

ANTITRUST MODERNIZATION COMMISSION

PUBLIC HEARING

Tuesday, March 21, 2006

Federal Trade Commission Headquarters
600 Pennsylvania Avenue, N.W., Room 432
Washington, D.C.

The hearing convened, pursuant to notice, at
10:00 a.m.

PRESENT:

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

ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director
and General Counsel

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Panelists:

THOMAS O. BARNETT, Assistant Attorney General for
Antitrust, U.S. Department of Justice
DEBORAH PLATT MAJORAS, Chairman, Federal Trade

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Commission

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'd like to welcome everybody here this morning. Before I start the hearing, I did want to take an opportunity to introduce two recent additions to the Antitrust Modernization Commission staff: Nadine Jones and Marni Karlin.

Nadine comes to us from Arnold and Porter. She's a 2003 graduate of Howard University Law School, where she was Articles Editor for the Howard Law Journal, and also a research assistant to Professor Andrew Gavil.

And Marni comes to us from Axinn, Veltrop, and Harkrider, where she was an associate. Previously, she worked with Debra Valentine at O'Melveny and Myers. She's a graduate of the University of Chicago Law School and a former clerk on the 5th Circuit.

We're really pleased to have them added to the staff.

Now, I'd like to open the hearing and thank our witnesses for agreeing to appear. We've been looking forward to hearing from you both. We appreciate that you've sent us members of your staff to testify and have given us written submissions in the past, and Chairwoman Majoras, we really

appreciate your giving us your room here and actually agreeing to sit on that side of the table.

MS. MAJORAS: Did I tell you we need the room for a Commission meeting at 10:30?

CHAIRPERSON GARZA: We're really good at clearing the room.

But I do want to welcome you to the hearing and, so that I can get you out of here quickly, let me just skip too much formality and tell you how we'll proceed.

We'll start with you, Chairman Majoras, and give you an opportunity to make your statement, and then we'll go to Assistant Attorney General Barnett and let him do that, and then each of the Commissioners will have an opportunity to ask you both some questions.

In order to keep us on schedule, we're going to ask the Commissioners to keep themselves to five minutes each, understanding that we'll end up going a little bit over that to give you a full opportunity to respond, but we do want to get you out of here by noon. We know you have lunch commitments and other commitments for the room.

So, with that, I'm going to turn it over to you, Chairman Majoras.

MS. MAJORAS: Thank you very much to all of you for

inviting me to participate in the hearing. I appreciate the opportunity to be able to share some of my views on the important issues this Commission is considering, and it is always a privilege to appear with my good friend and colleague, Assistant Attorney General Barnett.

As I understand it, the AMC is charged with determining whether the antitrust laws, some of which are more than a century old, should be modernized so that they function properly in our post-industrial economy. In my view, to the extent that any of the antitrust laws need to be modernized, it is to bring them in line with modern antitrust thinking, not to change them to fit particular industries.

The broadly worded language in Sections 1 and 2 of the Sherman Act, as well as the Clayton and Federal Trade Commission Acts, permits the courts, enforcement agencies, and practitioners to apply the antitrust laws in ever-more sophisticated and flexible ways as legal and economic learning evolve and our understanding of markets improves.

Although I, like I am sure the members of this Commission may not agree with the decision in every antitrust case—questionable decisions do not flow from deficiencies in the statutory language. Rather, they reflect flaws in legal and economic thinking.

Moreover, history has shown that flawed decisions usually are remedied through the corrective mechanisms of litigation and through the steady intellectual development of our courts, the agencies, practitioners, and academics.

Consider Section 7 of the Clayton Act. The statute has proven sufficiently flexible over the past half century to accommodate substantial changes in antitrust merger jurisprudence.

The courts and enforcement agencies historically have relied almost exclusively on market shares and other structural presumptions to determine whether a transaction violated the antitrust laws. Although structural analysis retains a place in current merger practice, particularly when we have to make decisions about a merger within 30 days, a progression of judicial decisions, agency guidelines, and academic work has changed merger practice, such that nearly all practitioners rely heavily on direct analyses of competitive effects.

