer than did Justice. There was a desire to have people who did not just "do clearance" but who would talk to each other on a more nuts-and-bolts basis. I think it was successful.

I understand that some of that structure actually has been retained.

CHAIRPERSON GARZA: Well, it's been suggested that this is an area where Congress might act, but some people who are gun-shy of attempting another industry allocation have suggested there may be other things that could be done if that proved to be impossible, such as obligating the agencies to clear at least merger investigations subject to

HSR review within a set matter of days, one way or another, whether it's arm wrestling or a coin toss, or the arrow or alternating, whichever way, including an arbitrary way—which obviously doesn't give much predictability to the parties and isn't as good probably in many respects as having an industry allocation—but if an industry allocation was impossible, at least to have some sort of legislatively mandated number of days by which one way or another a transaction had to be cleared.

Others have suggested that it would be helpful to require the agencies to report clearance statistics. Everyone sitting here has been speculating about the degree of delay that we are still seeing.

We hear from the agencies that it's not a big problem. The suggestion today is that it may be a bigger problem than is let on. But, of course, we have no way of knowing unless there's some transparency, some required reporting.

Others have suggested implementing some kind of penalties to the agencies for failing to clear mergers within a certain amount of time. Some of those suggestions have been a little bit problematic.

But I wondered if I could get the views of the panelists on alternative proposals if industry allocation didn't seem possible.

Mr. Sohn?

MR. SOHN: Well, two quick points. I think those proposals would be a distinct second best to allocation because one of the things that underlies most of them is that, as you pointed out, Madam Chairperson, there would be a degree of arbitrariness. And what you want instead is some predictability, and more than that, some impetus to gathering expertise within the two agencies, knowing which industries they have been allocated.

The other point I would make with respect to that is that, unless there is some impediment to it, this Commission should ask the agencies to provide statistics that would demonstrate the extent to which there is or is not a problem today.

MR. SIMS: Well, I certainly would second that point. There is no reason to be analyzing this in the dark. The agencies have that data; they can easily produce it, and they can easily provide it to you. And if for some reason they don't want to do that, then that might suggest that there is a problem.

I don't like any of those ideas very well, but if you told me that the alternatives today--and--was one of those ideas, I would say set a time limit. Recognizing all the problems that that might create in outlier cases, I would say, set a time limit and set a short time limit. The time limit ought to be seven calendar days or something like that, absent a finding by the agency heads that they need

more time—something that has some teeth in it but leaves them some out to deal with the unusual situation, because, again, it doesn't make much difference in the long run who does it, but it does make a lot of difference that they get started on it.

MR. NANNES: I would hope that whatever resolution one finds in this, it would be one accomplished by the antitrust agencies.

The reason I say that is I think there is one unifying factor, and that is that everybody agrees that the allocation ought to be driven primarily by agency expertise and agency experience. And while it may differ at the margin as to who has more or less with respect to a particular commodity, I think they are more likely to get that closer to right than if you simply throw it into the legislative arena where the array of variables that can be brought to bear on a particular allocation would be without limit and are almost certainly likely to involve things that we would deem to be less germane than agency expertise.

MR. MURIS: Well, it's an interesting question, and I think I can agree where John is headed, whether flipping coins would be a better resolution than agency expertise. I happen to think agency expertise would be a better resolution, but something that encouraged them amongst themselves to resolve faster and to go to some sort of dispute resolution process if they couldn't resolve by a

certain day, I think would be a good idea, and just because the likelihood of a major reform a la 2002 is unlikely doesn't mean that some changes couldn't be made now.

The last point is if you do ask them for a data set over several years so you can see that it's consistently performed—

MR. SIMS: If I could make just one other point. Tim mentioned this, but he didn't emphasize it, and I think it does get lost in the shuffle sometimes.

Having a clearance process, which depends upon the two agencies duking it out on a regular basis, is a very bad thing for the relationships between those two agencies and the incentives for people inside those agencies. You can't document that. It's not statistically analyzable, but I have a very strong view that that is a very bad thing that has all sorts of bad consequences, and fixing this problem would go not all the way but some significant way toward helping.

MR. MURIS: If I could just add, that what astonished me the most about the music clearance fight, and what led us to the resolution—Our staffs were pushing us to pound each other, and they were doing it in a way that completely eliminated the possibility, in their minds—and this was true in Justice as well—that the other side was acting in good faith.

When there is no consideration that the other side

is acting in good faith that has to poison the atmosphere.

The decision of Joel Klein to clear *Time Warner-AOL* to the FTC was monumental. I have never talked to anyone at the Department of Justice—and I mean never—who was involved with that issue—who was not bitter, and I mean bitter—about that decision. They would be bitter today if I talked to them about it, and the decision was five or six years ago.

