

ANTITRUST MODERNIZATION COMMISSION

PUBLIC HEARING

Thursday, December 1, 2005

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The hearing convened, pursuant to notice, at 1:15 p.m.

PRESENT:

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JONATHAN R. YAROWSKY, Vice Chair
BOBBY R. BURCHFIELD, Commissioner
W. STEPHEN CANNON, Commissioner
JONATHAN M. JACOBSON, Commissioner
DONALD G. KEMPF, JR., Commissioner
SANFORD L. LITVACK, Commissioner
DEBRA A. VALENTINE, Commissioner

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JOHN J. SULLIVAN, U.S. Department of Commerce

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PROF. DARREN BUSH, University of Houston Law Center
GREGORY K. LEONARD, National Economic Research
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Panelists:

ALDEN F. ABBOTT, Federal Trade Commission
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Law School
JAMES C. MILLER III, CapAnalysis Group, Howrey LLP
PROF. STEPHEN F. ROSS, University of Illinois
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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: I would like to welcome you all to this afternoon's hearings of the Antitrust Modernization Commission. We will be having two panels, or three panels, I guess, on the issues relating to immunities and exemptions. On our first panel, we have one speaker, Mr. John Sullivan, who is the general counsel at the U.S. Department of Commerce, who has brought some colleagues with him.

What I will do is - I think we are only going to have one microphone open, but if you could feel free to introduce the gentlemen that you have brought with you.

The way we usually proceed is to give the witness about five minutes to summarize his testimony, and then we allow time for the Commissioners to ask questions.

This panel is scheduled to be for 45 minutes, so what we will do is give you an opportunity to summarize your statement, and then spend the rest of the time with questions from the Commissioners. I guess all of the Commissioners will

have then five minutes each.

So with that, Mr. Sullivan, if you would like to take the time to introduce your colleagues and also to summarize your statement.

MR. SULLIVAN: Thank you, Chairwoman Garza, Vice Chair Yarowsky, and other distinguished Commissioners. Thank you for inviting me to testify before the Commission today.

I have brought with me some colleagues from the Department of Commerce. To my right, far right, is David Bowsher, who is Senior Counsel in my office. To my immediate right is Jeffrey Anspacher, who is the Director for Export Trading Company Affairs at the Department of Commerce. And then to my left is John Masterson, who is the Deputy Chief Counsel for International Commerce and our principal legal expert on the Export Trading Company Act.

My testimony today is limited to the Export Trade Certificate of Review program administered by the Department of Commerce under the authority of Title III of the Export Trading Company Act.

The Department strongly supports this program, which creates opportunities for small and

medium-sized companies that would otherwise not be able to export or not be able to export on a sustained basis.

As the numerous public comments received by the Commission on this program demonstrate, it is invaluable in promoting U.S. exports.

Through Export Trade Certificates, the Departments of Commerce and Justice provide U.S. firms with pre-clearance to coordinate and conduct export activities under the terms and conditions specified in Certificates issued by the Department of Commerce.

Vetting of the Certificate applications by the Departments ensures, as required by Title III, that the proposed export activities will not have anticompetitive effects in the United States.

No proposed export activities are approved that would violate federal or state antitrust laws. Thus, only after a thorough review of a Certificate application and a determination that the proposed export activities would not violate the standards specified in Title III will the Secretary of Commerce, with the concurrence of the Attorney

General, issue an Export Trade Certificate.

Even after the Certificate is issued, the Certificate holder remains under the oversight of the Departments of Commerce and Justice and is required to file annual reports on the export activities engaged in under the Certificate.

The benefits of this program are well established. Export Trade Certificates promote and encourage joint export activities, particularly by small and medium-sized companies, by providing Certificate holders with a high level of assurance that, while they remain within the specified boundaries of their Certificates, they will not be found to have violated U.S. antitrust laws.

This allows exporters to establish joint ventures that can, for example, negotiate lower overseas shipping rates, help U.S. exporters overcome export barriers and increase their competitiveness in foreign markets.

By forming export joint ventures, spreading risks, and sharing costs, firms can reduce their individual costs and allay their fears of exporting. Approximately 3,000 companies now enjoy the pre-

clearance provided by an Export Trade Certificate of Review, while exporting over \$10 billion annually.

Almost every country that has antitrust laws exempts export activities that do not adversely affect its domestic market. Under Title III, the United States provides the same benefit to its exporters through a highly transparent process incorporating public notice, opportunities for public comment, antitrust enforcement agency review, and ongoing U.S. government oversight, including modification or revocation of Certificates as necessary.

The positive effect of this transparency is evidenced by the fact that there has never been a successful antitrust challenge to export conduct covered by a Certificate of Review either in the United States or, to the best of our knowledge, anywhere else in the world.

This is a tribute to the careful manner in which Title III has been administered by the Departments of Commerce and Justice and to the procompetitive uses of Title III by U.S. exporters.

Indeed, Export Trade Certificates of Review

encourage small and medium-sized U.S. companies to compete in foreign markets, thereby benefiting consumers abroad. We believe that the program is in fact procompetitive.

Moreover, the pre-clearance procedure established by Title III has not hindered the United States' ability to work with other countries in their development of antitrust laws. With the support of the United States government, the number of countries with antitrust regimes has grown from 25 to over 100 in the past 15 years.

Illustrative of the U.S. government's continued role in supporting such development, the Department of Commerce, in conjunction with other U.S. government agencies and the private sector, recently sponsored a weeklong exchange with members of the Chinese government to assist in the development of China's first-ever antitrust law.

Export Trade Certificates also eliminate foreign trade barriers. U.S. agricultural exporters, for example, use Certificates to administer tariff rate quotas implementing agricultural market access provisions of international trade agreements. This

increased market access benefits U.S. exporters and their employees, as well as foreign consumers.

I will conclude my remarks at this point and would welcome the opportunity to try to answer any questions you might have.

CHAIRPERSON GARZA: That's great. Thank you very much.

Commissioner Cannon.

COMMISSIONER CANNON: Great. Thanks.

Mr. Sullivan, thanks so much for coming today.

MR. SULLIVAN: My pleasure.

COMMISSIONER CANNON: We appreciate your being here, and the team. I hadn't seen John in a long time, probably 20 years, I bet.

I just want to make sure I got an idea of the scope of what we are talking about. The only number I think I saw in your testimony was the 3,000 companies that get a benefit. But those aren't all Certificate holders, right?

MR. SULLIVAN: No.

COMMISSIONER CANNON: Those are companies that are part of a Certificate?

MR. SULLIVAN: That's correct.

COMMISSIONER CANNON: And so roughly how many Certificate holders are there?

MR. SULLIVAN: Roughly 80. I don't have the precise figure off the top of my head. So, you are right, there are 3,000 companies that are covered by Certificates. Each Certificate has a Certificate holder, and then there are members of the group that participate and are covered under the Certificate.

COMMISSIONER CANNON: But I assume when a Certificate gets filed, it's not - you have to ability to amend the Certificate?

MR. SULLIVAN: Yes.

COMMISSIONER CANNON: So people come in and out of this protection?

MR. SULLIVAN: Yes. And, in fact, every time a member is added, it is considered an amendment of the Certificate and it is subject to another review by the Departments of Commerce and Justice.

COMMISSIONER CANNON: Okay. I got it. And in terms of these are all companies essentially - obviously I assume they are essentially competitors, or there are various folks within a vertical chain or

MR. SULLIVAN: It varies. It's both vertical relationships and horizontal relationships. Most of the companies are small or medium-sized enterprises, although there is no restriction on the size of the entity or the type of entity. It doesn't have to be a trade association. Any person or entity, U.S. person or entity, is eligible to be the Certificate holder.

COMMISSIONER CANNON: So there are some trade associations?

MR. SULLIVAN: Yes.

COMMISSIONER CANNON: So every time a member comes in or out -

MR. SULLIVAN: The Certificate is amended, and it is subject to review.

COMMISSIONER CANNON: Does that go in like the Federal Register as well or -

MR. SULLIVAN: Yes, a Federal Register notice.

COMMISSIONER CANNON: I see. Okay. And then every one of these holders, not every one of the 3,000 members that take advantage of it, but 80,

roughly the 80 holders of Certificates, all file an annual report?

MR. SULLIVAN: Yes.

COMMISSIONER CANNON: And then that is reviewed as well?

MR. SULLIVAN: That is reviewed - that is filed annually, and every time a member is added during the year, not just at the filing of the annual report, but when a member is added, the amendment has to be filed at any time during the year.

COMMISSIONER CANNON: As you know, we have got a couple more panels. We are going to do a lot of discussion this afternoon, kind of a broad ranging overview of the whole question of immunities and exemptions, and maybe it is a semantics issue or not, but I notice in your testimony, you said that essentially, this really doesn't qualify, because really it is not an antitrust exemption, but I guess the question is, it certainly is the case that this activity, by virtue of the law and what happens at the Department, is treated differently than other either entities or practices that are subject to antitrust laws -

You would, I assume, agree with that?

MR. SULLIVAN: To be sure. In fact, we have referred to it - we at the Department of Commerce have referred to it as a limited immunity. It's not an exemption from the antitrust laws because a Certificate can't issue if the export activities would violate the U.S. antitrust laws. We are not exempting anyone from the antitrust laws. On the other hand, there are substantial benefits that are provided to Certificate holders that are pretty well known, and that are substantial, including the presumption that the conduct doesn't violate the antitrust laws in the event a private antitrust suit is filed and payment eligibility for attorneys' fees and costs should a defendant prevail in such a suit. So, there are substantial benefits and changes to the antitrust laws that are provided by this program.

COMMISSIONER CANNON: So in a sense they are certainly treated differently -

MR. SULLIVAN: Yes. To be sure. To be sure.

COMMISSIONER CANNON: Okay. Great. And I guess along those lines, then also when you talk

about the fact that there has never been a challenge here, I think we have had people testify on treble damages and other sorts of issues that will impact on this, and the fact that there really hasn't been a successful action or private action - my guess is you will hear people argue, "Well, that's because when you only have single damages, and you face attorneys' fees if you are not successful, you know, that would probably have some sort of a disincentive to bring cases like that."

MR. SULLIVAN: I can't disagree with that, but I think the most substantial reason is that the Certificate and the activities that are engaged in are subject to substantial review by the Commerce Department and by the Justice Department's Antitrust Division - economists and antitrust lawyers - looking at it. And there is a substantial number of Certificates that are not granted as originally requested. We don't deny many Certificates; usually they are withdrawn - the applications are withdrawn. But, by the time it has gone through that process, all the lawyers have looked at it, and terms and conditions have been imposed, it's very unlikely that

such conduct would be subject to a successful challenge in court.

COMMISSIONER CANNON: And one thing I did notice, that in the back - is the question of how much all this costs the department. It looked like you were saying there were three part-time professionals that do this. And how does that really relate to what the legal team may do in the GC's office or the Justice Department?

MR. SULLIVAN: Sure. Right now -

COMMISSIONER CANNON: That's not that many people to administer a pretty big program.

MR. SULLIVAN: Right. But, the number of Certificates, as we discussed previously, is relatively small. It's fewer than 100. It's not a full-time occupation for the three professionals, but it is a substantial amount of their time, plus they have the benefit of John Masterson's counsel and the lawyers in the general counsel's office, and there is a similar commitment by the Justice Department as well.

So it is not a substantial commitment of resources by the Department of Commerce, but it

provides a pretty significant benefit of anywhere from, we believe, \$10 to \$15 billion worth of exports as a result.

COMMISSIONER CANNON: In sales. I'm over my time. I apologize. Madam Chair.

CHAIRPERSON GARZA: Thank you. Commissioner Kempf?

COMMISSIONER KEMPF: Let me start where Steve started, and that is on the amount of these. You said you had roughly 80, somewhere in that, per year covering a commerce of \$10 billion on 3,000 companies.

What about in terms of new ones each year? How many new ones were there last year and this year, for example?

MR. SULLIVAN: Well, I couldn't tell you off the top of my head. Jeffrey, how many Certificates last year?

MR. ANSPACHER: New Certificates including -

COMMISSIONER KEMPF: I don't know. I'm not including amendments.

MR. ANSPACHER: Well, amendments are essentially new, because -

MR. SULLIVAN: They are treated as new Certificates and -

COMMISSIONER KEMPF: I understand that, and that's why I am excluding them.

MR. ANSPACHER: We average about six or seven a year usually, brand new ones, and we average probably close to 20 amendments a year.

COMMISSIONER KEMPF: Okay. Just so my perspective - I'm not sure I care one way or the other whether we keep or jettison this one. As I read the submissions and listen to the testimony, I hear two different strains.

Your piece, for example, Mr. Sullivan, says, you know, it's really not an exemption, because it covers activity that doesn't apply - covers foreign commerce, and that's not covered, anyway.

But that also translates into, well, if it doesn't cover, you don't need it.

On the other side of the coin, I sort of say, "well, if it only applies to stuff that's not covered by the antitrust laws, what harm is there in having it?"

So I'm sort of a bit ambivalent about it.

But I did find some of the stuff in your paper sort of troubling. Throughout you talk about, you know, "Gee, it's a way small firms can get together and do stuff where they might - where each standing alone lacks the resources to do," and you refer to, for example, negotiating lower freight rates.

But Title III is available to big companies with vast resources, and they can use it not just to negotiate lower shipping costs, but also to establish higher prices. Isn't that right?

MR. SULLIVAN: In theory, but higher prices would preclude the Certificate from being issued.

COMMISSIONER KEMPF: Why?

MR. SULLIVAN: It's precluded by the statute. Title III precludes the Certificate from being issued if it would have any effect basically on - any effect on prices in the United States.

COMMISSIONER KEMPF: No, no, no, I'm talking about prices overseas. I'm not talking about -

MR. SULLIVAN: Prices overseas, beyond the jurisdiction of the U.S. antitrust laws, would be subject to regulation by foreign antitrust regulators.

COMMISSIONER KEMPF: Correct, but under this Title III, six of the 10 largest corporations in America, with vast resources, could get together and establish higher prices - assuming they meet all the provisions of the Title - higher prices some place else, in Bolivia or Bulgaria.

MR. SULLIVAN: Right, with no effect in the United States.

COMMISSIONER KEMPF: Correct.

MR. SULLIVAN: And subject to foreign antitrust regulation.

COMMISSIONER KEMPF: Okay. The reason I - well, let me go back, I suppose, to where I am. Can we get a list of who the 3,000 companies are? I assume that's public information.

MR. SULLIVAN: Sure, it's all publicly available.

COMMISSIONER KEMPF: Your thing is transparency.

But is it - are the 3,000 companies predominantly ma-and-pa operations or are they -

MR. SULLIVAN: The vast majority are small and medium-sized enterprises. Larger - large

enterprises that have high market concentration are not going to be able to survive the type of scrutiny that Certificate applications go through to prove that there is no effect on U.S. markets or consumers or U.S. prices.

And, as a result, then the vast majority of the Certificate holders are small and medium-sized companies - you know, apple growers.

COMMISSIONER KEMPF: Let me turn and ask you about a question that is over on page 9 of your written testimony. It says that Certificates do not promote the formation of hard-core cartels seeking to exploit market power to the disadvantage of consumers, and we are talking about foreign consumers, not American consumers.

Why do you say that? I mean that's - that sounds good, but what is the evidence?