My inclination against substantive statutory change extends to proposals to modify the antitrust laws to address specific circumstances and particular sectors of the economy. A virtue of our system is that courts and enforcement agencies generally have applied the same criteria flexibly to

an enormous array of industries, and the result has been consistent competition policy that gives firms a reasonable degree of certainty and transparency.

So, I disagree with those who maintain that the antitrust laws are not well suited for today's rapidly changing high-tech industries, such as software and pharmaceuticals.

There is, however, one significant caveat to my reluctance to make substantive changes to the antitrust laws. This Commission should seriously consider recommending the repeal of the Robinson-Patman Act, the overall purpose of which stands in contrast to the recognized goals of modern antitrust law, to protect consumer welfare.

Legal and economic scholarship has persuasively demonstrated that, on balance, this statute is more harmful than helpful to consumers, and there is no question that as we work with new competition agencies around the globe, and they look to the United States as an example of an antitrust regime with consumer welfare as its centerpiece, the Act stands out as representing contrasting policy goals and the protection of special interests, something against which we repeatedly caution our counterparts.

Even as the antitrust laws have evolved to make

greater use of economics and to focus primarily on consumer welfare, the number of statutory exemptions that shield competitors from competition in the antitrust laws remains high. Exemptions covering a substantial volume of commerce that are decades old remain on the books. I recommend that the AMC evaluate these exemptions and urge Congress and the President to consider their elimination, if warranted.

Fundamentally, antitrust exemptions typically are inconsistent with a central premise of U.S. economic policy, that vigorous competition in a free market, protected by the sound application of the antitrust laws, is the best approach to promote consumer welfare and efficiency.

If there is one thing that modern antitrust thinking recognizes, it is that markets are not static. Yet, many exemptions are several decades old and likely were based on justifications that probably no longer are valid. Innovations in communications and transportation and other technologies have improved capital markets and increased the ability of consumers and business customers to evaluate competitive alternatives without the assistance of government regulation.

Consequently, some exemptions that were thought to be needed to correct market failures when enacted likely no

longer serve our consumers and our economy, and once again, statutory exemptions from the U.S. antitrust laws can significantly hinder the ability of the United States to promote sound competition policies abroad.

Of course, the health of our economy has become increasingly affected by the competition policies of other countries. The United States has been and remains at the forefront in advocating for the adoption of competition laws that reflect free market economic principles, but our ability, once again, is effectively reduced when we do not practice what we preach in this country.

A comprehensive view of our antitrust laws requires cognizance of other statutory regimes that regularly interact with the antitrust laws in ways that significantly affect competition and consumers. Today, the patent system is the area of law that perhaps looms the largest in its impact on the antitrust laws and competition policy. Patents are, of course, critical to promoting investment innovation. If improperly administered or misused, however, the patent system can harm innovation and competition.

Dubious patents can slow innovation by discouraging firms from conducting research and development out of fear of patent infringement and can result in the payment of

unnecessary royalties, which are then passed on to consumers in the form of higher prices.

The FTC's recent attention to these issues dates from a series of hearings in 2002, which led to the issuance of a report making recommendations on patent reform in 2003. We are now working with Congress on issues of patent reform, such as, for example, the issue of whether we should have an improved post-grant system of review of patents, which could perhaps provide a quicker and less costly means for resolving patent validity issues, and I urge the AMC to support this and other recommendations for patent reform, which currently are under congressional review.

Modern advances in merger analysis and advances in the technology of document and data creation and retention have led to increased costs and burdens in the agencies' merger review process. The process has to be updated to meet new realities, as I recognized when I recently introduced significant reforms to our merger review process at the FTC. The needed reforms, however, are best developed and implemented by the enforcement agencies, working in concert with the bar and the business community, rather than through new legislation.

Improving the merger review process requires

reforms that are durable and firm, but that are also sufficiently flexible to support a wide variety of merger reviews across a wide range of industries. The agencies can implement such flexible revisions readily through changes in their internal procedures.

In contrast, crafting revisions to merger review procedures through more static legislation presents substantial challenges, because changes in technology are going to continually affect how we review mergers.