MR. SIMS: The single worst clearance decision ever made in the history of the country, because it created all sorts of problems that wouldn't have existed but for that decision. But for that decision, we wouldn't have had the argument made in 2002 that the FTC had some special role to play in this area because they wouldn't have had anything to put on that side of the balance because they hadn't basically acted in that arena.

So I agree; that was an unfortunate decision that caused a lot of subsequent problems.

CHAIRPERSON GARZA: Thank you.

MR. MURIS: That wasn't my point.

[Laughter.]

CHAIRPERSON GARZA: Commissioner Yarowsky.

VICE CHAIR YAROWSKY: Okay. Well, I think we have covered all the substance of this panel, so let's talk about some politics, because I want to get your views about that.

If this Commission were able to take that agreement, or parts of it, procedurally and process-wise,

and put that together into a package—I think it was you, Tim, who said there are six committees, or someone said that, who may have to sign off. It's not just as simple as thinking about the traditional war between Commerce and Judiciary. That's probably true.

But let's assume we put together that procedural process package. It would do a lot—I think everybody has just said on this panel that does a lot in terms of moving things forward, getting finite decisions.

Then you come to the industry allocation. That's where people fight jurisdictionally because that same fight or fights you wanted to avoid are replicated in greater fashion on the Hill. Those jurisdictional assignments go back further than the Commission and the DOJ in history.

So what do we do? Some of the industries I think probably were easy calls. I don't mean to minimize all the work that went on, but there probably were easy calls.

Now let's move into the more difficult calls, not just the transactions, but the industry sectors. Take telecommunications—How does one deal with telecommunications when telecommunications mergers themselves have changed in character because of the nature of the technology and the fact that you are now getting conglomerate mergers doing a lot of different things, not just technology, but content? How would one parse that out? That's really where the explosiveness is on the Hill, because those are the mergers,

in addition to some others, that everybody wants to watch because they have real concerns.

So, how would we analytically try to parse that out? I'm just using that as an example.

MR. MURIS: Let me make two points. First, Bob Pitofsky asked Joel to exchange cable for electricity. Essentially, you can say that's what we did. In the long run, from the standpoint of the Justice Department, maybe it was a bad deal because over time they would have done most of cable, with cable more and more about entertainment. It's an open question whether the benefit to Justice is worth all the angst of the people involved.

Debbie Majoras, at the time—I can't speak for her now—was an avid supporter of the deal, and Hew Pate was not. I would submit the difference was, Debbie did clearance, and Hew didn't. That fact made a tremendous difference. Hew is public in his view of the deal, and has said so.

I would make this recommendation: that the Business Roundtable and the U.S. Chamber of Commerce ask the relevant committees to use an appropriations committee report to direct the agencies to work on resolving the clearance problem. That way the agencies don't have to start anything without a congressional blessing. See if you can help accomplish that. And I would hope the Roundtable, the Chamber of Commerce, the National Association of Manufacturers, and whatever other groups one wants to

suggest would do that.

MR. SIMS: Maybe it's a question as much as an answer to a question. The notion of six congressional committees sounds very daunting. Even one sounds daunting. But as a matter of how this really rolled out, I have the sense from Tim and others that it was influential to be sure, but one Senator— So I'm not sure that either your Commission or the agency ought to be thinking they have to climb that steep a hill.

MR. NANNES: I just offer up the thought that this is a distinguished Commission that's going through a good deal of process to look at a wide array of antitrust-related issues. If the Commission shares some of the concerns that we have about the clearance process and believes that some of the constructive suggestions that were made either in 2002 or that you might even hear today have some traction, then I wouldn't be reticent about trying to embody that in some form of whatever report you are going to issue. And that may give the agencies some notion that there is not only a legal constituency but maybe a business constituency for trying to move this forward.

VICE CHAIR YAROWSKY: And that was a constituency that didn't seem very visible at least at that time.

One last question, because this will come up, I think, if this were ever to go to the Hill and go to a vote, and that is, is one of the antitrust agencies better suited

to deal with certain types of mergers, certain industrial sectors, than the other agency, not based on historical experience, but just because of how it's constituted?

So, again, the question is, how would you knock down that argument other than saying, well, that's a ridiculous argument? Because that is an argument that I think we will hear on the floor of the Senate.

MR. SIMS: Could you spell out what's behind that thought?

VICE CHAIR YAROWSKY: Well, okay. Let's take media mergers. I think you would find a debate on the floor about having a diversity of final decision-makers at the FTC looking at issues around media and information as a—that diversity would be a plus in trying to reach a final conclusion about a particular transaction, as opposed to the Justice Department, which would just have kind of a—

MR. SIMS: Well, that's probably wrong, but if the price of getting a clearance process together was to give all media mergers to the FTC, give them all to the FTC. It doesn't make all that much difference which agency does it.