MR. SULLIVAN: Well, the basis for that is that the - the principle underlying it is that we are actually promoting competition in foreign markets by having market entry by exporters here in the United States that otherwise, because of their small size and the barriers to foreign trade, wouldn't be

participating in those foreign markets.

The other thing I will say is that there is a standard term that is included in Certificates that preclude the Certificate holders from restricting output. So there are restrictions on both information that can be shared by members that are participating in an export joint venture under their Certificate, and there are provisions that preclude restrictions on output or exports outside of the Certificate by participating members.

COMMISSIONER KEMPF: Madam Chair, I have one other question I would like to ask.

CHAIRPERSON GARZA: Yes, go ahead.

COMMISSIONER KEMPF: The - as I said at the outset, I am not sure I care one way or the other whether this is maintained or jettisoned because of the arguments on each side. You say we should keep it, but your paper convinces me that you don't need it, and those who are opposing it, their arguments sort of persuade me that it doesn't hurt to have it.

MR. SULLIVAN: Right.

COMMISSIONER KEMPF: So my question is this, because I sense among my colleagues some sentiment to

jettisoning it, and the question I have is, do you have any comment whether, if we should jettison it, whether there should be some grandfathering of existing certified - in other words, address the issue of if we decide to jettison it, which I understand you are opposed to, what we should consider doing so that we don't have unintended damage in the wake?

MR. SULLIVAN: Right. Let me make two points; first, if the program were to be discontinued, I think it would - as a matter of fairness for entities that had made substantial investments in export trading activities on the basis of having a Certificate - that those expectations not be dashed, and that we continue to allow the exports under those Certificates.

But let me add a comment regarding the premise: that there is - we don't need this program and that we don't - that we shouldn't care whether the program exists. It actually does provide a substantial benefit to small companies - agricultural producers, for example - and I think there are a number of comments that have been received by the

Commission from them: agricultural producers, apple growers, farmers that produce pistachios, that aren't able on their own to market their agricultural products, that are able to combine to reduce costs and to make their exports without being subject to the threat of treble damages and having to hire expensive antitrust counsel and economists. Getting that conduct pre-cleared by the Justice Department and by the Commerce Department - being able to engage in that export activity - provides a substantial benefit to them.

We also think there is a benefit in trade agreements that are being negotiated by the United States which have tariff rate quota provisions, which has caused the United States Trade Representative, Ambassador Portman, to say that this is an important tool in being able to implement those types of foreign trade agreements, allowing, for example, agricultural producers - we just had experience with CAFTA chicken producers that will be able to export chicken products to the CAFTA countries - to take advantage of tariff rate quotas that have been implemented under CAFTA.

So, I think there are substantial benefits to the program, and we would hope that it would continue.

COMMISSIONER KEMPF: Thank you very much.

CHAIRPERSON GARZA: Thank you.

MR. SULLIVAN: You are welcome.

CHAIRPERSON GARZA: Commissioner Litvack.

COMMISSIONER LITVACK: Thank you. As I think I recall, Mr. Sullivan, at the time that this Act was passed, it was passed really because we felt that our domestic companies were being disadvantaged in export trade because other countries were doing this. They were allowing it. Is that correct?

MR. SULLIVAN: That was one of the reasons, I believe. I think there were high expectations that the program was going to do probably more than it was capable of doing. But that was certainly one -

COMMISSIONER LITVACK: There were very high expectations, you are quite correct, which probably have not been realized. But I guess my question was going to be, therefore, if other countries did away with this kind of cartel protection, would you favor the U.S. doing away with it?

MR. SULLIVAN: Well, I think I would have to disagree with the use of the pejorative "cartel protection." We would characterize it as an export joint venture that is not subject to U.S. antitrust laws but would be subject to a foreign country's antitrust laws.

So, for example, if the exporters were violating the antitrust laws of The Netherlands by exporting apples there in a way that violated Dutch antitrust laws, we have no basis to say that they are immune from liability under Dutch law.

So, I think the system that we are hoping for is a system under which each country would have its antitrust laws apply to its own domestic markets through a transparent process like the one that we have. These types of export joint ventures, which are matters of public record - people know what the exporters are doing - that those export activities are then subject to foreign countries' antitrust laws.

We just met, John and I, with a Chinese delegation, and China, we hope, is on the verge of adopting an antimonopoly law, and so, exporters

exporting to China would be subject to, we hope in the next year or two, Chinese antitrust laws.

COMMISSIONER LITVACK: That should be interesting.

(Laughter.)

CHAIRPERSON GARZA: Better worry about what you hope for.

COMMISSIONER LITVACK: Someone once told me that Chinese antitrust law is an oxymoron, but we'll put that aside for a moment.

I have a paper here, which has been made available to us, written in 1991 - I realize that is obviously 14 years ago - by Paul Victor in which he says - and I don't know what he's talking about - "Studies conducted by the U.S. Department of Justice, the Federal Trade Commission, and the Organization for Economic Cooperation and Development have all found that export cartels" - and I think he includes what you are talking about as such - "primarily benefit large firms, tend to facilitate anticompetitive practices in domestic markets, and create and maintain trade barriers."

That's the end of the quote.

I guess my question to you is, if the Department of Justice is cooperating with you in this effort and reviewing these things, why and how, and is it true, that they have done studies that have all found this to benefit large firms and be anticompetitive?

MR. SULLIVAN: I have never seen such a study. I'm not aware of any such study. And, in fact, I think the public record will demonstrate - and we'll be happy to produce the list of 3,000 members who are covered by the fewer than 100 Certificates - will demonstrate that the vast majority are small and medium-sized enterprises.

The fact that - if that were the case, as this article describes, I think there would probably be a better - there would probably be at least one Certificate that had been successfully challenged on antitrust grounds even if the plaintiff wasn't going to get treble damages.

COMMISSIONER LITVACK: That leads me to one last question, which is, is the ultimate benefit or purpose of this and the ultimate reason for it in some ways our private antitrust laws? Because if in

fact the conduct doesn't violate the U.S. antitrust laws and apparently doesn't violate the Chinese antitrust laws or the Bulgarian antitrust laws, then what do we need this for? It's not violating anybody's laws. It's just like setting up something in the Commerce Department for administrative purposes.

MR. SULLIVAN: Well, it's part of a larger effort by the Department of Commerce to encourage export trade, and, as we discussed just a few minutes ago, I think the hopes and expectations for this program may have been somewhat overstated in 1982. Our focus is more on small and medium-sized businesses. You know, \$10 or \$15 billion - I used to work at the Defense Department, so that - you know, it's a lot of money to me personally, but \$10 or \$15 billion is not a huge export program, but we think it is an important one, and it is part of - it is just a tool that we are using to encourage exports, part of a larger program that Jeffrey is involved in is the International Trade Administration.

COMMISSIONER LITVACK: One last comment, and as you say, the hopes for the program may have been a

little high at the beginning. I recall, at the time, one critic shortly afterwards saying, when Secretary Baldridge was there, he had announced that it would end up with the creation of 100,000 new jobs and someone said "that's true, but they're all in the Department of Commerce."

(Laughter.)

MR. SULLIVAN: We only succeeded in one - well, two and a half, I guess: three half-time and one full-time. So, it didn't quite make it.

COMMISSIONER LITVACK: You're a little short even there. Right?

MR. SULLIVAN: It didn't quite meet expectations.

(Laughter.)

COMMISSIONER LITVACK: Thank you, Madam Chair.

CHAIRPERSON GARZA: Commissioner Valentine.

COMMISSIONER VALENTINE: Good afternoon, Mr. Sullivan.

I want to follow up on something you just almost finished off with, which is that \$10 billion is not that much in terms of U.S. global trade. What

is the statistic for the years 2001 and subsequently of annual global U.S. export trade in goods and services?

MR. SULLIVAN: We would have to get back to you with that. I couldn't tell you off the top of my head, but this is just a minuscule fraction of that.

COMMISSIONER VALENTINE: That's what I thought. Okay, thank you.

I would actually very much like to save you your three part-time professionals and your one full-time administrative staff, and suggest that if your program functions exactly as you say it does, it is a very wonderful program that is absolutely not needed at all, that all of these are joint ventures, they are totally legal, they involve small firms with no market power, sharing marketing expenses and distribution costs, costs associated with analyzing trade information - I couldn't agree with you more, this all sounds like wonderful activity and it is great that we encourage it. But we need absolutely - and I will say this speaking as a former federal antitrust enforcer - absolutely no exemption from the laws, no protection from the laws.

And as you yourself say, since this only affects non-U.S. commerce, and you have guaranteed us that it is actually not involving U.S. trade at all - that is, since the U.S. antitrust laws address only effects on U.S. commerce, and since your export activities are affecting only foreign commerce, you need absolutely no exemption.

So I guess what I would like to suggest is that the one thing that these firms may need would be actually foreign antitrust advice, and the reason I would like to suggest this is that, if in fact these Export Trade Associations Organization activities were to have an adverse effect anywhere, it would be overseas.

As you know, our Justice Department operates an extremely effective, an extremely effective cartel enforcement program. As you may also know or not know, the Justice Department is constantly seeking cooperation from other foreign enforcers to help them enforce against cartel activities. And when we have cartels that affect our consumers, we ask the Europeans, we ask the Japanese, we ask the Canadians and the Germans to help us prosecute against these

activities. And they often do so. And the UK is possibly going to be extraditing one of its nationals, and that person will be spending time in prison here.

Now I think the one question I want to ask you is, if you - if we were to suggest that the U.S. go forward on efforts by all countries to repeal similar laws in all countries that seek to protect export activities that may or may not hurt foreigners, and if all other countries were to promise to help each other were there to be adverse effects overseas - let's say there's an adverse effect of one of these apple cartels in Japan or in France - I don't mean to keep calling them cartels. You can call them export associations - and the head of the JFTC and the head of the French Competition Council requested help from the Assistant Attorney General of the Department of Justice, would you be happy to let the Department of Justice help in prosecuting against the adverse effects of that association overseas?

MR. SULLIVAN: Well, in fact, I think we would say that cooperation would be provided even

under the current system to the extent it is permitted. There are some statutory protections for some of the information that is provided in support of the application, but, assuming there aren't statutory bars on providing information, we would be in favor of cooperation with foreign antitrust regulators.

Our position is that we think our program - first of all, we think it does provide substantial benefits to these small and medium-sized enterprises, and that it has new uses in these trade agreements that are being negotiated. But we think our program, which provides for public notice and an opportunity for comment by parties, including foreign governments who have commented on proposed Export Trading Company Certificates of Review - we think that is preferable to a system under which there is just implicit antitrust authorization through foreign laws - or our own laws - that would limit antitrust coverage.

I think we would prefer to have a system like ours where there is review, public comment, and assurances provided to small and medium-sized companies that may be reluctant to engage in export

activities but for the protections that are provided by the statute.

COMMISSIONER VALENTINE: I won't comment on an oxymoron.

Thank you, sir.

MR. SULLIVAN: You are welcome.

CHAIRPERSON GARZA: Okay. Commissioner Yarowsky.

COMMISSIONER YAROWSKY: Yes. Thanks for coming, all of you.

I just want to know a little bit more about the operation, kind of functional operation.

I take it that when someone makes an application for a Certificate, they disclose the nature and scope of their activities.

MR. SULLIVAN: Yes.

COMMISSIONER YAROWSKY: If it is a new application, it would be also the membership of that group. Now if the scope or nature of their activities changes, is that when they are required to file an amendment?

MR. SULLIVAN: Yes, any of their activities - the Certificate would list the export trade

activities that they are proposing to undertake.

Members of the organization - changes to any of that would require an amendment -

COMMISSIONER YAROWSKY: Okay.

MR. SULLIVAN: Which is treated as a new Certificate application.

COMMISSIONER YAROWSKY: And is there a time-limited period for this review, both at the Commerce and Justice?

MR. SULLIVAN: Yes. Yes, there is. It's generally 90 days. It's subject to extension. There is also a provision for expedited review, but there are time limits.

COMMISSIONER YAROWSKY: And then, as Commissioner Cannon said, you publish it in the Federal Register so that there is public notice?

MR. SULLIVAN: The application itself is published when it is first filed, and then the final disposition -

COMMISSIONER YAROWSKY: Okay. And so if someone wanted to challenge the activity that is in there, they would have to say that the participant were acting outside the scope of their disclosure?

Would treble damages lie if a lawsuit was brought against a participant, and it was alleged that the conduct that they were going after was outside the scope of the disclosure?

MR. SULLIVAN: Yes, if it is outside the scope of the Certificate, then the protections provided by the statute and the program wouldn't attach.

COMMISSIONER YAROWSKY: Okay. Now you mentioned the process of revocation. Has there ever been a revocation, and what would be the reason for that?

MR. SULLIVAN: There have been a number of revocations - revocations and amendments - that have been required by the government. For example, if a party doesn't file an annual report, the Certificate is revoked.

COMMISSIONER YAROWSKY: Okay. So if there are procedural lapses -

MR. SULLIVAN: Well, procedural lapses, and we have received complaints even after the statute of limitations has passed for challenging the Certificate. If there have been changes in market

conditions - not changes in the export trading activities of the Certificate holder, but just changes in market conditions, we have received complaints from parties suggesting that we look again at the Certificate, and we are always open to those types of suggestions, and the Certificate holders know that they are subject to our continuous review, and we will always be looking to see if things have changed and the Certificate should be amended or revoked.

COMMISSIONER YAROWSKY: Okay. Now are you aware of any complaints received from other countries?

MR. SULLIVAN: I am not aware of any.

COMMISSIONER YAROWSKY: Of the operation of these -

MR. SULLIVAN: I believe in his confirmation hearing, Ambassador Portman testified that USTR is not aware of any, either. I'm not aware of any.

COMMISSIONER YAROWSKY: Okay, because one question I have, and this is also an issue of controversy, is that thus far antitrust really hasn't been subject to trade negotiations, World Trade

Organization trade negotiations. I think there would be a lot of resistance in this country to throwing up the antitrust laws - I'm not trying to be polemical now - to that kind of thing, even though we hope to see the expansion of antitrust enforcement.

My question simply is, if there is pushback or resistance or even distress about what we are doing in this country, this could be one reason that other countries could agitate to try to put antitrust as part of the trade agenda talks.

MR. SULLIVAN: Well, I just add as an observation that a number of the - this program has been the subject of, and has been provided for, in several of our recent trade agreements and negotiations. For example, the recently negotiated CAFTA agreement specifically provided for Export Trade Certificates, and we have an export trade -

COMMISSIONER YAROWSKY: So there is a reciprocal policy in CAFTA?

MR. SULLIVAN: Yes. And we have, in fact, an association that is providing for export of chickens and chicken parts to the Central American countries and the Dominican Republic.

COMMISSIONER YAROWSKY: More than you ever wanted to say here.

Last question, quickly. I mean this seriously. Is there any set of circumstances by which if you looked around in the relations with those small companies - I know they need the perception of certainty. That's what I'm picking up. That they wouldn't participate or export for fear that joint activity might subject them to antitrust liability. Is there any set of circumstances that you would foresee that would then make this program unnecessary?

I mean, what would be the state of the economy, world economy, our economy, or trade situation where you would say, just simply, "It's served its purpose, but we don't need it anymore?"