Last month, I introduced a series of reforms to the procedure that the FTC uses to review all transactions reported under the HSR Act, and the central purpose of them is to lower the costs of merger investigations for the FTC and the parties by reducing the volume of material that the parties must preserve and produce in response to a second request while still preserving our ability to conduct effective merger investigations.

This is the first time that a U.S. antitrust enforcement agency has ever imposed such limitations on itself, including a presumption that the FTC will only require a party to search a certain number of custodians.

As I stated when I released the reforms, they represent the start rather than the end of the FTC's efforts

to improve the process. For example, we are going to continue to try to work through experience to reduce the burden of requests for empirical data, which, as you know, are becoming more and more important in our reviews.

I also intend to devote significant resources to improving the technologies that the FTC uses in merger investigations, particularly the hardware and software for processing and reviewing electronic documents and data. Our staff should not be behind the private sector in terms of being able to absorb this data.

But, as I stated when I started, despite the need for significant improvements, and I have been a strong advocate for them, I do not think that formal statutory or regulatory changes are warranted.

The question of whether a modern U.S. antitrust regime should include two agencies with largely overlapping jurisdiction has threaded through your mandate since the formation of the Commission, and given that I have held senior positions in both agencies within the last five years, I often am asked for my opinion on whether we really need two agencies and on the strengths and weaknesses of each, and sometimes people even corner me and ask me to talk about all kinds of things just "off the record."

My answer, though, to this important question is unlikely to surprise you. There is no point in the AMC considering how to create an antitrust regime from scratch and whether that means creating two agencies, because you are not starting from scratch. You have before you two strong agencies with overlapping and also differing strengths, and to change the current system would come at a cost that would not be offset by the benefits.

For example, the FTC was formed in part to study markets and competition issues in depth, and it has become a significant part of what we do. Divorced from actual enforcement experiences, though, that research and policy work would be far less effective and informed.

In addition, especially if you have ever been in government, one should never assume that combining all of the strengths, the talents, in one bigger agency would necessarily be more efficient and therefore better.

Further, as a champion of the idea that competition is a driver of greatness, I do not mind admitting to you that healthy competition with each other drives these two agencies toward greater effectiveness and responsiveness to the needs of our public. To be sure, you would not necessarily have created it that way, but this is what we have, and I think it

is working effectively.

Conversely, I do not see public harm from having two agencies. The clearance process works effectively in more than 90 percent of matters, and we are actively working today to make it faster and smoother. Still, not only do I recognize the warts in the clearance process, but I also disdain the conflicts that develop in a handful of matters.

Should the AMC therefore determine that improvements to the clearance process are warranted, I would not object to the AMC's making such recommendations.

Madam Chairman, may I have just a few more seconds for my last topic?

CHAIRPERSON GARZA: Please.

MS. MAJORAS: Thank you.

Finally, no modern antitrust regime can be effective without a strong international component. As champions of market-based economies, we are highly encouraged by the large number of nations that slowly have been shifting away from government-based economies over the last 15 years.

Nonetheless, concern over the fact that multiple antitrust agencies around the globe now may be making their own decisions about the same merger or conduct has prompted questions about the desirability of additional procedures to

promote greater comity in the application of the antitrust laws.

The FTC, together with the Antitrust Division, devotes substantial resources to participating in international competition fora, maintaining strong bilateral relationships, and promoting convergence with competition agencies around the world. The agencies have incorporated comity into their guidelines for international operations, and the U.S. bilateral antitrust cooperation agreements provide for the application of comity and list the factors that parties should take into account in applying them to particular cases.

Still, as this Commission has observed, there remains considerable interest in determining whether it is possible to develop additional procedures to enhance international comity. I am open to considering new ways of implementing comity principles that are consistent with my responsibility to protect competition in the United States.

Currently, though, I want to emphasize that we are not without meaningful options to further the objectives of comity, irrespective of what agreements we have or do not have.

As I see this, our job as enforcers is to protect

competition, and doing so effectively requires understanding and accounting for what other jurisdictions may or may not do, and this is because any meaningful action taken by any other competition authority is going to impact the market in question.