MR. SOHN: I agree with that, but I think it's not only probably wrong, I think it is wrong. I think Tim pointed this out in his testimony. The agencies have gone to considerable pains to get together on the substance of section 7. There have been Merger Guidelines, and there have been revisions of Merger Guidelines and other joint

statements as to what the law is that they are going to be enforcing.

And I don't immediately understand the point that diversity would help apply the Merger Guidelines.

VICE CHAIR YAROWSKY: It's not a substantive point; it's a political point.

MR. SIMS: This is a political point, and if that solves the political problem, well then, solve the political problem. The benefits of solving the political problem are a hell of a lot more than which agency looks at media mergers.

MR. MURIS: The irony is, after the agreement blew up, I am saying publicly that I responded to these incentives, and I did things that don't make a lot of sense in terms of good government. They were done, instead, solely to promote the interest of the FTC. I said I appointed the meanest, toughest person. I told the Justice Department I was doing it. They could hardly blame me, given how they repudiated the deal, but I also went to Senator Hollings and said, fine, let's see if we can take this stuff away from the Justice Department. They said no, we are not interested in that. I thought that was amazing. They were not interested in helping us get media mergers, even though we told them that we were going to lose in the long run under the Clearance Agreement. To this day, I don't quite know what to make of that.

But I do dispute the premise that in the long run, one agency is better. You'll have somebody who is more aggressive than someone else, on occasion—and maybe you can discern some trend where the FTC is more aggressive in certain areas over time. But I think that is not obvious based on the histories of the agencies.

CHAIRPERSON GARZA: Thank you.

Commissioner Valentine?

COMMISSIONER VALENTINE: The other answer to my Commissioner-to-the-left's question is, if the Hill wants diversity, they also have the FCC opining on a public interest standard, and that is where this all should take place.

Okay. This one is, for me, such a no-brainer, and I think we absolutely would all benefit from a clearance agreement, and so for me, I am struck exactly the way that Mike and John were by that profound pessimism, the true depression of Mr. Sims and relative pessimism of Tim Muris.

I am thinking that if we were to recommend something along the lines of what was done in 2002 that the other things we need to think about is where we went wrong in 2002. And so I think the only question I'm even going to bother to ask each of the panelists is, what are the things that should have been done and/or going forward should be done to make sure that this does happen this time around?

And I guess I would like to assume that yes, there

was one member of Congress who was difficult. That person is gone. There was one Commissioner who is no longer there who may have been somewhat problematic. There may well have been one consumer interest group, but it is likely by the time this gets up to the Hill—we're talking 2008. Maybe media mergers aren't even going to be the hot flavor of the day.

And so if we have to do it right, or if we want to do it right, what is it that we need to focus on in terms of whether that's consulting more with Congress in advance, getting more business community support, whatever? I just want sort of best thoughts from everyone.

MR. MURIS: I actually came up with an idea today that I hadn't thought about before. You would avoid the political problems for the agency if you got the business community to ask the appropriators to put in their report, or in the FTC authorization, that the agencies should resolve the clearance problem.

That would take the agencies off the political hook. I don't know if you can get it done, but it shouldn't cause a problem. That would be highly useful.

Obviously, there were mistakes in 2002. I'm a blunt guy. Senator Hollings' staff asked me, have you learned your lesson? And I said yes—don't trust the Justice Department.

[Laughter.]

MR. MURIS: That's not the answer they wanted to hear.

COMMISSIONER VALENTINE: So coordinate between the Attorney General and the Assistant Attorney General better.

MR. MURIS: I made a mistake, obviously, in spending all this time and not seeing that the Justice Department would back out. I saw in spades that Senator Hollings would blow up, but because of my contacts, I was convinced we could beat him or at least do what Joe had said; we'd give him some media. I'm convinced that I had that resolution set up.

Once the Attorney General's office let Charles sign the agreement, after delaying for a while, it never occurred to me or my friends in the White House, with whom I had been talking about this, that they would repudiate unilaterally without trying to fight through the process. That was obviously my mistake not to foresee that.

It's normally a good thing for the Antitrust Division that it sits uneasily, except for criminal enforcement, within the Department of Justice. Merger review is not like what the rest of the Department of Justice does, and it's a good thing in the sense that the Department of Justice allows the Assistant Attorney General to proceed without a lot of outside supervision.

The criminal enforcement DOJ understands, but that's the cops and robbers stuff, and it's very good. With

the clearance agreement, that lack of interest turned out to be bad, because when they were threatened with retaliation from Senator Hollings—and he had a very important position—rather than fight through the process where I think we would have prevailed, at least through a compromise, they just said, this isn't worth even considering. It was not very long after September 11th, and perhaps the decision to run was reasonable. Yet that decision—coming only 11 weeks after they had made the other decision—meant that the combination of those two decisions was very strange. If it wasn't predictable before I signed the agreement originally, it was certainly predictable in early March, when they allowed Charles to sign, that Senator Hollings would try to retaliate.