MR. SULLIVAN: Well, if we were fully satisfied with the level of exports, which I'm not sure we would ever be politically - but, I mean, there will always be, I believe, smaller organizations that face substantial burdens in - if they want to get, for example, a law firm opinion that the conduct that they are proposing to engage in

wouldn't violate the antitrust laws, it's a substantial expense to hire McDermott, Will & Emery and economists and have Bobby Burchfield opine that your conduct isn't violating the antitrust laws. So -

COMMISSIONER YAROWSKY: All right. So you just see it going on for a long time?

MR. SULLIVAN: I think so.

COMMISSIONER YAROWSKY: Okay.

CHAIRPERSON GARZA: Commissioner Burchfield, maybe you will offer to lower your rates in exchange for -

COMMISSIONER BURCHFIELD: Thanks, I think.

It seems to me - I have two questions. The first question, as sometimes happens in this environment, will take a minute to set up.

A lot of what we have talked about on this Commission, and a lot of what the witnesses have talked about to us on this Commission, is overdeterrence of the antitrust laws. Situations that really are competitive but that the market actors are deterred from engaging in because they, for whatever reason, believe that there is antitrust

risk. It can be, in the case of a small apple grower, just a misperception about what the antitrust laws provide. It can be a misperception about whether the antitrust laws even apply to conduct beyond the borders of the United States.

It seems to me that the case for this particular process, this statutory scheme, is that it provides comfort to companies that might not otherwise - that might otherwise be deterred from engaging in legitimate competitive activity by misperceptions about the antitrust laws or the threat of antitrust litigation that might not be well founded.

And if that premise were true, that those companies, as a result of this program, undertake export activity that has good competitive significance and good benefits to the nation, to the commerce of the nation, that they would not otherwise undertake.

Could you address that, and in particular, Mr. Sullivan, give us any information that you have at your disposal - I'm sure the Commerce Department takes this sort of thing - of companies, entities

that perhaps are more actively engaged in export activity as a result of this program than they would be if this program did not exist?

MR. SULLIVAN: To address the first part of your question, I think there are substantial burdens that are faced by small businesses seeking to export: not having the wherewithal to overcome the costs and the burdens of exporting abroad, seeking to come together with other similarly situated entities, and facing the risk of a treble-damages antitrust suit. To lessen that risk, there is a substantial cost that is incurred. And, I said it in jest before, but it's a serious cost to reduce that risk, to get an opinion letter from a law firm or from - to provide the type of assurance that a business would need before venturing - even if it's conduct that would be - that we would think was clearly not covered by the antitrust laws, it is a substantial risk for a business to risk treble damages liability and substantial attorneys fees. The Commerce Department - this program provides that type of assurance to a small business at very little cost to them, and, frankly, at very little cost to us, given the scale

of the Department and our export-promoting activities generally.

To get to the second part of your question, my experience is that - our experience is that there are a wide variety of small businesses, and they are not just commodity exporters: they are agricultural associations - apples, pistachios, cherries - but services, as well, like engineering services.

So, it is a pretty wide variety of businesses and partnerships and organizations that are involved, and I think it would be useful for us to provide you with a list of the 3,000 to give you a sense of the types of businesses that are benefiting from this and the scope of their activities.

COMMISSIONER BURCHFIELD: We would also be interested in seeing, I think, if there is any internal analysis that you are able to share with us on how this program has in fact enhanced the growth of exports as opposed to just serving as a comfort blanket for companies that might have already engaged in the exporting.

MR. SULLIVAN: Yes.

COMMISSIONER BURCHFIELD: My other for you,

which is a fairly straightforward one, I think, is, I know you are not here to speak for the Department of Justice, but are you aware of any instances in which the Department of Justice in an official way has either opposed or supported this program as either consistent with or inconsistent with the antitrust enforcement policies of the country?

MR. SULLIVAN: I am not aware of the Justice Department taking any position in opposition to this program. I know that it has been suggested, I believe, in a letter from the former Assistant Attorney General, that it be looked at. But, I don't believe the Justice Department has taken a position, nor has - I know the Administration has not taken a position in opposition to this program.

MR. MASTERSTON: In fact, as I recall, in the two most recent editions of the International Guidelines, the Department of Justice and the FTC, in the case of the most recent edition, cite with approval the Export Trading Company Guidelines that were issued in 1985 by Commerce and Justice. So to that extent, you have an ongoing affirmation by the Antitrust Division of the Department of Justice that

the principles under which the two Departments issue Certificates of Review are still valid.

MR. SULLIVAN: And the President's Trade Representative, Ambassador Portman, strongly endorsed the program earlier this year.

COMMISSIONER BURCHFIELD: Thank you.

CHAIRPERSON GARZA: We are close to our time, so if you can stay a few more minutes -

MR. SULLIVAN: I'll be happy to.

CHAIRPERSON GARZA: I just have one very quick question. Most of them actually have been asked by my colleagues.

The one thing I will ask is, one of the concerns I have heard expressed is that, while we can be sympathetic to the goals of the program with respect to the small and medium-sized enterprises that really need to cooperate in order to take advantage of certain scale efficiencies or to be effective exporters, some people have raised a concern about, well, what if what you had is actually, you know, all of the or nearly all of the U.S.-based international oil companies or nearly all the U.S.-based international chemical companies who

obtained an Export Trade Certificate. They don't really need that in order to be effective exporters, but somehow or other they may use it as a shield for what we might think of as more traditional cartel activity, albeit aimed at foreign markets, and so in that sense, if nothing else, it sends a bad message in terms of our - what we believe should be happening in the world of antitrust enforcement.

Do you have any doubt as to whether the Justice Department would approve or disapprove an application for a Certificate in that event? And is there any entitlement that companies would have so long as they could establish that there wasn't any effect on U.S. commerce, any entitlement that they would have to a Certificate?

MR. SULLIVAN: There is a provision for judicial review for denial of a Certificate, so, if a Certificate were denied - it has never been successfully pursued-but, if a Certificate were denied, the Certificate applicant could seek judicial relief and, under, I guess the APA, seek to have the denial reversed or at least sent back for reconsideration.

I would think in the hypothetical you just described that not only the Justice Department but also the Commerce Department would be exceptionally skeptical of any such an arrangement given the - if there is substantial concentration in the domestic market in particular.

If there were such an arrangement proposed - the Commerce Department and the Justice Department, in looking at these types of applications, apply the Merger Guidelines, and, if there were such a Certificate or application proposed, I would be very skeptical that it would be approved.

CHAIRPERSON GARZA: Okay. Thank you.
Commissioner Jacobson.

COMMISSIONER JACOBSON: Thank you. Mr. Sullivan, thank you very much for your time. I do have a couple of questions.

One is just a technical one. Are there any policy considerations that are different in our assessment of ETCs as opposed to the Webb-Pomerene associations? Should the analysis be different when we are looking at Webb-Pomerene as opposed to the Export Trading Company Act?

MR. SULLIVAN: You know, the Webb-Pomerene Act is a much narrower scope than the ETCA. The ETCA was passed decades later and is much broader in scope. Webb-Pomerene is limited to export associations, and so it's - we think it provides useful benefits, but it's not a statute that we administer, and it's substantially different and narrower in scope.

COMMISSIONER JACOBSON: As I understand your paper and your testimony, there is no risk that an Export Trading Company with a Certificate would engage in any conduct that would increase prices or restrict output to U.S. consumers. Is that a fair summary of what you said?

MR. SULLIVAN: Yeah, it's precluded by statute. Title III, the statute itself, provides that a Certificate can't issue if the effect would be to increase prices in the United States, or affect competition in the United States.

So, if we make a mistake, you know, we are subject to being corrected, but, by statute, we are not allowed to issue a Certificate if there would be such an effect.

COMMISSIONER JACOBSON: So from what is there a limited immunity that has a positive value?

MR. SULLIVAN: The positive value is the limited immunity from private antitrust suits. The Certificate will, in effect, provide almost complete assurance that, so long as the Certificate holders engage in conduct within the four corners of the Certificate, they won't be prosecuted and there won't be a civil action by the United States.

The principal benefit to the Certificate holders is in the private antitrust field where there are substantial benefits to them like detrebling and provision for attorneys' fees if the defendant prevails in an antitrust suit. So, I think, as Mr. Burchfield mentioned before, one of the principle concerns - and risks - that the small businesses in particular have expressed to us is the threat of treble damages.

COMMISSIONER JACOBSON: No, I understand that, and I have got limited time, so I'm just going to try to be crisp with this.

A private action against conduct that has been approved and granted an Export Trading Company

Certificate perforce should lose precisely because there is no adverse effect on U.S. competition.

Isn't that fair to say?

MR. SULLIVAN: By definition.

COMMISSIONER JACOBSON: All right. So what we are talking about is protection from civil antitrust cases that would have no basis.

MR. SULLIVAN: In theory.

COMMISSIONER JACOBSON: Okay. So why is that justification not applicable to every company in the U.S. economy?

MR. SULLIVAN: Well, I said in theory. In theory, it should be. There have been suits brought - not successfully, but there have been suits brought and the threat of suits is what the statute is designed to allay the risk -

COMMISSIONER JACOBSON: No, I understand that, but I have the honor and privilege of defending some of the most frivolous cases you will ever see, but we don't have an Export Trading Company Certificate as a defense. We are still going to win the case, but my question is, what is the difference

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MR. SULLIVAN: Your clients probably have the resources to defend that case reasonably without being driven out of business and paying just for the defense.

COMMISSIONER JACOBSON: Not always, and I would suggest -

MR. SULLIVAN: Often enough.

COMMISSIONER JACOBSON: - I would suggest that, although I know McDermott, Will & Emery's rates are reasonable and fair -

(Laughter.)

COMMISSIONER JACOBSON: - and those of economists are, too, that the cost of getting a Certificate in each case is not appreciably different than the 1-in-200 chance that you may have to defend a lawsuit.

In any event, my time has expired. I think you understand the skepticism that I have. I just don't see the difference between ETCs and General Motors.

CHAIRPERSON GARZA: Well, even though the yellow light is still on -

COMMISSIONER VALENTINE: Could I ask for

just one revision of Bobby's request to them to be sure we get the data accurately?

CHAIRPERSON GARZA: Okay. What we will do, though, is just to be - it's best to follow it up with something in writing or have the staff follow up with a written request.

COMMISSIONER VALENTINE: Okay. Because what I would like is to just have the data sorted or divided. To the extent that they want to show that this Act is in fact increasing exports and making a material difference, I would like any evidence with respect to the TRQs, the tariff-rate quotas, separate from the actual supposed benefits to the associations that get the Certificates.

CHAIRPERSON GARZA: What we will do, just for clarity, is, after the hearing we will follow up with staff and get to you, Mr. Sullivan, what we would ideally like to see.

Thank you. I would rather conclude the hearing right now so we can - all right, thank you very much, Mr. Sullivan. And as you can see, it is likely that we will have some continuing interaction. There may be some additional information or questions

we would like to put to you. But I appreciate your written testimony and I appreciate your presence here today.

MR. SULLIVAN: Thank you. We would be delighted to respond to any questions you might have.

CHAIRPERSON GARZA: All right. Thank you.

MR. HEIMERT: We will take a brief break and begin the next panel momentarily.

(Recess.)

CHAIRPERSON GARZA: Welcome to the second panel of the AMC's hearings on immunities and exemptions this afternoon. This panel will consist of Professor Darren Bush and Gregory Leonard, who will make a presentation on work that they did in proposing a framework for assessing immunities and exemptions.

Gentlemen, I appreciate your appearing today; I appreciate the work that you have done. We are going to go until 2:40, and then take a break for the next panel.

If I could ask you both to make each about a five-minute statement, sort of summarizing what you have to say, and then we are going to have

questioning by two or three Commissioners after that, as time permits.

So, gentlemen, if you could. Mr. Leonard, if you like to start. Would you prefer to start? Whichever.

MR. LEONARD: I'll go first. I want to thank the Commission for giving me the opportunity to speak today about the framework that Darren, Steve Ross, and I developed for analyzing antitrust immunities and exemptions.

I thought I would focus on the choice of benefit-cost analysis as the analytical tool to use in assessing whether an exemption or immunity should be granted or continued.

Darren is going to cover some of the other issues that we addressed in the framework.

Well, almost anyone who has made any kind of personal decision has engaged in some kind of informal cost-benefit analysis. When I decided to walk over here today, I thought, well, if I walk over, I'm going to use up some calories, and it's not going to cost me as much as a taxi would.

Unfortunately, it took me a little bit more

time, but I made the analysis and decided to walk.

Similarly, the so-called "net present value" rule is widely used by businesses and it is taught in business schools as a way to make business decisions, and that of course is another form of benefit-cost analysis.

In the '30s and '40s, economists developed a theory of cost-benefit analysis as applied to public policy. It should be pretty clear that a policy that makes everybody better off is one that should be pursued. But a lot of policies create both winners, who are made better off by the policy, and losers, who are made worse off, and so the question is what to do then.

After due deliberation, economics arrived at some kind of answer. Economists said that a policy should be implemented if the aggregate benefits outweighed the aggregate costs, that is, as long as the gain to the winners exceeded the loss to the losers. And in theory, the winners could compensate the losers, making both sets of people better off, and the policy would be preferable to both. And that is what is called a potential Pareto improvement.

The requirement that the winners be able to compensate the losers is called the Kaldor-Hicks criterion, and it is really the basis for a lot of the cost-benefit analysis that's gone on since that time.

I will note that the Kaldor-Hicks criterion and the usual benefit-cost analysis that economists use typically ignore the distributional issues that arise, but that can be an important consideration to decisionmakers and policy.

Now in a business context, you know, you're making a decision where it's pretty easy to figure out what the benefits and costs are. You know, we're talking about a profit maximizing company, and it is interested in its own revenues and costs. But in a public policy context, the benefits and costs are often much more diffusely spread over a larger population, and they are sometimes difficult to quantify.

For example, an environmental regulation may create recreational benefits to a wide variety of individuals who partake of the improved natural resource, and so it's hard to figure out exactly who

all those people are and what the benefit would be to each one.

In addition, a public policy decision may also need to take seriously those distributional consequences that I talked about.

So there are complications, I think, in a policy context, but nonetheless, a cost-benefit analysis has been widely used in the United States in the last 50 years. And, for example, as the OMB Circular A-4 states, Executive Order 12,866 requires agencies to conduct a regulatory analysis for economically significant regulatory actions, and it goes on to say that benefit-cost analysis is a primary tool for regulatory analysis.

So it is natural, then, given all this, that we would settle on the use of cost-benefit analysis in our framework, but I want to emphasize that we are really advocating a fairly broad definition of what it means to do a cost-benefit analysis.

For example, we recognize that Congress, as part of its decisionmaking, may want to consider the distributional issues that would not traditionally be considered in a pure economics cost-benefit analysis.

Or, Congress may want to weigh one group's benefits or costs more than another's, and our framework is flexible enough to allow that.

Now a common complaint about cost-benefit analysis is that some costs and benefits are hard to quantify and therefore they tend to get ignored. We submit that that is really the fault of the analyst, not the analytical tool itself.

One of the advantages of a cost-benefit analysis, properly done, is that it requires the analyst to lay out all of the costs and benefits, even those that can't be quantified, and we think that that is very important in this context, because it promotes good decisionmaking in that all affects of the proposed policy are at least considered, as well as transparency, which is very important, we think, in the context of a political process.