COMMISSIONER VALENTINE: Sorry, John, I interrupted.

MR. NANNES: Well, I'm still grappling with the relative role between the legislative branch and either the executive branch or the independent administrative agency with respect to who has the ultimate responsibility for this.

If you could do some kind of base-closing legislation with respect to allocation, where the agencies were directed to come up with a solution and send it up to the Hill, and it would be an up-or-down vote without everybody trying to pull one commodity out of one group and

give it to the other, that would be one thing. I don't think that's terribly likely.

I'm not sure that if you go to the Hill and ask them to put in a directive that the agency work it out that it won't be coupled with a report back and subjected to some presumptive vote before it could go into effect.

And I just wonder whether -

COMMISSIONER VALENTINE: I thought you were not the pessimist.

MR. NANNES: Well, I wonder maybe if the agencies were going to embark on this and they started with something of a consultative kind of advance notice to the committees to which they were most responsible, they might be able to explain the logic of it and get enough acquiescence to get the cover they need so that if they actually went out and did it in good faith, as I think they did before and would presumably do again, they wouldn't be hit by an avalanche.

MR. SIMS: Here's the problem with this. It doesn't really matter to anybody who is not involved in a particular transaction right now. That's why the business community doesn't get all excited about this, because it happens every five years for every company, and so compared to all the other things they've got to deal with and spend their legislative and political chips on, this is pretty low on the list.

Now, if you want to go talk to Procter & Gamble

right now, they just had a transaction; they spent a lot of time at the FTC, and they probably would be interested in doing something. But if you talk to them three months from now, they probably couldn't care less.

So I'm dubious that you are going to get a lot of the business community spending their legislative chips on this, and I'm very dubious that you can actually get this done in consultation with the Congress, and because of the history, I am dubious that you can do it with that, and that's why I'm so pessimistic.

I think the only possible way that I see that this could happen is if the two agencies decided they were going to try their best to make it happen, and they held a very wide-reaching consultative process, which would be a huge pain in the ass and would waste a lot of time and effort, but manage to get the bar, as much of the business community as possible, and to whatever extent they could, the various other interest groups to coalesce around a core of ideas, even if they couldn't get them in agreement on everything, but a core of ideas—with all of that behind them, if they presented that package to the Hill, I think that's an unlikely event and I think it's a really hard row to get it done.

MR. SOHN: Just to be very brief, I like the idea of this Commission doing its part, and I like the idea of this Commission saying to the relevant congressional

committees, ask the agencies to do it again. And I don't see why you wouldn't, given these two agencies have deference to enforce some rather generally worded laws, Section 1, Section 2, and Section 7. If you give them that degree of deference, you ought to pay them considerable deference in the allocation they make subject to some capricious mistake. That's the part you can play.

I think the bar has to play its part as well, and as I say again, I think Tim's criticism of the bar is correct, and I suspect that it would not happen that way again.

CHAIRPERSON GARZA: Thank you. Commissioner Shenefield?

COMMISSIONER SHENEFIELD: I, like everybody else, think that not having a clearance agreement is unconscionable and indefensible. It is mind-boggling.

As to the 20 percent that were not covered by the industry allocation, is there a tiebreaker that doesn't reward the most aggressive agency?

In other words, is there a perfectly neutral tiebreaker?

MR. SIMS: The best we could come up—all the systems that have been tried have problems in them because they can be gamed in various ways—the coin flip and all that kind of stuff.

The best we could come up with was this notion of

having a panel of arbitrators standing by, and if you got to the point where you couldn't decide it, you went to the arbitrator, but you compressed dramatically the time and data that you gave to the arbitrator, and you just let them make a decision, again on the theory that a decision is what is important here, not the right decision.

That was the best we could come up with. They have been used at least a couple of times that process. The agencies don't like it. The agency people don't like that process, because they think like it's removing them from the decision-making process. But, damn it, if they can't make a decision between themselves, I'm not very sympathetic to that criticism.

COMMISSIONER SHENEFIELD: Any other answers?

Go ahead, Tim.

MR. MURIS: For the reason that people don't like the mediation—and it wouldn't surprise me at all if they abandon it—I liked it. It makes this process look crazy.

When I spoke publicly about assigning my good friend Rhett, who is sitting behind me here, because he was the meanest, toughest guy we had, I thought that reflected poorly on me and the FTC, but I was willing to say that publicly.

Now, look -

COMMISSIONER VALENTINE: Rhett is raising his eyebrows.

[Laughter.]

MR. MURIS: I'm sorry, what?

COMMISSIONER VALENTINE: Rhett is raising his eyebrows, let the record reflect.

MR. MURIS: Well, I think Rhett is proud of the fact that he's the meanest, toughest guy in the FTC. And the anecdote I have on page 1 of the testimony is true. Rhett piped up at a public event that I had given away too much, and it wasn't something that we had orchestrated.