Now in our framework we gave a number of examples of how one might go about measuring some of the costs and benefits that would result. These are not meant to be exhaustive. What they are really trying to do is show, in a rough way, how you could come up with estimates of costs and benefits in a

situation where you are probably not going to have a huge amount of information available, which is pretty much what we expect to be the situation Congress will be in.

So to summarize, we used cost-benefit analysis, because it's intuitive as a basis for decisionmaking, has a strong economic foundation, it's been well accepted by policymakers in other areas, it forces the decision maker to identify and consider all of the potential costs and benefits, and it promotes transparency.

So thank you for your time, and I will now hand things over to Darren.

MR. BUSH: Thank you very much, Commissioners, for allowing me to talk with you today about the report I have done with Greg Leonard and Steve Ross.

I am in a slightly awkward position, because my oral statement has mysteriously disappeared, but I am a law professor and am therefore used to talking off the cuff and will do so now.

I want to spend my time not summarizing the report but accentuating some of the things that I

think are important implications of the report. And, specifically, I want to focus on stage one and stage two. Dr. Leonard has already talked about stage three, and if I have time, I will be able to address stage four and stage five.

But before I even do that, I want to point out a couple of things about the report.

First of all, this report is not a panacea. This report does not cure all the potential ills of immunity analysis. Rather, it is a tool that will hopefully be useful to Congress in determining the relative merits or demerits of any particular proposed immunity and any particular existing immunity.

The report is in itself pragmatic, recognizing that Congress has before it considerations that go beyond things that we traditionally think of in the antitrust realm. Therefore, there are, for example, in stage two, justifications that go beyond consumer welfare and total welfare.

Secondly, the report is, embarrassingly enough, not exactly much new - there's not much new

in there. These tools are very familiar in the antitrust world, they are very familiar to the administrative law world.

For example, in the Administrative Procedure Act, there are inherent procedures for quasi-legislation in the context of rulemaking, and for administrative agencies to gather information, filter that information, and to make relative cost and benefit calculations based upon the information before Congress.

Our report does something similar. It borrows essentially what we think is to be Congress's view of what good decisionmaking is, and it has translated that into the Administrative Procedure Act, and we have borrowed certainly from that.

In addition, of course, the administrative agencies are subject to executive orders, which require some cost-benefit calculations, and certainly we are cognizant of that with regard to stage three.

With respect to stage one, I view stage one as an important component actually of stage three. Stage one is the input, if you will, to the stage-three analysis. In order to do a full and complete

stage-three analysis, more information is better. So we have in there provisions that allow for the acquisition of information from a variety of sources.

One of the biggest sources, of course, is the proponent of the immunity. Our report, in addition to the ABA comments, puts the burden upon those who propose the immunity.

We do so for very good reasons. To paraphrase Deputy Assistant Attorney General Ken Heyer, in the context of merger efficiencies, it's the merging parties that have the unique ability to obtain information with respect to their procompetitive benefits of an acquisition.

Here, too, in the context of statutory immunities, we have in - the proponents of the immunity are in an inherently unique position to provide that information as to the relative merits of the immunity.

But that is not the only source of information from which we encourage Congress to seek information. Administrative agencies, antitrust enforcement agencies, opponents of the immunity, academics like myself, should all be able to provide

comments.

If you look at the report, you will notice in one of the footnotes a discussion of interested parties. Administrative law, in the context of rulemaking, administrative agencies have to solicit comments from interested persons. And that is far too broad, we think, a standard for Congress, which has much more limited time. So we used the term "parties," despite its adversarial nature. There has to be some cut-off, but we believe that the more information, the better.

I am out of time even faster than I thought. That's what happens when you don't have your written comments, but I would certainly be happy to entertain questions on stage two and four and five.

CHAIRPERSON GARZA: Thank you very much.
Commissioner Cannon.

COMMISSIONER CANNON: Thank you, Madam Chair.

First and foremost, on behalf of all of us, thank you very much for doing this work. It's not an insubstantial thing that you have done; it is not an insignificant amount of work.

We really appreciate this. It's a lot of work, time, and effort. Obviously, it's a very thoughtful piece, and we appreciate it.

I say say, reading it, probably some parts I would agree with, some I might not, some I would think would be useful, certainly for the Congress, and then again thinking about how the Congress does its business, perhaps not as relevant as if you were in an administrative proceeding or in a court, for that matter.

In that regard, there will be some folks who will say, "Well, this is really too general and nothing new, or it's really overly detailed." So you will probably hear a lot of different comments here, but overall I just want to leave you with saying thank you for the help. We appreciate it.

Let me ask you, Greg, on your comments on cost-benefit analysis, you do talk about the consumer welfare test in the paper.

MR. LEONARD: Yes.

COMMISSIONER CANNON: Can you be more specific? Are you talking essentially about, you know, the benefit to end consumers, or do we care

about, you know, mid-stream consumers, or how would you really define that consumer welfare test?

MR. LEONARD: Well, it would be end consumers, in my view.

COMMISSIONER CANNON: So if there is some impact along the way to before end consumers, that's - you wouldn't worry about that?

MR. LEONARD: Well, I should say the framework itself actually contemplates addressing impacts on groups all along the way, but if you are talking about just the consumer welfare effect itself, that would be the end consumer.

But if there was a - if the exemption would have an effect on intermediate firms or other firms, competitors of the firms covered by the immunity, the framework does talk about evaluating those, either benefits or costs to them.

COMMISSIONER CANNON: Do you have anything to add, Darren? I know that Greg probably focused on that mostly, but any comments on that?

MR. BUSH: No, I think actually he did it very well.

COMMISSIONER CANNON: Okay. Great. Thanks.

And obviously you just heard John Sullivan from the Commerce Department talk about the Export Trading Company Act, and you know, which raises the question there are certain statutes that fall in the category that we are looking at today that one can argue, it really just says that conduct that is already going to be lawful is lawful.

So is that how you would - would you put the Export Trading Company Act in that? What would you do about that? How would you characterize that? And obviously various people have opinions up here about whether or not that statute should be continued. Do you guys have an analysis on that?

MR. BUSH: Steering away from discussion, at least for the moment, of any particular immunity, I can talk generally about how I view basic industry perception of the effects of antitrust laws on their industry, and perhaps on conduct in that industry.

I think there have been, of course, immunities passed for the purpose of assuaging those kinds of concerns, and I suppose the question is, what is the conduct at issue, and what is the real risk of antitrust liability?

And, of course, as you go towards more *per se* type of behavior, the risk is very high. As you go perhaps to other types of conduct, the risk is quite low. And if the risk is quite low, I think it is incumbent upon the party seeking the immunity to demonstrate why this is somehow viewed as a larger risk than it actually is.

COMMISSIONER CANNON: Greg, do you want to add to that?

MR. LEONARD: I was just going to say in the framework, we are pretty clear that we say if no justification applies, including situations in which the conduct at issue would be lawful under antitrust laws, in any event, the immunity should not be granted.

So I mean that is our overall view, but I think the problem, at least that was raised in earlier testimony, is that there can be, for instance, litigation costs just to get rid of frivolous lawsuits.

Well, you know, that's a type of inefficiency that might want to be considered. So I think you would have to look at the facts of the

situation.

COMMISSIONER CANNON: And I think actually you hear the argument, or you will, that Commissioner Kempf raised or a question he posed to Mr. Sullivan, which is, if it's not - if the conduct you are addressing isn't unlawful, then you really don't need it. But then does it really matter? Is it of any consequence other than obviously putting one more statute on the book to arguably protect conduct that is already lawful?

So I don't know, you know, it's almost like it doesn't matter or it does matter. You know, I mean that's kind of the issue, the quandary that I think you face for that.

MR. BUSH: Indeed, and that's why we have, in essence, a sunset provision, because once the - if Congress feels that there is a really strong perception in the industry that the antitrust laws might have some deterrent effect that they shouldn't have on efficient conduct, then we can see whether the immunity actually has somehow transformed the industry, if more of these types of behaviors are now engaged in because of the immunity, and we have that

data because we can review that in the review period, and if there is no data that supports that anything has changed in the industry because of the passage of the immunity, then obviously the immunity had no effect.

COMMISSIONER CANNON: Well, I was going to ask - actually, the sunset provision was my next question, which is, I have been involved in things over the years and observed some things that happened in Congress, and I think it may be safe to say that, on occasion, a sunset provision gets added, because it's kind of the price of final passage that will allow this to go through for five years or 10 years.

Have you seen that in your research? I know you obviously have a lot of reference here in the report to legislative history and all of that. Do you have a feel for that, as to how in fact a sunset provision does get added to some - and, you know, there are a lot of statutes other than antitrust-related statutes, that have sunset provisions in them. So, is that what you found? I mean, that's kind of my impression, that, on occasion, you will see exactly that; that is the final price of passage

of a statute.

MR. BUSH: Well, we're at a disadvantage in antitrust land because of sort of the paucity of sunset provisions. I haven't gone out and taken a look at other realms of law to see the underlying reasons for the sunset provisions and whether in fact they were sort of a cost of the immunity.

COMMISSIONER CANNON: Greg, do you have any comment on that?

MR. LEONARD: That's not really my area of expertise; I'm sorry, I don't.

COMMISSIONER CANNON: Okay. And one other question on legislative history. Obviously, you have gone back and looked at quite a bit. If you had to rate that today, in terms of putting it within your framework, are there any particular examples that you would cite that are particularly helpful here, or would be closer to your model, versus others that aren't?

MR. BUSH: I'm having trouble answering this, because I keep thinking of sort of the effect of the immunity - but I think it's very helpful to see, if you look at the most recent Standards

Development Organization Advancement Act, if you look at the purpose underlying the legislation, you can go back to legislative history, and I can actually see what the underlying concerns were.

I think that is a fairly detailed legislative history in that regard, without making any comment as to whether the statute actually has the effect that legislative history intended.

COMMISSIONER CANNON: Good. I'm cognizant of the time here. We don't have very much, so let me yield the balance of my time to Jon or -

COMMISSIONER YAROWSKY: Hi. I wanted to add my voice in giving thanks to you all and Steve Ross for your *pro bono* excellent activity on behalf of the Commission's inquiry.

You know, there are three categories of immunities and exemptions that seem to spring up. Mainly, they are statutory. I think that's where your main focus was.

There were a few case exemptions that were primarily legal fictions, and they still exist, and then there is a whole area of implied immunity. Now that's kind of - that emanates out of probably the

study you looked at, but that area may be one of the most provocative as we go forward.

We are also going to have some hearings coming up on regulated industries, and I think we will look into that at that time, but we may want to touch on it just briefly here.

Here is a question for you, though. Let's try to really set up the environment we're thinking about. As I said, I think it's really Congress, because the great bulk of these immunities and exemptions are statutorily created.

That means Congress is going to have to evaluate a framework. It may be yours, it may be our suggestions, but hopefully this activity in this area will generate some type of framework.

There is very limited time. The same committee that maybe in the morning has a hearing on an exemption will then in the afternoon have a 2 p.m. hearing on the PATRIOT Act and then at 5:30 vote on the budget reconciliation. That doesn't mean this isn't great work; it is. I mean, it's incredible what goes on in Congress. But there is a limited amount of time to focus. For that reason I think the

greatest utility I see of the framework that you have produced is more in the procedural area. In no way am I diminishing your contribution, because I really believe that it's in a procedural framework that Congress may have its greatest direction from you, from us, from anybody, so that there is a more regularized process.

You know, in the '80s, the same concern grew, not out of exemptions, but out of the rules of evidence and the rules of civil procedure. Now, Congress has plenary authority to create those rules any way it wishes, somewhat because of the unsystematic way that things were proceeding in the '70s and the early '80s, the concept of the Rules Enabling Act came up, and there was actually a process where the Judicial Conference developed some suggestions, forwarded them to Congress, and then Congress had a procedure in which it could respond, modify, accept, and whatnot. They still retained plenary authority to do whatever they wanted.

I think we are in the same area. That's just my instinct about this, and I think that's why I am particularly interested in exploring, when we have

a little more time, because we are limited on this particular panel, your procedural suggestions.

As to some of the substantive analysis, I'm not saying that is less important. I mean, we could get into a grand debate about your definition of consumer benefit or consumer welfare versus total welfare. We could do that. I don't think Congress is going to do that. I think they will do a balancing test; they will call it - and I say this in an admiring way - they will call it "cost-benefit analysis."

The rules of evidence in Congress are not the rules of evidence in court. It's like an arbitration. Everything that's relevant comes in. Okay? And everything relevant will come in, whether it's economic, or social. And there will be a balancing test eventually.

So that's why I believe a lot of the procedural and presumptive ideas that you have come up with really are very fertile for us to explore, and we will do that.

Second, on the implied immunity area - and we may talk about this next week, but we may want to

talk about it a little bit today. The state of regulation has changed, too, and whereas before there was, in a sense, a dialectical model; there were either free markets, you know, safeguarded by competition, or there was a comprehensive, pervasive regulatory scheme.

In such a situation, the antitrust laws would yield because of the clear preference of Congress to have regulation.

In the deregulated environment that we have been in, which I think is a very positive development, in the last 15, 20 years, we have at times reached a hybrid state where you really don't have complete comprehensive regulation, and for that reason the role of antitrust in regulation is somewhat in flux.

How do you respond to that, Mr. Bush, Professor Bush, in terms of how we may need to look at the interactive effect of both in a way that maybe we haven't before?

MR. BUSH: Well, let me first respond to the notion that the report is probably most useful in its procedural aspects. And I agree. And one of the

reasons I agree is that Congress, like generalist judges, really has no expertise in this area that we all have expertise in here.

So I think that providing them with a framework that they can turn to when an issue of statutory immunity comes up is quite useful.

With respect to the second issue of the - I would call it the - either the tension or complementary nature of antitrust in regulation, and you see both in the literature. You see law professors and judges talk about antitrust and regulation as substitutes, and other times as complements.

I view it in the context of the most recent sort of trend toward deregulation, and I use that deregulation term very loosely, that the whole point of these deregulation movements is to create some competition, and that competition is established by the rules of the game that are created by some administrative agency.

So the purpose of the regulation is not the displacement of the competition but the creation of competition, and if it is the creation of competition

that is being sought, then antitrust law plays a very complementary role.

COMMISSIONER YAROWSKY: So you say that antitrust law should not be displaced in a situation where there is not pervasive comprehensive regulation, and in fact the regulation is actually to stimulate competitive markets? Is that what you are saying? So the antitrust laws should apply?

MR. BUSH: Indeed. If you look at - and, as an example - I'm currently writing an article on everything that everybody loves to talk about, primary jurisdiction, implied immunities, express immunities, state action, and *Keogh*, which I will call the "everything" article.

But in the context of state action, if you look back at - harken back to the original notions of state action, which is, of course, based upon federalism, it's this notion that states have the ability to regulate, in the old traditional sense of regulation, sort of monopoly-rate regulation, activities within their state.

But now there are oftentimes movements not to displace competition with regulation, but actually

to use regulation to instill competition, and in those instances I think that antitrust law should apply as well.

CHAIRPERSON GARZA: Well, I want to thank you very much for appearing here today, again, for the work that you did on the report, and also for your testimony here today. I'm sure there is more that we could ask you, and there probably is more that we will follow up on, but I will let you go for now and ask that the next panel - we'll take about a five-minute break and then proceed with the final panel.