I'm not worried about my reputation. I thought I had a good reputation as Chairman, but I occasionally speak my mind in ways maybe that I shouldn't—I'm looking at Steve Cannon. He remembers my dealing with Senator Hollings in the '80s.

I think publicity about the irrationality of agencies fighting with each other and wasting resources fighting with each other is a good thing. Thus, I claimed, I think with good justification, that I'm the only one who, as a public official, would stand up and say how irrational the process is. You need a way to break ties, and I thought the mediation was best. There may be other ways, but the mediation couldn't be gamed. It does reflect very poorly on the agencies, of course.

COMMISSIONER SHENEFIELD: One final question: Does anybody on the panel think the world would not be a better place if all horizontal merger enforcement action was taken

solely by one of the federal agencies? In other words, eliminate private plaintiffs, eliminate the state AGs.

Let the record show nobody thinks the world would not be a better place.

MR. MURIS: It depends; there are process costs and substantive costs. If the one—Howard Beales and I went through this point, at great length in the advertising book—If the one decision-maker is applying the wrong standard, those costs could exceed the procedural gains of having one decision-maker. Thus, unfortunately, it's like a lot of things in life; it's complex.

I agree, John, with the implication of what you're saying. In the current world, one with only one decision-maker, I wouldn't see either federal agency making too many wrong decisions.

COMMISSIONER SHENEFIELD: And I confine it to mergers. So the standard is whatever the agencies say.

MR. SIMS: I guess I'm not prepared to accept that as the optimal solution. It might be, but I'm not sure there isn't a role for private enforcement in the unusual situation, and I don't think it carries with it in this area much burden. If you look, as a practical fact over time, the possibility of a private challenge to a merger that has been cleared by one of the agencies—that exists, but it has not been a practical problem. So I'm not sure I would eliminate the opportunity for people to challenge mergers.

Now maybe—maybe—I would be a little more sympathetic to a proposal that said that once a merger has gone through regulatory review there was a heightened standard or a heightened burden that would have to be shown, that might make some sense. But I'm not ready to buy into the single merger decision-maker yet.

COMMISSIONER SHENEFIELD: Take the private plaintiff out and just leave my hypothetical as removing the state attorneys general.

MR. SIMS: I don't think the state AGs play any useful role in merger enforcement. I could see a sensible division of labor between the federal agencies and the state agencies on the grounds of the breadth of the effects of the transaction. It might well make sense for federal agencies to defer to state agencies and some localized transaction if there were state agencies prepared to take that on and capable of taking it on. That might be a sensible thing to do.

On matters that are national in scope, I don't think the states add anything of value to that.

COMMISSIONER SHENEFIELD: John or Mike?

MR. NANNES: I don't know enough what the statistics are with respect to state enforcement. My sense of it is that, in the main where you see the states bringing merger actions—they are usually as co-plaintiffs in a lawsuit brought by the Justice Department or have worked

with the Federal Trade Commission, and I don't know what incremental burden-benefit they bring to any particular transaction.

If you put those aside for a second and look to see when the states are bringing actions on their own accord, other than in conjunction with a federal agency, I am just not sure how many those are, and if they are localized, where there could in fact be an anticompetitive effect, but would be a kind of transaction where for resource allocation or other purpose you wouldn't expect the federal authorities to be acting on that.

MR. SOHN: Yes, I think the world would be a better place with the caveat that there probably are some localized mergers where the federal agency should defer. I don't see immediately that much would be lost if there was not private enforcement of section 7, either.

CHAIRPERSON GARZA: Commissioner Jacobson?

COMMISSIONER JACOBSON: We had hearings specifically devoted to these other enforcement issues that are outside the scope of this hearing. We did our best with those panels to make sure they were balanced. This panel was selected with regard to its expertise in federal clearance procedures. You are certainly well known practitioners whose views are respected here, but I don't think this is the place to rehear the issues of state and private enforcement. I would like to focus-

COMMISSIONER SHENEFIELD: You are not going to move to strike their answers, I take it?

COMMISSIONER JACOBSON: I'm going to move to have us consider what we are here to consider.

COMMISSIONER SHENEFIELD: Just move on. Yes, right.

COMMISSIONER JACOBSON: I would be very disappointed if there were not a unanimous conclusion from this group that a clearance agreement was a good thing, that one and a half days meeting and clearance time was better than 15.

The question I have is, what can this group best do to help that goal be achieved? Mr. Sohn made a brief suggestion. I'd like to get just sort of the outline of the chapter of the report as you would draft it if you were in our seats from each of you, starting with Tim.

MR. MURIS: I would hope that the Chair or the Vice Chair would meet with the congressional staffs and the agencies and share their views on several issues. Obviously, you are going to discuss many points, but there may be a short list of items that people could act on.

I don't think the agencies will respond by themselves on a big fix for clearance, although I would hope they would make some small improvements. It would surprise me if they don't.

I would think that clearance would be on a list of

issues to at least discuss with people in Congress. I hope you would first try to generate some support amongst various groups—consumer groups, business groups, whatever—for your recommendations.

I just finished the tax panel this week, and it was established to influence the process. It was to start a process that the Treasury Department will continue. You are not constituted in that same way, but there is no reason why you can't try to present, along with your points about big-think issues, some precise recommendations that people could follow.

COMMISSIONER JACOBSON: I'm trying to get at what they should be.

MR. MURIS: On clearance, I have already said you should talk about the various kinds of reforms that people should do. It would be good to get the data from the government, and I recommend that you ask the congressional committees to ask the agencies to improve the clearance process.

COMMISSIONER JACOBSON: Just as Mr. Sohn did. John.

MR. NANNES: I think there is actually some grist for this in the various statements that the panelists prepared. I think having a fairly succinct statement of the—what we all take as a given, which is the compelling logic of having an allocation system that works easily and

well and is based predominantly on expertise, recognizing that over time which agency develops an expertise may be less important than to have a system that works smoothly, roundly endorsed can't hurt. It may substantially help. Whether we have to sell it to the agencies or sell it to the Hill, having it in one coalesced place, I think, has some advantages to it.

COMMISSIONER JACOBSON: But do you agree with the sort of format that we should ask Congress to direct the agencies—I'm a little wary about that, candidly, because asking Congress to do anything may be a recipe for inactivity. But the agencies won't do it on their own, I predict.

MR. NANNES: Look, the way you pose the question reminds me that every time you go to get something, you might get something that you don't expect, and you weigh that in the calculus in deciding whether to go in or not. It's probably worth remembering that for decades the clearance agreements were negotiated between the agencies and put into effect between the agencies without particular congressional consultation or advance congressional approval.

One of the ironies may be that the fact that the 2002 Agreement was announced so formally may have contributed to the electric charge it set off on the Hill, but that may also be because you had a particular

Commissioner who was anxious to have that vetted in a more public forum.

But there may come a time when you have constituencies at both the Division leadership and the Commission leadership that would be prepared to take this on on their own, and certainly explain to the Hill, but not go to the Hill in an advance form or fashion that would require ultimate congressional approval.

MR. SIMS: Jon, there are no good answers here. Going to the Hill in whatever form is a bad answer, but if you don't do something that causes the agencies to act, they aren't going to spend their capital on this. They are not going to do it.

So, I don't have a great solution for you, but unless you jump-start the process in some way, it is not going to happen.

COMMISSIONER JACOBSON: Thank you.

MR. SOHN: Just briefly, I would do it in a way suggested.

I would say it in the following way: what the agencies did in 2002 was right. Not right—and I think you should say this explicitly—you are not talking about specific allocations they made, but the decision to allocate was right. And they ought to be asked to do it again.

And I wouldn't see in principle why you would address that to committees beyond the authorizing

committees, and I say again that the point I would make is, if these agencies, these two agencies are delegated the considerable power to give content to the antitrust laws, which are very brief in what they say and very broad in what they apply to, they ought to be given deference by those authorizing committees in the allocations that Congress is asking them to make.

COMMISSIONER JACOBSON: I think the fact that each of you has a very similar process recommendation for us carries a lot of weight with me; let me put it that way. And thank you all very much.

CHAIRPERSON GARZA: Commissioner Cannon?

COMMISSIONER CANNON: Great. Thanks. It seems like we're kind of in violent agreement here unless I'm missing something. And I wonder about this. A lot of us here have some work on the Hill here and there, and it seems we might be thinking a little too long and too hard about this. And something like this could be fixed by a small little amendment, say to the State-Justice-Commerce appropriations bill. Tim, that would be kind of ironic, wouldn't it, to get it fixed that way?

MR. MURIS: That's why I'm saying, because the appropriators can stop it so easily, you need to rope the appropriators in. The appropriators may even be able to help, which is what I was suggesting.

COMMISSIONER CANNON: Indeed. And Joe is

absolutely right; in terms of this being a huge issue for a lot of people, people go up and say, my issue today, Mr. Chairman, is clearance.

Now if it's in the middle of a merger, they may feel fairly strongly about it, or they may not. But this is interesting.

Years ago we did this, and there was a whole question about the interlocking directorate provisions of Section 8. Not a big irritant for a huge number of people, but eventually it got to be enough of an irritant for a group, and that's how the de minimis exceptions in Section 8 got enacted. It never became a burning issue of the day, I can tell you.

But what about this as an idea: the thing that I've heard that is probably most attractive and is something that the Hill is good at in terms of grasping kind of reasonably simple solutions is to try to get something like a three-day requirement for clearance, but at the same time put it in something that says, in addition to enacting that, the Justice Department and the FTC essentially have to promulgate a joint regulation about how they are going to do it.