Thank you very much.

(Recess.)

CHAIRPERSON GARZA: I would like to begin this afternoon's third panel on the subject of immunities and exemptions, and welcome to the panelists here today.

The procedure that we have been following is that each of you will have five minutes to summarize your testimony. After that, we will have questioning by the Commissioners. We will begin with Mr. Yarowsky, who will have 20 minutes and will be the

lead questioner for the Commission for this panel, and then following that, each of the Commissioners will get about five minutes to ask their own questions.

Alden Abbott, since you are the current government official, we will begin with you, if you would like to summarize your statement for us.

MR. ABBOTT: Thank you, Madam Chair, Mr. Vice Chair, Commissioners. Thank you for inviting me to speak today. My statement and my responses to questions reflect the views of the staff and not necessarily the views of the FTC or any individual Commissioner, but the Commission has voted to authorize my statement.

As a baseline proposition, we strongly believe that an economy based on vigorous competition, protected by the antitrust laws, does the best job of promoting consumer welfare, economic efficiency, and economic growth.

This conclusion is supported by economic studies, both domestic and international, and most of our economy is based on the competitive model.

Accordingly, laws or regulations authorizing

departures from the competitive model should be disfavored, and proponents of such departure should bear a heavy burden of demonstrating, with factually supported reasons, why such a regime is necessary.

Congress, over the years, has adopted a wide range of measures that partially or fully immunize certain sectors of the American economy from antitrust review. Collectively, these sectors of the economy cover a substantial volume of commerce.

It is not my purpose today to argue about the original merits of Congress's decision to displace the antitrust law, in particular cases. I believe, however, it is important to consider whether the continued existence of these exemptions in their current form fosters the goal of a strong, innovative growing American economy, or instead undermines it.

Many exemptions allow firms to agree to limit the terms of competition among themselves and impose restrictions on entry into the affected sector. From an antitrust perspective, such agreements, particularly agreements among horizontal competitors, generally present the greatest risk of competitive harm. Unless the restraint is reasonably

necessary to the generation of countervailing efficiencies, consumers are likely to suffer.

Basic economic theory teaches that a non-regulated competitive market generally leads - competitive market generally leads to the economically efficient level of output, and I won't get into the minor qualifications.

However, it is certainly a general rule, and also, as a general rule, regulatory intervention, absent a very strong case, is not necessarily likely to improve performance.

In contrast, a restraint that affects - effectively raises price above a competitive level generally will result in consumers buying less of the product or service, and firms producing less at a higher price, than under competitive conditions.

Accordingly, a restraint lowers economic welfare and consumer welfare, and it is well accepted that competition itself, moreover, is an engine that drives economic efficiency, sometimes called dynamic efficiency.

Accordingly, economic logic suggests antitrust exemptions may well handicap economic

progress of industries they are intended to protect.

This is more than theory. Much empirical literature supports the proposition that industries sheltered from competition perform more poorly than those subject to competition.

Now many of the existing exemptions are decades old, and represent a time when the American economy was very different. Thus, even if one assumes, for the sake of argument, there may have been valid economic justifications for specific industry exemptions in the past, it is not at all clear that those justifications still hold water.

Moreover, we do not believe that an antitrust exemption is necessary to achieve any efficiency gains that an exemption allegedly might bring forth. Modern mainstream antitrust analysis does not condemn efficient collaborations, only such agreements as collaborations that diminish competition and harm consumers.

In short, antitrust today should not be viewed as an impediment to economically desirable forms of collaboration.

Finally, foreign jurisdictions are

broadening the scope of their antitrust laws and subjecting to antitrust scrutiny formerly exempt sectors. It would be ironic if the U.S., which argues for strong application of antitrust laws overseas, would now take the lesson and apply its own medicine.

And then in summary, we believe, although we have not studied individual exempted industries, as a general matter derogations from competition harm the American economy and the consumer, and the AMC and Congress may well wish to address the question of whether individual statutory antitrust exemptions continue to make sense.

Specifically, Congress and the AMC may wish to examine critically the current validity of whatever justifications may be offered in support of each exemption and to assess the overall impact of each exemption on consumers and on the economy.

Thank you.

CHAIRPERSON GARZA: Thank you very much.
Professor Ross, a five-minute summary of your -
MR. ROSS: I thought I was going to go last,
but -

CHAIRPERSON GARZA: Oh, well, you can go last. Professor Carstensen.

MR. CARSTENSEN: Any professor will do; is that it, at this hour of the day?

(Laughter.)

MR. CARSTENSEN: Okay. Thank you. I am really honored to be asked to share my views with you. I do want to emphasize that these are my views, since I am involved in a couple of collaborative projects, and I speak only for myself when I reference any of the work that we have done collectively.

My first of five brief observations is that I think the framework that has been proposed by Steve Ross and his colleagues has a great deal of merit to it, especially emphasizing the need to put the burden on the proponent of an exemption to come forward with clear justification.

And I do think it is useful to emphasize to Congress the need to consider both costs and benefits, although, as the ABA comments note, and I tend to concur, it is a little problematic as to how well Congress can go about doing that process.

I do have a couple of reservations about the details of the framework that they propose. The first is that I think more emphasis should have been given to the problem of buyer power and harms that producers can sometimes suffer from in the face of buyer power, and, in that context, where modifications of antitrust law might avoid some of those or even eliminate some of those problems.

Secondly, I am a little concerned that the many examples do not narrowly define the kinds of conduct that should plausibly require exemptions. These are naked restraints of competition, mergers, or joint ventures where the objective is to create market power. And we had a good discussion earlier about the trade regulation example, which is one of those that ought not to be even in this subset, it seems to me.

My third point is that there are some additional issues of general application to exemptions. The first, which the framework and the ABA both endorse, is sunset provisions. I think that would be extremely helpful in getting further review and reflection on the merits of these things.

A second point that is in various comments and implied in the framework is the need for some metric of strict construction of these statutes. There's a wonderful quote that I have from Judge Easterbrook.

I commend your attention to both the Wisconsin and the Connecticut state statutes, that implement a strict construction approach. I think that is something you could urge on Congress as a way of constraining the scope of exemptions.

Finally, I think it would be terrific if you could get Congress to put exemptions in one place in the U.S. Code. Todd Anderson and I spent a lot of time going back and forth trying to ferret all those puppies out, and we are still not sure we found them all. And I think it would be helpful to illuminate the nature of what's going on.

A fourth general point, echoing Mr. Abbott, is just how important competition is, that regulation and exemption from antitrust in general is not efficiency enhancing, and does not serve social goals. We ought to move towards a more open competitive economy. That is our first best policy

point.

My general observation in our case studies of specific exemptions find generally that they are just not very useful.

Turning to the specific categories that you raised, the Fishing and the Webb-Pomerene statutes should go. Nobody is using them; they should be knocked on the head because they are useless.

The discussion today of the trade bill shows that trade law is really an example of variation of the business review clearance process, and it is probably worth your while thinking about whether adapting something from that or some of the other so-called modification statutes might provide a better business review clearance process for general use. There is no reason to do it for just one set of businesses if there are significant transaction costs that can be cheaply avoided by seeking clearance, and I'm not sure that there are.

In agriculture, it is very important to distinguish between Capper-Volstead and the Agricultural Marketing Agreement Act. It is not Capper-Volstead that is the problem or the source of

market power; it's the AMAA, which is a system of government-authorized cartels, which are especially pernicious in the area of dairy.

In the Shipping Act, we have another example of a holdover from the past that ought to be put out to pasture or sunk at sea, or whichever is the appropriate metaphor.

More importantly, I put together an exhibit at the end of my statement. We have got a set of transportation exemptions that are all holdovers from much more generalized regulatory systems. It is really thinking - urging Congress really to think about whether there can't be a more systemic transportation oversight system, maybe with primary jurisdiction or something that would solve that problem.

Lastly, the insurance area is one where the ABA in 1989 said that the McCarran Act is overinclusive and unnecessary. Modern experience shows that most states actually encourage competition in insurance.

There is, as the ABA said, need for a carefully crafted safe harbor for forward-looking

information exchanges in that industry, and I think that probably is still a valid small piece that is there.

Reform of the exemption process and its results, I think, is long overdue. I think you at the AMC can make a major contribution to the public interest if you can induce Congress to act.

Thank you.

CHAIRPERSON GARZA: Thank you. Mr. Miller.

MR. MILLER: Madam Chair, members of the Commission, I appreciate the invitation to appear today. I think it's an honor to contribute whatever small amount I might to the work of this Commission.

I think the starting point for any discussion about antitrust immunities ought to be the antitrust laws themselves. Or, do the antitrust laws contribute to economic efficiency, or do they not? There is a respectable body of academic literature out there that suggests they do not, and that is something I think the Commission should look at.

I don't hold that view; I don't share that view, but it's something I think you ought to address. If I am correct, and the antitrust laws do

contribute to economic efficiency and to public welfare, then it would seem to me that any exemption from the antitrust laws should be reversed; any immunities and exemptions don't make sense.

Now I know there are a lot of complicated things out there, but if you look at the antitrust immunities and exemptions, they tend to be the product of a lot of self-interest, very concentrated interest as opposed to very great diffuse interest, that is American consumers' .

I want to thank the Commission for authorizing or commissioning or enabling this report by Messrs. Bush, Leonard, and Ross. I think it is a first-rate piece and establishes basically a decision tree that Congress and the President ought to use in deciding whether antitrust immunities or exemptions make sense.

I also want to pay tribute to the comments by the American Bar Association. I thought they were spot on, especially in their description of the reasons that you have - you get some of these antitrust immunities and exemptions.

So the bottom line is I think that for the

most part, antitrust immunities and exemptions, especially those that simply enable anticompetitive behavior, ought to be reversed. Two of them, of course, are farmers and labor, and I am no Don Quixote here; I don't think it is likely that Congress is going to reverse the antitrust immunities and exemptions for organized labor, or for farmers, either. It would be easier to reverse it for farmers than for organized labor, but hope springs eternal.

Commissioner Cannon, I am sure, can give some observations on how you can get things like that through Congress. But I am not very hopeful.

I will say that I think a conclusion you might draw about the present system of antitrust immunities and exemptions is that - two conclusions. One is that the original rationale probably doesn't exist anymore. That is, that what led to them, at least on paper, aren't the conditions that they describe - and that includes organized labor - don't really exist to the degree that they did then.

And secondly, and accordingly, the adverse effects on the economy and efficiency are not as great as they were then.

Now let me say that I would suggest the Commission consider not only immunities and exemptions from the antitrust laws, but immunities and exemptions from the antitrust principles, and No. 1 on my list of activities that violate not the antitrust laws but antitrust principles is the way the market for political representation is monopolized in America.

And I specifically think of members of Congress and the market for selecting members of Congress. You have a lot of people out there who would like to be members of Congress, and you have a lot of people, and then you have voters wishing to make choices among them.

But guess what. There are sort of two classes of folks. One is incumbents and the other is everybody else, and the incumbents set the rules under which competition will take place. Not surprisingly, they establish rules that are quite adverse to challengers and very much in favor of incumbents. They put limits on the advertising, called campaign - indirectly control campaign expenditures. They amass war chests. They do so

many things, as I said in my written statement, which I hope you will include in the record, and the longer piece that I attached to the paper. They engage in a lot of activities that really limit competition, and I think result in the same kinds of monopolistic behavior and the adverse effects on efficiency and public decisionmaking as you get in the market for goods and services.

When I was chairman of the Federal Trade Commission, especially in the early years of the Reagan administration, I was roundly condemned from time to time by some members of Congress for not being sufficiently aggressive in enforcing the antitrust laws, and they would characterize my behavior as letting these monopolistic practices go with even challenge, and I used to sit back and think, "But the way you organize your own market is just absolutely contrary to all the principles you are espousing."

So, in any event, I think that is something that you might at least touch on, and I apologize for getting on my hobby horse on that issue.

Thank you.

CHAIRPERSON GARZA: Thank you, Mr. Don Quixote.

Professor Ross, are you ready?

MR. ROSS: Thank you very much, and it is a great opportunity to participate. It has been a very enjoyable experience, and it is great to be able to respond to comments, *et cetera*.

To start, I looked at the list of 29 exemptions that we prepared in appendix A, and I thought about all the incredibly important issues that Professor Carstensen talked about, and about the issues of capture and how things work in the beltway, which I am sad to say it's going to be 20 years since I've been out of.

The fact is that you guys, such a talented group of very busy Commissioners, spent 45 minutes the export exemption, and why is that? Because a major cabinet government official wanted to come and talk about the export trade exemption, and so therefore, we spent two minutes talking about all the transportation exemptions, and 45 minutes talking about the export exemption. This sends a cautionary note about this whole process, and regulated

industries as well.

And then when you think about the whole dialogue and the excellent questions - and I am sure that Mr. Burchfield's fees are reasonable -

(Laughter.)

MR. ROSS: - and notwithstanding that, I am sure that they are - his hourly rate is substantially more than Commerce and Justice Department lawyers. But it isn't that much more in the sense that the time it would take Mr. Burchfield to write an opinion letter, which would be, however, a very thorough job, I'm sure, compared to the time it would take to do a very thorough and rigorous analysis of the same issues by a GS-15 lawyer - now if that is all we talking about in terms of the time - I mean, that's an issue you can think about, but I have to say that I am skeptical that that is going on when we talk about these reviews.

It seems to me that is why one of the things that is an important part of our framework is that a presumption - and Congress is free to reject it - but the presumption should be that, in any matter regarding an ascertainment of competitive effect

other than by Congress, it ought to be by the Justice Department or the Federal Trade Commission. And it ought not to be - I'm sure there are very smart lawyers in the Commerce Department, Transportation Department, and elsewhere. But I think the level of both the quality and consistency and lack of capture and lack of bureaucratic concern make it a very important - it would be a major contribution if the Commission would see fit to endorse that aspect as a presumption that again Congress is free to get rid of.

My second comment is that I am glad that our framework is taken sufficiently seriously that everybody wants to sort of get on one side as opposed to the other of the labeling process when all these decisions are decisions for Congress to make. So some people took issue with the fact that an efficient practice that wouldn't redound to the benefit of consumers is a ground for exemptions and they would rather have it called lawful while Professor Carstensen thinks that buyer power is an important issue. I agree that buyer power is an important issue, but I would say we took care of it;

we just call it wealth distribution, and maybe he would rather not call it that; he would rather call it something else.

So I am glad that our framework is being taken seriously, but I want to emphasize that, whatever you call these things, Congress can do all of this, and they will do all of it, and it's all in the balancing.

Unlike judges, where burdens of proof matter, I am skeptical that to an average Congressman - the fact that the framework called something a social policy consideration as opposed to an economic efficiency consideration really matters. If it's a plus that they care about, they are going to take it seriously. If it's not a plus they care about, they won't take it seriously.

And then finally, let me just suggest a great political opportunity here, because, as I was thinking about this and approaching it - I am one in the maybe, probably, unique position of as a young lawyer, having spent two years of my pre-academic life with Bill Baxter as a boss and the two next years of my pre-academic life with Howard Metzenbaum

as my boss, and I think that when I heard Chairman Miller's comments, I think that there is a unique opportunity here. There is widespread and steadfast view - a view of public political economy that Chairman Miller represents that is basically that these exemptions are terrible.