That way you could have full public input. The last thing I think you want is 535 members of Congress trying to divide this up between the agencies. But whether it is telecom or other places, they are very good at saying

here's the issue, and we want you guys to solve it.

But saying a three-day requirement for making a decision is something that is easily grasped, it's concrete, and they can say, we fixed it, details to be done by the groups who are most affected. That way, you have the ability for public input, and you can do that forever, but eventually you could come out with a three-day mandate, and the agencies would have all sorts of incentives to do something like that, because if they are on a three-day timeframe—the only question I've got is what sort of penalty you would have if they did not make those three days—whether or not you would take off the amount of time they would have to consider something, or what. I don't know what. But there could be a little carrot and stick there.

Joe, you think about that.

MR. SIMS: I was thinking of the carrot and stick. You could say that the Hart-Scott-Rodino period expires if it hasn't been cleared within X days. That would be an interesting stick. That would incentivize them, I think.

I'm not sure. That's the best articulation that I have heard today, really, of—

COMMISSIONER CANNON: I just made it up.

MR. SIMS: I know, but you're good at this. If you put something out that says you have to get to a three-day average by X date, and in order to get that, you'd better come up with a new program, then you've got to attach a

pretty big stick to it, I think, like Hart-Scott-Rodino clearance or something like that, because otherwise, they will resist it. But if you put a pretty big stick to it, that might work.

COMMISSIONER CANNON: You could hold up the Commission's highway funding or something. That would be perfect.

Now I do wonder about that.

MR. MURIS: Don't let them travel to Europe.

COMMISSIONER CANNON: Yeah, there's an idea. But, look, in the end, on the Hill, number one, there is no such thing as a permanent victory or defeat, which is absolutely true. And secondly, I'm not so sure how much you can vilify Senator Hollings on this because in the end that battle was not finished; it was not done. One of the two parties essentially withdrew is what it—I think that's what happened, as I understand it.

MR. MURIS: Absolutely. His office asked me if there was going to be a Clearance Agreement, and I said, agreement means two, and since there's only one; obviously it's gone.

COMMISSIONER CANNON: You're absolutely right. And another thing I did think about in terms of help here or something that would help push this along—Michael, you're talking about this 15 days versus one and a half days. We have all been involved in transactions. I can't fathom the

amount of legal fees you might save over—for every day a transaction goes on, I don't know how you calculate it except that it's a lot of money.

In my former seat as an in-house counsel, that would be very attractive to me to think that I might be able, by doing this, to save an enormous amount of legal fees. And in some transactions, it's simply a rounding error in the scheme of the world, but it still is a substantial amount of money that you could actually quantify every day that goes by, how much more this transaction is going to cost.

MR. SIMS: I wrote an article some 10 years or so ago that attempted to quantify the cost of Hart-Scott-Rodino waiting period extension, and came up with a pretty big number. Now I have to admit, it was not statistically verifiable, but it was a big number.

COMMISSIONER CANNON: I'd love to see that, Joe. How much do you think—what did it really amount to?

MR. SIMS: No, I don't remember what the number was, but it was in the billions.

COMMISSIONER CANNON: Approximately a lot.

MR. SIMS: Yes.

[Laughter.]

MR. SIMS: Before electronic discovery, so it's gone up.

COMMISSIONER CANNON: Yes, good point, Joe.

MR. SOHN: Two thoughts. First of all, I would certainly defer to you and Tim as to which are the right committees to handle it on the Hill, and if the feeling is that you need to engage the appropriations committee-

COMMISSIONER CANNON: I would say two committees with one bill in conference, around midnight. And that would do it.

[Laughter.]

MR. SOHN: The second point I would make, going to your point about legal costs—it isn't simply legal costs. Most mergers are engaged in to achieve cost savings or other synergies. Most mergers. The Guidelines say that. That's the real cost of delay here.

COMMISSIONER CANNON: And we're not here to debate how most mergers come out, because it's not like mergers live happily ever after, but luckily, it's not our job to determine how this all comes out. It's a question of whether or not the antitrust laws are violated.

So thank you, Madam Chairperson.

CHAIRPERSON GARZA: Commissioner Burchfield?

COMMISSIONER BURCHFIELD: I believe all the questions I have have been asked so I will pass.

CHAIRPERSON GARZA: All right, Commissioner Kempf. But you still only get five minutes.

[Laughter.]

COMMISSIONER KEMPF: On the costs, we talked about

the legal costs and lost synergies cost. There is also loan costs. There are a lot of standby loans that are in place, and I remember when we did *Kraft-Philip Morris*, which was \$12.5 billion, somebody ran the calculation there—I don't recall off the top of my head, but it was astronomically large, and quantifiable because of the way the financing was set up.

Just two things for Mr. Sohn. I like your suggestion of having the staff ask for the data, but you had two data points, the 15 days and the day and a half. Your article gives the source for the 15 days. What is your source for the day and a half?

MR. SOHN: I think it was Tim Muris.

MR. MURIS: We announced that publicly. The 15 days is not a number that I remember. The numbers immediately before and after weren't that long. There was also business days versus total days.

15 days for what period of time, Mike?

MR. SOHN: That was the time period—

COMMISSIONER KEMPF: Right or wrong, it has a source in his written submission.

MR. MURIS: Okay, fine.

MR. SOHN: It was the time period, Tim, between October 1999 and February 2002. That was the 15 days.

MR. MURIS: Okay.

MR. SOHN: The one and a half days—the source I

give here is *FTC Watch*, but I think they were-

MR. MURIS: No, we said it at the spring meeting in 2002, I believe.

COMMISSIONER KEMPF: Okay.

MR. MURIS: Or maybe it was '03; I don't remember.

COMMISSIONER KEMPF: And hold on one second.

The second one is for anyone, but particularly for Tim, and that is, this new improved Tide—in other words, old Tide was never bad, but new improved Tide is better. Old Tide used to get your clothes white; new Tide gets them whiter than white.

So, on the theory that the old agreement will have some residual opposition just because it was something that had people's dander up, if you were to do new improved Tide, what changes, if any, would you suggest apart from saying, direct the agencies to go back and do it in terms of the agreement itself, experience in round one? Are there any changes?

MR. MURIS: I've tried to be careful making sure everything I said had a public source. Anything's possible. Look, if media is the problem, the FTC can do more media and Justice can do more of something else.

It certainly is possible, and that's a good idea if it turns out well. The uproar over media is interesting the farther you get away from *Time Warner-AOL*. The FTC hasn't jumped in and done whatever people wanted it to do on—have

there even been big media mergers that people were worried about?

The competition in the future is going to be between the cable companies and the phone companies. It would be hard to believe that the FTC, not having jurisdiction over common carriers and therefore not having much experience dealing with some of the big players there, will have much of a role. But maybe something else will be the flashpoint. So the concept is a good one.

MR. SIMS: Having gone through the considerable agony of working out this allocation between just four people, all of whom were acting in good faith and were intelligent and generally rational—we struggled. We had a lot of back and forth for this for some period of time.

If you could adopt the old allocation en masse, that would be far better than starting from scratch. If you can't adopt it en masse, then tinker with it. Make one change or two changes, but don't start from scratch, because starting from scratch is going to open up all of those arguments again. It was hard enough for four people to do it. For the world to do it in the halls of Congress—that's not going to happen.

COMMISSIONER KEMPF: That's all I have.

CHAIRPERSON GARZA: Okay. I'm going to sneak in one question, and just ask for a yes or no answer from each of you.

Neither the 2002 Agreement nor the initial recommendations by Mr. Sims and his colleagues addressed the issue of communications to the merging parties about how the clearance process was going. I think it was the ABA that suggested in comments that the merging parties should be apprised when clearance has been requested by an agency, when both agencies have requested clearance, and then therefore there is a dispute, and when each clearance sort of milestone is reached.

Can you just say with a quick yes or no whether you think that there should be greater transparency about the process, better communications between the agencies and the merging parties?

MR. SOHN: Can I have a sentence rather than yes or no?

CHAIRPERSON GARZA: Sure.

MR. SOHN: Yes, there should be greater transparency. I'm not sure that there isn't. Certainly in the transaction that I reference earlier in my testimony, we knew there was a clearance fight. We knew what each of the agencies was contending, and we had a chance to talk to each of them.

MR. SIMS: I don't see any merit in that point. If the clearance process gets decided in three days or five days, it doesn't—why do the parties need to be involved in that process?

CHAIRPERSON GARZA: John, do you have anything?

MR. NANNES: Nothing new to add.

MR. MURIS: I agree with what Joe said here. I don't think Joe meant to imply that the allocation—that they did was arbitrary. It was based on historical experience.

MR. SIMS: It was, but historical experience is historical experience. Both sides had some experience in some areas, and you had—

MR. MURIS: Sure, but most of those decisions were made on historical experience. There were some decisions—like giving the FTC trucks because it had cars—to rationalize the process. Nobody has focused on this, because software and hardware was no longer a firm distinction—we created what we called a convergence committee to consider what to do and thus punted that issue down the road.

I agree that if somebody does this again, they should start with what we did, but it may be that there will be some clear changes needed. I was surprised in 2001 how many industries had flipped from the mid '80s, and if some of that happens, and it's easy and obvious, then go ahead and make those changes. Nevertheless, I agree completely with Joe that starting over again would be a heroic task.

CHAIRPERSON GARZA: Okay. Thank you, gentlemen, for your testimony, both written and oral. This concludes

the afternoon's discussions. Thank you.

[Whereupon, at 4:29 p.m., the hearing concluded.]