I think there is now much more skepticism on the part of people who, in the past, might have favored regulation. There is much more of a sense that the interests that get represented are corporate interests or others who are interested in harming the public, and I think there is a real coalition here, that the AMC can lead, of people on all sides of the aisle to really make a significant contribution here.

So I will stop there, and welcome questions.

CHAIRPERSON GARZA: Well, thank you. That was well worth waiting for. I'll give it to Commissioner Yarowsky to begin.

COMMISSIONER YAROWSKY: Thank you all. We feel that this is an incredibly important area if we can concretize it a bit in terms of our deliberations and our recommendations ultimately.

For that reason, it sounded like there may

be an emerging consensus - I don't want to put words in your mouth, but I would like to check that out - about certain aspects of the framework or just your general point of view.

Can I just take off four or five points and just sense whether there is a building consensus there?

That the proponent of an immunity or exemption should have the burden of persuasion, either to renew that exemption or to get a new one.

CHAIRPERSON GARZA: For the record, probably instead of just having people nod, they should articulate.

COMMISSIONER YAROWSKY: I wanted to go through this. Let me just list them, though.

Second, there should be an extensive public and transparent record, and, if in fact legislation is produced, an extensive and precise legislative history. So public record and legislative history.

Three, immunities or exemptions should be time limited, with some type of sunset provision.

Four, there should be some type of cost-benefit analysis, and maybe a suggested analysis, and

that's one of the questions I want to follow up with you about.

Five, these immunities and exemptions should be codified in one place so there is a real recognition of what exists, or at least incorporated by reference because, as you have seen, Professor Carstensen and others, they are scattered throughout, and some are not just stand-alone exemptions. So they are tied into other provisions.

And six, before you go the full distance to pass an immunity, you should look at less restrictive alternatives.

Now, one - well, could you all comment about those? And if I left a hallmark that we should be considering, let me know.

MR. ROSS: If I could jump in, I would divide the second point you made, Commissioner Yarowsky. I agree; I agree with all of them, but I think that there are two separate things, and the reason I say it is, one is maybe easier to insist that Congress give than another.

I would like there to be a transparent record; I would like there to be a full cost-benefit,

with a full hearing, lots of testimony, everything we set out.

Sometimes that doesn't happen; there is a rush of business, the subcommittee chairman is having a fight with somebody, and so things don't always happen the way we would like.

But with regard to the legislative history, I think, at a minimum - even if there's some good reason that members of Congress perceive that they can't do that, there is just no excuse for the sponsor of the legislation not getting up and, in a floor statement, making this case. And I think any member of Congress has the right to insist on, and more realistically, it is a lot easier to say to a senator or a congressman, "Okay, you know, I understand why you couldn't get a hearing at the committee or whatever, but at least, you know, this framework says you need to make this case." At least you get up and articulate this case in the *Congressional Record* and let us say it.

So I would just recommend that you split those two, so even if one can't be achieved, the other might be.

COMMISSIONER YAROWSKY: Okay. Chairman Miller.

MR. MILLER: The answers to your six questions are:

Yes, yes, yes, yes, yes, and yes.

I would like to amplify on No. 5. I would also suggest that the committee of jurisdiction in both houses be the Judiciary Committee and not the special interest committees.

COMMISSIONER YAROWSKY: Thank you. Mr. Abbott.

MR. ABBOTT: Speaking for myself, I think your six points are generally consistent with the central point I was making in my testimony that the burden should exist both at the time an exemption first is considered and at regular intervals thereafter. The burden should be on the proponent of the immunity, and it is well worthwhile for Congress to look closely at the costs, the benefits, and the effects of particular immunities, and it strikes me that the six points certainly are consistent with that overall message.

COMMISSIONER YAROWSKY: Professor.

MR. CARSTENSEN: I concur, and I think Chairman Miller's suggestion of these being directed to the Judiciary Committee as the one with oversight of competition issues is a particularly good addition.

COMMISSIONER YAROWSKY: Thank you. Let's look at just one of them briefly, and I don't mean to take too much time, but as I said in the earlier panel, I am a bit concerned, having watched this process a lot, that if we make a highly detailed recommendation embodying a very sophisticated economic analysis, however you want to define cost-benefit, that that may not be the appropriate guidepost for the kind of analysis that needs to be done up there.

If one could, in just a few sentences - and if you can't do it here, maybe you could help us after this hearing - make a suggestion, backed up by longer analysis, but what kind of description would you give the Judiciary Committees in terms of the balancing tests they are going to have to do?

MR. MILLER: I would make the suggestion that you follow, by and large, the decision tree that

Professor Ross and his colleagues outlined, but the Committee could draw on its own staff, people like Mr. Cannon there when he was up on the Senate Judiciary Committee, and also CBO has a reservoir of considerable expertise for Congress to answer just that sort of question.

COMMISSIONER YAROWSKY: Steve.

MR. ROSS: I hate to be sort of defensive, but we submitted, in addition to the report, an overview, and if you look at the overview, stage three is less than one page; it has six subsets, and I really think that that stage three, that one-page thing, is a workable standard. And the lobbyists can haggle with the staff and the various interest groups when they're fighting over it about whether they have accurately done it and then whether this fits within Greg Leonard's example 1 or not, and people can argue about that, but I think that the six steps that are taken, that are reflected with bullet points in less than a full page, really is something that is a workable standard that we can - the Chairmen of the Judiciary Committees, if they buy into it, can just say, "We expect, when you guys walk in to us, that

you will cover these points."

COMMISSIONER YAROWSKY: Professor.

MR. CARSTENSEN: This is the problem you're going to have; it's really got to be the Chairmen or other leaders of the Committees who are saying to proponents and to staff, "Here's the kind of information you've got to come in with, and here's the kind of commentary we need before we can go forward." That gives a certain level of deniability to the Committee - "Gee, we'd love to help you, but you haven't crossed your "T"s and dotted your "I"s on this.

One thing that occurred to me, and I can go back to your six points, is that there may be a seventh, which is a strict construction of any exemption or immunity that is granted.

Again, I refer to you the Wisconsin statutory language as a way of giving courts a clearer notion of what they are supposed to do when they confront one of these exemptions.

COMMISSIONER YAROWSKY: That has been very helpful.

MR. ROSS: Let me just throw in something

that should not probably be in your formal report, but might be something some of you might mention when you are marching this up to the Hill. Given the problems that Chairman Miller identified with the political marketplace, I would observe that a sunset provision allows people to restudy an issue every five years, and if important campaign contributions have to be made so that the Committee focuses properly on their issue every five years, certainly some members of Congress might find that to be a realistic benefit of what we otherwise consider to be a public interest proposal.

COMMISSIONER YAROWSKY: Well, we're happy to have you back after 20 years.

Professor, you also suggested in your testimony that one should maybe create - you didn't say presumptions, but consider such things as pooling and other types of joint ventures as reasons. Can you explain that a little bit further?

MR. CARSTENSEN: Well, there are two different categories here. That is, a joint venture as described earlier in the trade context, which is a legitimate productive venture, seems to me to be

exactly the kind of thing that is now clearly made lawful by federal antitrust law. And to the extent you have questions about it, you come through the business review clearance.

What I have been looking at in the context of agricultural markets - and here I think I am somewhat at odds with Chairman Miller - is that the problems that arise when you have got a single buyer or a few buyers in a market who can exercise very substantial buyer power, if they deal one on one with a whole group of small producers - in that context, there is an efficiency gain in terms of market facilitation possible, when you allow the producers to organize into some sort of a bargaining or marketing group, so that you get a negotiation that will revolve around costs and a more equal allocation of the benefits.

And again, the examples that I used - and this may be significant - where the buyer in turn is in a downstream competitive market so that it does not have any monopoly power in the resale of the goods, so that we are not looking at a division of monopoly but rather looking at the - I think they are

called Ricardian rents - that arise within the efficient production and who is going to be receiving those.

That kind of problem, which may be resolvable in part by the use of some kinds of group negotiations, I would emphasize that, as I said in my paper, the first best choice is to figure out some way to facilitate the efficient operation of the market as a market, and that is where my preference would be and where I have actually been advocating in some other agricultural areas for reform of the marketing system so that you can have much more individual transactional markets that work with the problem of excessive exploitation.

COMMISSIONER YAROWSKY: All right. Thank you very much.

Mr. Abbott, given the framework we have sketched out, and that you have heard, would you have any problem with Congress reviewing the exemption that applies to non-profits in terms of the FTC's investigative ability?

MR. ABBOTT: Well, I think the framework I proposed, we proposed, was a general one that in

principle should apply to all immunities.

COMMISSIONER YAROWSKY: Okay. I accept that.

Chairman Miller, you have really made a difference in this town in terms of moving it and others, too, to consider deregulation and privatization in a very important way, an historic way in the last 20 years.

MR. MILLER: The jury is still out on whether that is a positive or a negative.

COMMISSIONER YAROWSKY: Let's just take a freeze frame. I'm going to give you credit today. But I do want to ask you and others, because I think this isn't a subject of immunities and exemptions, and you may have heard me lead up to it in the previous panel. There is kind of a - in some instances there is a hybrid state of regulations so that Congress passes a regulatory act or delegates regulatory authority. It's not like the old days, like in the ICC days, where there is a total regulatory scheme, which would clearly displace competitive, displace antitrust, because it's antithetical, and we have to accept it for better or

worse. We just have to accept that.

It is in between.

In that case, how - is there a framework, theoretical or practical, we should try to put our arms around to deal with the role of antitrust in those hybrid regulatory settings?

MR. MILLER: Let me distinguish two things. Someone gave me a call yesterday, and we chatted about a particular issue involving telecommunications.

You have a situation where sometimes companies follow the regulator's dictates about what prices might be, and then there is some liability, although I understand the courts have pretty much ruled this out, of their being sued because of monopoly pricing, but it was pursuant to a regulator's dictates.

On the other hand, I don't think there is any question that, if companies in competition are regulated get together and engage in violations of Section 1 or 2, they should not be immune from prosecution.

And one other thing I mentioned in my

testimony is that, under the old ICC, even, the trucking companies and the railroad companies were not immune from antitrust liability to sit down and talk about rates and engage in the rate-making process. They were immune only insofar as the Interstate Commerce Commission put the laying on the hands of what they did and within the four corners of what the ICC said they could do.

I agree that a lot of more modern regulation has made it a little difficult, and the line is blurred a little bit.

COMMISSIONER YAROWSKY: Well, let me ask you this, because again, as at the beginning of this segment, we tried to concretize. This raises issues of drafting, legislative drafting, just like we're talking about with the immunities and exemptions. Should there be a presumption that unless the antitrust laws are explicitly excluded from a statute, they apply? What's the default position? Should that be the default position?

Or should we say that, unless there is a savings clause where it actually says at the end, "And guess what; the antitrust laws apply?" -

So the question really is if Congress doesn't write a savings clause that says, "And by the way, the antitrust laws apply," should they not apply?

Or should it be the reverse? Should we assume the antitrust laws apply unless they are explicitly excluded? Because this is again a drafting suggestion that might be helpful to avoid a lot of litigation for years and years and years.

MR. MILLER: Well, being the only non-lawyer at the table, I think I am probably as well qualified as most, to see it from the eyes of most Congressmen.

I think that, unless there is a savings clause, the presumption is that the antitrust laws do apply. However, this raises an important point, because if I were at the Federal Trade Commission with Alden, and my former colleagues and someone brought to my attention, and if it were something where the firm at risk had in fact, in good conscience and in good will, carried out a requirement of the regulator, I would see this as a defense, even though there was not an explicit exemption from antitrust. I would choose not to - I

mean I would use prosecutorial discretion not to take issue with them even if I thought that the outcome was a bad one or inefficient in some way. But of course that wouldn't immunize from private liability.

MR. ROSS: I think that that suggestion is an excellent one, for a number of reasons. First, the way I would deal with the problem that Chairman Miller talks about is to apply basically the same doctrine we use in international law, the sovereign compulsion defense.

So I have absolutely no problem - you know, if somebody was price fixing because Margaret Thatcher told them to, well, we are not going to prosecute - true story - and likewise, if the ICC is telling them not do it -

But absent compulsion by the other regulator, it seems to me that default rule against implied immunity is incredibly important for a number of reasons. And that has to do with the legislative drafting process.

Who is best qualified to know what the problems are, to realize that some regulatory mandate might run afoul of the antitrust laws, to have the

expertise to at least start the drafting process? It's the lawyers for the regulated companies, and it's staff counsel for the industry, you know, at FERC and FCC, and those are the guys who know that.

So if you tell them, if it is not absolutely clear, that you don't get an immunity, that provides a powerful incentive for them to do this. And if your staff wants to go back into the books, there is now an extensive law and economics literature on default rules in contracting that talk a lot about putting the burden on the default rule on the party who has the most information as the one most likely to lead to efficient contracting, and I think there is a very good analogy here for that reason.

Make it absolutely clear what you suggested, Commissioner Yarowsky, and then you will bring out - this doesn't prevent anybody from doing anything they want, but it just has to be done very clearly - and it will bring the lobbyists and the agency counsels up to the Hill to do their work.

COMMISSIONER YAROWSKY: Professor.

MR. CARSTENSEN: We have some more transition issues, I think, than is fully appreciated

when you are moving from a market that was conceived around command and control, and I'm thinking of electricity and some of these other - and even telecommunications. So I am a little nervous about - okay, in the absence of a clear preemption of antitrust, the antitrust court on its own should go and start making decisions. But I think we have a doctrine, the doctrine of primary jurisdiction, and Professor Darren Bush in his comments raised that as an - in his written comments, flagged that as a very important tool here for the antitrust court to look at some broader part of what an agency might be trying to accomplish in this transition time.

There is a very interesting Ninth Circuit opinion, the name of which I don't recall exactly, involving natural gas distribution in California, where it is more of a state action issue, but they try to chart things out in terms of the relative role of the regulator and the market in deciding when fuller antitrust would apply, and I think that is a helpful intermediate step that you may want to look at.

COMMISSIONER YAROWSKY: Okay. Thank you

all.

MR. MILLER: Madam Chair, could I follow up with the Vice Chair's point?

You know, my suspicion is that members of Congress don't really know that they have all these exemptions out there; they don't know. And putting them all in one place, and bringing it to their attention, I think, is going to be a very useful thing.

I remember at the beginning of the Reagan administration, we pointed out to the President that his executive orders - and we had just gotten him to sign Executive Order 12,291, which set up the benefit-cost testing and reporting to OMB and all of that, that these were his regulations. Those were his regulations, and so we did a sunset, tried to do a sunset, on these regulations, and of course people came out of the woodwork and protested mightily, et cetera. But he had not looked at them that way, and others had not looked at them that way, and I suspect members of Congress have really little conception of what they have done here.

CHAIRPERSON GARZA: Thank you. Commissioner

Litvack.

COMMISSIONER LITVACK: I am not surprised, and I doubt that anyone is surprised, that when you have an antitrust commission and an antitrust hearing with antitrust experts that everyone thinks immunities aren't something that ought to be lightly granted, and we ought to stay with the antitrust laws. It would really be shocking to the world if we reached some different conclusion.

So I don't have a lot to ask you. I mean, yes, you all agree that there should be rigor, there should be sunset, and all this should happen.

I have one general question, which is probably slightly off the mark, anyway, but - look, we have all these exemptions. They are there. Suppose that everything you say is applied rigorously for the future. What do we do about what's there?

And I guess my question is really the following, to be specific:

Should there be, in fairness, any different test or any different burden in terms of repealing or sunsetting these provisions than the one that has been articulated with respect to the innovation or

granting of these immunities? Does anyone think there should be a different test? And I guess I'll start with Professor Ross since he seems the most animated.

MR. ROSS: I think - I would say yes, and my answer would be paradoxical. For members of Congress who think about fairness, the greatest concern about sunsetting is with regard to the worst exemptions.

To go back - since they asked for and got 45 minutes, I guess they deserve it - to the Commerce Department, there is no anticompetitive illegal behavior at all. Oh, but we would certainly need a transition period for all these people who have made investments in reliance on the fact that their behavior is perfectly legal and of course we will never sue them, anyway -

I think it is hard to justify any significant transition there. For the insurance industry, for the very anticompetitive things that they may be doing that may make the repeal of the McCarran-Ferguson Act or significant narrowing of it one of the more significant pro-consumer things, I think there is a very fair question about how much

time you need, and I think Congress is uniquely suited to make those sorts of judgments, both in terms of antitrust law, and in terms of doing other completely non-antitrust things.

One of the things - and I don't know if Chairman Miller was involved in it - but I seem to remember that there was a special tax break that people who add value in an ICC license, primarily because it gave you monopoly profits, and I think they were allowed to depreciate that break over some relatively - like a five-year period - as a way of helping them out. And that was a change in the tax laws.

So I think Congress has lots of tools that it could use, and I think it is a legitimate case, but there's that paradox there.

COMMISSIONER LITVACK: Chairman Miller, the same question, except let me just change it just slightly to, say, focus on the question of, with this long list of exemptions, whether there should be some burden, some inquiry to prove that they really have been anticompetitive.

In other words, maybe most of them are no

harm, no foul. Maybe the antitrust laws should have applied, but you can't show any adverse impact from the immunity in the first place. Should there be any studies to do that?

MR. MILLER: Well, I said in my statement and orally, too, that I think that the adverse effect on competition is less because the market is so dynamic and technology moves so fast. But, nevertheless, it is a good argument to eliminate most of them.

Look, Congress works, as my professor now deceased, Warren Nutter, used to say on the theory of the thermostat. It's like the temperature has got to rise to a certain point before the AC kicks in, and fall a certain amount before the heat kicks on. You have to get their attention. But if you've got a good argument, you eventually can.

The first issue I worked on in graduate school was the military draft. It was very inefficient, and seven of my - six of my colleagues and I wrote a book on the military draft, and four years later - not just because of my effort, our effort - but four years later, the draft ended.

COMMISSIONER LITVACK: We want to thank you.

(Laughter.)

MR. MILLER: And I started writing at the time - you know, Ted Keeler and Bill Jordan and others began to write about airline regulation. Hardly anybody gave a passing thought to the inefficiencies created by airline regulation. But yet I was there when President Carter signed the airline deregulation bill, and I am proud to say an economist helped lead the CAB to make that happen.

And likewise, with trucking and railroad deregulation, there an economist led the ICC, Darius Gaskins.

And so, when you make a good argument and the newspapers pick it up and show the inequities, that tends to drive things more than an efficiency argument, the inequities caused by that; it gets Congress's attention.

The basic screen should be the same whether it's existing immunities or new immunities. And I think it was laid out in the paper of Mr. Ross and his associates quite well.

COMMISSIONER LITVACK: Madam Chair, can I

allow the other two to ask the question?

CHAIRPERSON GARZA: Sure.

MR. ABBOTT: I would agree that the same screen should be applied. I'm not endorsing a specific screen, but with regard both to existing and new proposed immunities, the burden should be on those who propose the immunities or propose retaining immunities. And that is because, with existing immunities, it may be very hard to prove up the but-for world. You can show why these are the benefits, but there may be subtle costs that come to light only after an exemption is repealed. So the fact - and because it is so difficult to prove a but-for world, it may be very difficult to prove that existing exemptions have caused great damage.

But if benefits cannot be shown to follow from the existing exemptions, it seems to me there is still a substantial argument in principle for not retaining them.

MR. CARSTENSEN: I think the point to focus on is whether there are investments of various sorts that need to be recovered or unexpected risks. And I thought immediately of the Bank Merger Act that

changed our regulation of banking and also insulated all previously consummated bank mergers from Section 7, but not from Section 2.

One might want to do that, for example, in railroads, so that the Justice Department can't go back and say we won *Northern Securities*, darn it, we're going to reopen that case once again.

So one would want to look very carefully, because there will be enormous incentives to say, "Oh, my goodness, the world is coming to an end."

For example, I disagree with Steve about insurance. Most of the insurance industry is operating under a very competitive regime right now. The transition costs of insurance companies are minimal. There is a problem of shared pooled prospective information that they have to worry about, but that is not their major economic risk invested in the enterprise.

COMMISSIONER LITVACK: Thank you all. Thank you, Madam Chair.

CHAIRPERSON GARZA: Thank you. Commissioner Kempf.

COMMISSIONER KEMPF: Yes, I want to thank

all of the panelists for your papers, and I particularly want to thank Chairman Miller, because you touched on stuff that I have been focused on from our very first meeting.

I want to address two things in particular with you. In your testimony, you refer to something that is in your written testimony where you state that there was a respectable body of academic literature suggesting that the antitrust laws and their enforcement may well do more harm than good, and you suggested in your oral testimony that that is something we should look at.

What specifically would you recommend in that regard?

MR. MILLER: Well, I know the ABA meeting I guess last year had a session on that issue, but that would be something that you could take a look at. But, you know, the underlying assumption of the Commission's work is that the antitrust laws make sense and - excuse me, at least in this issue of antitrust immunities and exemptions. The default assumption is that the antitrust laws really do generate a lot of benefits at very low cost.

I would just say that that is an assumption you ought to deal with, and you know, I don't mean that you need to hold hearings on whether the antitrust laws are good or bad, but I think it is something that, in your report, you might make reference to, and take a look at. Crandall's piece and - Crandall and Winston and some of the things in their piece. Their piece is cited quite often as an example.

COMMISSIONER KEMPF: And you are careful in your paper itself to again stress that everything that follows that is all based on assumption, not on fact.

MR. MILLER: Well, yes, it is based on an assumption, but it is an assumption I think predicated on reasonable conclusions that most people have. I think people who argue that the antitrust laws are not beneficial are very much the minority.

COMMISSIONER KEMPF: Let me next shift over to the subject of the immunities and exemptions themselves, and I particularly appreciate your highlighting organized labor and farmers in your testimony, both oral and written.

My fellow Commissioners have heard me say numerous times that I have a concern that the antitrust laws don't enjoy the respect that they should among the general populace because so much of our activity is price fixing every day, all day, pursuant to a wide variety of exemptions and immunities, and they have heard me tell the story of the two guys in Iowa, one of whom is a farmer and the other of whom is a farm-implement seller. They both do a good job of price fixing, and they both get their cover on the magazine. One is the "Man of the Year," and they hold a big dinner for him, and the other guy is in the "Police Gazette," and he goes to jail. And they both do the same thing, basically.

But every time we get to talking about antitrust immunities and exemptions, the ones I hear most frequency are - we need to get rid of the baseball exemption, which baseball pretends it doesn't have yet allowed Paul Konerko to get \$60 million yesterday as a free agent; or the export associations, which we spent 45 minutes on today, and everybody says, "Gee, they have no impact at all, or if they do, it's two guys in Bolivia who pay a little

bit extra for widgets."

Nobody wants to talk about either labor or farming, and those cost hundreds of millions of people hundreds of millions of dollars, because they cover most of what we buy, the products we buy, and much of what we eat.

To say that it's Don Quixote tilting at windmills may be accurate, but my view is, unless you focus on that reality, it's sort of silly to be talking about exemptions that don't impact anybody.

So my focus has always been what do we do, not about the exemptions and immunities that don't impact anybody and nobody cares about one way or the other, other than very small special interest groups, but what about the big ones, labor and farming? If we all recognize those are nearly impossible for Congress to even look at, let alone change -

MR. MILLER: Well, I think you can chip away at them and chip away at the extremes. The president's executive order, basically causing workers to understand that they have a right not to contribute to political campaigning on the part of the - undertaken by the unions, that is a way of

restraining certain, in my judgment, excesses of the use of the antitrust immunity, but I don't know - you chip away at it, and sometimes people in organized labor are quite reasonable in understanding that certain things make sense, and certain things don't make sense, and I suspect there are people who feel that, both in agriculture and in organized labor, there has been some overreaching.

But when I say Don Quixote, I just do not see a political will to take that on, on Capitol Hill.

COMMISSIONER KEMPF: Steve.

MR. ROSS: If I could respond, I don't disagree, but I think there is a little more to it, and I think that if you adopt - look at our framework, my suspicion is, you and John Sweeney would reach very different results as you walked through the five stages. But I think the framework really accommodates this, and the labor exemption is a good example. The Wagner Act was passed based on a view that workers needed to be able to organize collectively and collectively bargain, A, to prevent unbelievable wealth transfer of their labor to

capital, and B, macroeconomically, to give them purchasing power that would end up helping in the economy.

It is a perfectly legitimate thing to say, "That was 1935; this is 2005, and we ought to repeal the National Labor Relations Act." But that is a policy decision that Congress can make. And I think that the labor exemption is a classic example of something that is pursuing socially - in the view of Congress - socially desirable activities, at least when they passed it.

And it is a very fair question to ask whether those things are still socially desirable, and I am sure that, as I said, you and the AFL-CIO would have very different views on that. But I think that the framework that we are coming up with really provides an answer to that. And I would suggest, quite frankly, that, unlike some other exemptions that may be sacred cows, the reason that the labor exemption won't be repealed is that members of Congress probably - at least enough of them to block the legislation - probably just don't share the view of critics of the labor exemption about the social

utility and wealth distribution that's going on.

The thrust that I made in the opening paragraph is, if antitrust law is going to be focused, like William Howard Taft said, on competition, we have to allow Congress to make even boneheaded political judgments about what is socially desirable and what isn't.

MR. MILLER: What he was just saying makes me think of a thought experiment. Suppose that Congress had a secret ballot on these two issues. The vote might be very clear. It might well go the way of abolishing both.

COMMISSIONER KEMPF: Can I ask the Professor just a quick follow-up question? What do you think of taking the framework that you developed - somewhere along the line, judgments you talked about in the courts - they said, "Well, let's draw a line in this. We've done enough of this already. We have *per se* rules." What do you think about the courts' abolishing *per se* rules and taking the framework you put forth and saying, "Hey, let the courts make those decisions as well as Congress?"

MR. ROSS: Well, as the first paragraph

expresses, I agree with William Howard Taft. I think that is setting sail on a sea of doubt. I think having generalist judges - I think it would be troublesome enough to have the Federal Trade Commission do that. At least they would be experts, and they would be subject to the political changes. A Jim Miller might view things differently than might a Bob Pitofsky, and there would be the sensitivity.

To have it thrown up for grabs, and if you happen to get Steve Reinhardt, you get one result, and if you happen to get Alex Kozinski, you get a very different result - I just don't think is a good system.

COMMISSIONER KEMPF: Thank you.

CHAIRPERSON GARZA: I think Professor Carstensen had something. We have time, I think, to take a short response.

MR. CARSTENSEN: As the ag. person here, I am the son of someone actually born on a farm in Iowa. That's as close as I get in family ties. I want to make sure we are a little clear about the ag issues. For most agricultural commodities, there is no cartel, there is - at least no government-

protected cartel. Capper-Volstead, on all the evidence by itself, does not give farm co-ops any particular leverage in the market.

What does create problems is the Agricultural Marketing Agreement Act. I'm onboard for getting rid of that one. But you have to understand, it applies to fruits, nuts, and cows. That is, dairy cows. And it is really only in the dairy cow area that there is a serious problem, because there, it is a relatively pervasive one. There is some good evidence that it imposes significant consumer costs and enormous inefficiencies on the way our whole dairy product system works.

There are enormous complexities in there. If you can suggest to Congress it is really time to bring dairy subsidies, whatever you want to do to protect dairy farmers, into, gee, the 20th century, maybe even the 21st century, I think there is some real progress to be made there, and the time may be now, because dairy farmers have fallen to quarreling among themselves, and that gives a political opening.

CHAIRPERSON GARZA: Thank you. Commissioner

Valentine.

COMMISSIONER VALENTINE: Thank you all obviously, for your statements.

I have been puzzled somewhat, like Commissioner Litvack, over why we should be perhaps so fair and evenhanded with respect to the existing immunities and exemptions. I think the framework that the three who gave us their eleemosynary efforts makes lots of sense for immunities that we may see coming down the pike, when Congress wants to get about creating a new immunity - basic, straightforward, fair balancing of costs and benefits.

But I think, with respect to existing immunities and exemptions - I mean we know that they are not all the same. Some are really historic anomalies and absolutely useless; some are more harmful than others. And why wouldn't we want to look at existing ones and say, okay, with respect to certain that are historic curiosities or absolutely are justified like ocean shipping or maybe some of the detritus of the transportation statutes that Professor Carstensen points out that are left over

from deregulation of those industries, just recommend getting rid of them and be intellectually honest about it?

And then with ones that apparently all that's going on is legitimate, procompetitive joint venture activity, like Export Trade Certificates, they don't need an immunity if all they are doing is what Mr. Sullivan says that they are doing.

So why don't we just say, "Okay, those don't need it either," and I don't know whether Capper-Volstead falls there or not?

Maybe others we make clear that, okay, we will allow some immunity for the data pooling in the McCarran area.

Why shouldn't we sort of bite the bullet a little bit more? If we wait for Congress to review all of these - I mean, unless we are going to sunset them all tomorrow, this is going to take a long time to get to a rational world.

MR. ROSS: That is a very good question, which the framework doesn't address in terms of an implementation. There are two ways that you guys could approach this to address Commissioner

Valentine's question.

One is that the AMC could actually review exemptions and comment on them. We had been told through staff that that was at least not your initial preference, which is why we tried to come up with a general framework. But that obviously is not in stone, and that's obviously one possibility, and for those that you see fit, if there is sufficient consensus, you can just recommend repeal, and there you go.

The other possibility would be to have a staged sunset; the Federal Trade Commission shall report in one year on any exemptions for which it feels little justification exists, and those where it feels some substantial justifications exist, and anything where little justification exists, is sunsetted in two years. And anything where the Federal Trade Commission -

MR. MILLER: Unconstitutional.

MR. ROSS: Well, all right. Anyway, there are ways to work the -

COMMISSIONER LITVACK: The one non-lawyer says to us.

(Laughter.)

MR. ROSS: But there are ways to set it up. You could set it up like the base-closing commission, and -

MR. MILLER: But you would have to vote on it.

MR. ROSS: You would have to vote on it, but it's an up and down or something like that. But there is a process that you could work out to do that.

But I think the way the two choices you have, if you want to address existing immunities, it seems to me, are either directly substantive comments by the AMC or setting up some framework for a staged sunsetting of existing immunities.

COMMISSIONER VALENTINE: Can I ask one question? This is on page 8 of your report. It comes up in stage two. And either it's a null-setter, an oxymoron, or I'm not reading properly. You are talking about - okay, you want to show pro-consumer justifications, and the justification should be based on a legislative determination that the immunized conduct would enhance consumer welfare.

And you say, "Okay, now this is going to be hard since the antitrust laws themselves are designed to promote consumer welfare." And then you say, "Thus, a valid pro-consumer justification for an immunity from these very laws, the antitrust laws, would likely be limited to cases where the conduct in question may create antitrust liability under existing antitrust statutes in case law, even though research and experience has demonstrated that conduct to be pro-consumer."

What conduct fits in this box?

MR. ROSS: Well, I think there are a couple of things. One is - and the testimony may suggest that in the minds of Congress the last sentence here may have been an empirically inaccurate prediction - one would be the sort of chilling-effect problem. It's perfectly legitimate conduct, but people don't do it. I was talking to Professor Carstensen in the morning session, and the facts are that everybody said that the National Cooperative Research Act was completely unnecessary, because everything was legal, and why can't they just even go get business review letters?

Well, you passed the statute and way more people filed than had previously sought business review letters.

This strikes me as economically irrational behavior, but since I'm not an economist, I'm prepared to accept that people don't always behave economically rationally, and so that may be a legitimate reason for an exemption.

This was Commissioner Burchfield's comment earlier. People need comfort for ill-founded misperceptions. And that is one possibility.

The other possibility -

COMMISSIONER VALENTINE: "May create antitrust liability" means people wrongfully and improperly perceive that the antitrust laws could be misapplied to them?

MR. ROSS: Right. And the second situation is a situation where a law may be - and I think this is where you're thinking of the - but the law, where the case law is wrong. But, for whatever reason, Congress might find it not to be a great idea to simply change the case law.

Let me give you an example, a counterfactual

example, on the real facts. The district court in the *Topco* case found that exclusive territories were absolutely essential for small grocery store cooperatives to exist.

Now actually, that turned out to be completely wrong, because I still buy *Topco* products today, and they found a very easy way to get around with no problems with the exclusive territories.

But let's assume that was correct, and as Justice Blackmun said in his concurrence in *Topco*, this is a shame because *Topco* is going to go out of business, and this is terrible.

Now Congress might well have decided, and I would think properly, that it was not going to legislatively rewrite Section 1 to come up with a new rule for joint ventures, that that was something it really needed to let go forward.

On the other hand, these particular exclusive territories in small market cooperatives might be pro-consumer, so they might want to pass an immunity from the law.

Now this is a narrow set of circumstances, but it seems to me that there are circumstances where

you are immunizing things from what Congress thinks is bad law, bad case law, but Congress quite properly decides we do not want to open up the Pandora's box of completely redrafting the law of horizontal restraints or the law of vertical restraints or, you know, anything like that in order to solve the one problem where, to use Chairman Miller's analogy, the thermostat has forced the air conditioning on.

COMMISSIONER VALENTINE: Okay.

CHAIRPERSON GARZA: Commissioner Cannon.

COMMISSIONER CANNON: Steve, listening to you, I can close my eyes and go back to 1982, when we used to have these exact same arguments, sitting around the conference table in the Judiciary Committee, if you remember. Some I won, some he won, I think.

But listening to all of this, I mean, in the end I am in fact looking at you and Jim Miller and myself and Jon Yarowsky here, going back a few years where we had precisely the same arguments, and looking at the Report that you guys did - especially on the area of kind of less restrictive alternatives, that's what a lot of those things were all about.

Beginning with the NCRA and then heading into, if you remember, the Local Government Antitrust Act that we were all involved in -

To Jim's point, you know, a lot of these things that get on the books are the results of their being essentially event driven. I think you would probably agree with that. Would you, or would you not? Let me get you to opine.

MR. ROSS: The Local Government Antitrust Act and the substance of it was absolutely completely driven by one large jury verdict in Illinois, and the Federal Trade Commission's pro-consumer challenge to a City - I think it was a taxicab regulation.

COMMISSIONER CANNON: New Orleans, Louisiana is, I believe, where it was. Is that right, Jim?

MR. MILLER: We sent an attorney down there, and we were not sure he would make it back.

(Laughter.)

COMMISSIONER CANNON: But that is the point. And I have had more than my share of questions today, so I don't want to take up time; we're running a little bit late.

But in the end, as I remember, all of our

discussions on the Local Government Antitrust Act, obviously a bad case or at least a lot of the state and local and municipal government community viewed it as a very bad case, prior to that case coming out, after the *City of Boulder* case, everyone said, "Well, it's theoretically possible that a municipality could be held liable for antitrust damages, but it will never happen." And then about two months later it happened.

And so it seemed to me that, if you recall, I remember very well a lot of folks coming to the Hill on their cost-benefit analyses, which is exactly what you are talking about, saying, "Well, look, this is horrific because you can see taxpayer dollars going to pay damages."

But what I think the Congress did at that point was essentially engage in your analysis up to a point for a less restrictive alternative and said, "No, we are not going to exempt this conduct or exempt these entities from the antitrust laws. We are going to make injunctive relief available, and we are going to eliminate a damage remedy."

So am I missing this, or is that exactly

what we are talking about here today?

MR. ROSS: My memory isn't good enough to say that Congress actually used the framework, but certainly I think the approach of focusing on less restrictive alternatives and then why things were necessary and the insistence that one of the tools of a less restrictive alternative was the Federal Trade Commission's continued ability to scrutinize those things, which was a key piece of the puzzle, I think is an important one. Although, à propos of that, I will note for the suggestion about committee jurisdiction, that at that time, the idea that we would put this pool together and lift an appropriation restriction on the FTC and make substantive changes led a - not Jon Yarowsky, but another House Judiciary Committee staffer with an otherwise impeccable record of strong antitrust enforcement to opine that he didn't care if the Sherman Act were repealed or the Federal Trade Commission zero budgeted as long as the first bill came out of the Judiciary Committee and the second bill came out of the Appropriations Committee.

So I think it also recognizes the importance

of recognizing clear turf battles in Congress in this process.

COMMISSIONER CANNON: Jim.

MR. MILLER: Could I - your question, Steve, just triggered a thought in my mind. One thing the Commission might want to address is the tolling of any agency comments on regulations engaged in by the federal government or by state governments, specifically on agricultural marketing orders.

When I was at the FTC, we had the audacity to say some things about agricultural marketing orders, and then we had an appropriations rider preventing our spending any money to say anything about that.

MR. ROSS: And the same thing about insurance.

MR. MILLER: Insurance was there already, and when I went over to be Director of OMB, they put an appropriations rider on that so I couldn't say anything about agricultural marketing orders from OMB. And then I had the audacity to propose privatizing the PMAs, the power market administrations, and they put an appropriations rider

on it so I couldn't, say, at least spend any taxpayer money. I guess the First Amendment gave me the authority to say whatever I dadgum well pleased on my own private hook.

But that is an interesting issue you might at least flag there.

But let me just, I think in a fundamental way, ask the question of whether that was good legislation. The Federal Trade Commission took issue with the city of New Orleans for monopolizing its taxicab industry, and there were interstate commerce effects.

Well, basically, the statute put us out of business in that regard, but was that a good thing or bad thing? I think it was a bad thing, because if you had - and if the taxpayers of New Orleans allowed their elected officials to engage in anticompetitive behavior, they should hold those officials responsible and replace them.

COMMISSIONER CANNON: Alden, did you want to say something? You looked like you were -

MR. ABBOTT: I think I will -

COMMISSIONER CANNON: I had a feeling you

might.

MR. ABBOTT: Brevity is the soul of wit at this point.

COMMISSIONER CANNON: Well, you are very witty, no doubt.

(Laughter.)

CHAIRPERSON GARZA: Well, you know, I actually have found the written comments and the oral comments here today to be very helpful to me in my thinking, and most of my questions have been asked and answered. But I do have one thing that I wanted to raise maybe a little on the margin.

You know, there are certain - not all exemptions are equal. They are very complex. And there are some like the standard-setting organization legislation recently passed, the NCRA, to some extent I think, the Export Trading Company Act that some have argued, not really exemptions - special treatment, maybe, but they are really aimed at addressing another concern that we have been addressing in the Commission, which is the inefficient impact of the fear of treble-damage actions, which some people have minimized here, but

from time to time I think people have been concerned that, when it comes to the formation of joint ventures and cooperative action of competitors, the threat of treble-damage litigation in particular can be very significant and can keep that from happening. So you have the NCR; enough people seriously thought it was a concern that they took the time, spent the money to actually lobby for something.

Now at that point they didn't get a straight-out immunity from the antitrust laws, but what people came up with was something along the lines of activity - that the only activity that is covered is the activity that we think would be subject to rule of reason, which isn't *per se* legal, but rule of reason, therefore subject possibly to litigation and very expensive, protracted litigation.

But it applied to activity that we thought of as being subject to the rule of reason, and it required transparency; it required disclosure. So you didn't have the smoky room kind of things. If what you were going to do had to be disclosed, everybody had to have a chance to look at, the government agencies had to have a chance to object to

it, and indeed, private parties could still challenge it, although they couldn't necessarily get treble damages, but maybe that's not such a bad thing, because maybe it's not bad conduct -

This reasoning seems not too inconsistent to me with what people were telling us earlier on in the hearings, that, hey, we think that maybe you should consider recommend a detrebling of - or, you know, for certain types of conduct.

So I guess my question is, do you all see things like the NCRA and the SSO and the Export Trading Company Act as equally bad as some of the other immunities and exemptions that we have been talking about today?

Professor Ross.

MR. ROSS: I have to disclose here that my views on this have changed since Steve Cannon bought me lunch at the American Café and we negotiated Senator Metzenbaum's graceful withdrawal of his opposition to detrebling in the NCRA.

But I have come 180 degrees on that question that was of so much concern to my former boss. I think these immunities are very different, and I

think that they are a good thing. Without going into the entire general detrebling debate - which we obviously don't have time to talk about - let me give you my perspective, which comes from my study of Canadian law, where they don't have treble damages.

And that is one of the essential elements, I think, that makes the American economy competitive and vibrant, that we have a minimum viable scale of a plaintiffs' bar. And in that - that is an externality that transcends any particular case. And that is why I would be so strenuously opposed to a wholesale detrebling, even a detrebling of rule of reason along the lines that you talk about.

But having said that, I think that there are areas where there are general deterrents, and I think public policy is actually better served by maintaining treble damages as the normal rule and allowing a minimum viable scale for a plaintiffs bar, and then exempting congressionally where you can go through this cost-benefit analysis and you can show that careful drafting in the matters that you are exempting really are likely to be procompetitive, and it is sunsetted for periodic review. I actually -

that is a preferable way to go.

And there are many reasons for it, but I will just out the one that I mentioned as one that perhaps the Commission hasn't had a chance to think about.

CHAIRPERSON GARZA: Anyone else want to comment?

MR. CARSTENSEN: Well, I guess I would throw in the thought that, in our work on the monograph, we have really come to talk about exemptions and then modifications of antitrust law as a way of separating out these things on treble or elimination of damages, but allowing other remedies.

I am also struck by your description - again, the problem is the uncertainty going in, and the apparent reluctance which Steve tells me is economically irrational, to use the business review clearance process.

CHAIRPERSON GARZA: Have you ever tried to use the business review clearance process?

MR. CARSTENSEN: No.

CHAIRPERSON GARZA: Okay. Thank you.

MR. CARSTENSEN: I was at the receiving end

years ago when I worked at the Antitrust Division, but it does seem to me that again thinking - one of the things to think about rather than the trebling versus detrebling, which may not be a very good discriminator among the cases that ought or ought not to be subject to damage claims, to think more about whether you want to recommend an improved, less daunting clearance process that might work more generally as a way of addressing some of these concerns and uncertainties that individual clients - because they are going to come from all over. All different kinds of business transactions. And we do get these silly event-specific, you know - Charitable Donations Antitrust Immunities Act or the Anti-Hog Cholera Serum Act. It would be nice to have a different method of dealing with the problem of giving some comfort to legitimate business transactions.

CHAIRPERSON GARZA: I don't mean to be too flip about the business review process, but the one thing I think happened at the time of the NCRA - I think people considered the possibility of doing something like the exemption, the block exemption in

the EU and decided that they specifically didn't want to have the Justice Department looking at that.

Commissioner Burchfield?

COMMISSIONER BURCHFIELD: Thank you. I will be brief.

First of all, Chairman Miller, I appreciated your comments about the political monopoly, and if the 12 votes of this Commission were sufficient to overturn the five votes in the *McConnell* case, I would certainly be an advocate to do that.

The only comment that I have goes to the point that Professor Carstensen was just making, which is the business review process. To the degree that these exemptions have arisen - and some of them, I think, have out of either misperceptions or fear that antitrust laws would be improperly applied to legitimate competitive activity, does the panel think that a revived or modified business review process at the Justice Department might help eliminate some of that concern?

My experience with the business review process - and I haven't used it in years - is that there is ample concern by clients going in that,

rather than getting a business review letter, you might get an antitrust investigation by going in and asking for approval of a particular transaction.

Comments on that, Professor Ross?

MR. ROSS: Well, that's a good explanation for what struck me as otherwise being economically irrational, and if that is true, I think that is a serious concern.

But the problem I have is the mismatch between that and the arguments made. To use the one experience that I know most about, the idea that - I mean if you think about it, I don't know that the government has challenged a research venture that was filed, and there had been - the only case that the government ever brought on that is something I just like to illustrate in class is obvious - when GM - I think the Big Three, and when they were only the Big Three, all agreed that they would only do research on catalytic converters themselves with this one joint venture that they would all contribute \$10 to or something.

So I guess I still don't understand, like in the context of joint ventures, why somebody would

say, "Oh, now that we have got the potential for detrebling, we are going to file this thing because the government might sue us, but then we'll get this great protection of detrebling," but, gee, in 1983, "We better not file for these perfectly legitimate, procompetitive R&D joint ventures because the government might sue us."

There is still somewhat of a disconnect there, I think, but one of the things I try to do as a law professor is realize that I am a professor and not a real lawyer, so I will sort of let you real-world people try to figure out why that really goes on.

COMMISSIONER BURCHFIELD: Any other comments? Professor Carstensen?

MR. CARSTENSEN: Well, I do think that you highlighted the point of the down side of coming in, and I don't - again, because I don't - I haven't done any of this, and when I did do it, I was at the Justice Department - I don't have much of a feel for whether there is a way that could reduce that risk.

I'm inclined to think that these are transactions, since they are proposed transactions,

proposed ventures, that really wouldn't raise - shouldn't raise - much of a risk unless what the client is really concerned about is all the other parts of its baggage that might get exposed, and I did recently, for other reasons, go trundling through and see that there were a substantial number now of business review clearances of some fairly complex information exchanges, joint ventures in transportation, ocean shipping, in fact.

So it looks to me as though this is a better route for those who pursue it than maybe some of the past experience and mythology might suggest. And so again, like Steve, I retreated to the monastery here, and don't have the hands-on feel for how to tweak that process.

CHAIRPERSON GARZA: Thank you very much to all of the witnesses, again, for both your written testimony, your presence here today, your toleration of our questions. You have been very gracious and also very helpful.

Thank you.

MR. HEIMERT: The hearing is adjourned.

[Whereupon, at 4:21 p.m., the hearing was

adjourned.]