Consequently, another agency's regulatory intervention should be considered as a market fact when we are thinking about whether to take action. Nowhere is this approach more important than in the imposition of remedies, because a company's divestiture or a company's actions taken or maybe not taken but actually forbidden pursuant to an order entered outside the United States obviously can affect the U.S. market.

We will continue actively to engage our foreign counterparts on major substantive antitrust issues as we are doing every day, and I look forward to working with this Commission and all members of the antitrust community to continue our efforts to promote healthy convergence and comity among competition authorities around the globe.

Thank you for the opportunity to appear before the Commission, and I look forward to answering your questions.

CHAIRPERSON GARZA: Thank you very much. Assistant Attorney General Barnett?

MR. BARNETT: Thank you, Madam Chair. I appreciate the invitation and the opportunity to address the Antitrust Modernization Commission and also readily endorse Chairman Majoras' sentiments. It's always a pleasure to serve on a panel with her.

The Antitrust Modernization Commission obviously has addressed a wide range of topics, and I can't address all of them, and won't try to, either in the written submission, or much less in my 10 minutes or so of comments. But there are a few highlights that I will hit upon.

I want to talk a little bit about cartels, a little bit about merger review, and a bit about international issues. But before I do that, I want to stress one point that could easily be forgotten, and that is, it's very easy to focus on all of the issues of dispute, of disagreement. Those are the most interesting. That's where conferences and seminars get focused.

It's easy for us to forget all of the things that we do right, that we agree upon, and, almost like the air around us, that we take for granted. This Commission is a very important commission. It brings a tremendous amount of expertise to bear, and the results will be reviewed carefully, not only in the United States but also

internationally, so I view the Commission as having an opportunity to play a valuable role by affirming some of those things that we do correctly.

Let me just mention a few such topics: First, the Commission should reaffirm that consumer welfare is the correct touchstone for competition law and enforcement. The antitrust laws help to maximize the wealth in our society when they are enforced to protect competition, not competitors.

Competition law and enforcement agencies should not be in the business of picking winners and losers. Efficient transactions or conduct should be promoted even if rivals suffer. As Judge Learned Hand famously admonished, "The successful competitor, having been urged to compete, must not be turned upon when he wins"—A very important lesson that not everybody has yet learned.

Second, the Commission should reaffirm that the antitrust laws and their enforcement should be based on sound economic principles. Competition laws should not be politicized, and although firms and others may try to use competition laws as a weapon against their competitors, enforcement should be grounded in sound economic theory supported by solid evidence.

Third, the Commission should identify that the administrability of rules is an important factor in determining standards to be applied in the antitrust area. It does little good to have the correct theoretical rule in place if businesses and enforcers cannot understand and apply it appropriately and consistently.

Moreover, transparency and guidance with respect to the rules are necessarily a high priority. Voluntary compliance with the law is the best outcome for consumers, and compliance depends on knowing when the line is being crossed.

With that said, I would like to turn now and talk about cartel enforcement. Within the Antitrust Division, as we have said for some time, it is our number one priority. Cartels are the "supreme evil of antitrust," as Justice Scalia recently said, and with good reason. They have no procompetitive justification. They can inflict massive harm on consumers.

We believe our resources are well spent and well focused on this area of enforcement, and this is yet another enforcement policy decision that this Commission can support, that cartel enforcement is the appropriate priority for the Antitrust Division and, as I will get into a little bit

later, for the rest of the world.

There are several things that are worth mentioning in the area of cartel enforcement. The Leniency Program that was revised in 1993, which has been nurtured and cultivated mostly by the people who came before me, has been extraordinarily effective. It continues to be far and away our best tool for identifying cases as well as building cases, and notwithstanding our successful enforcement, there still seems to be a substantial amount of cartel activity out there.

In my written statement, you'll see an attachment listing some of the criminal fines that we have obtained, including the second largest just a few months ago in the DRAM investigation, at \$300 million.

Imposing substantial financial penalties on criminal cartel participants is an important deterrent, but I also want to underscore a point, and I understand that you all have at least heard some testimony that suggests otherwise—that we believe the most effective deterrent is to incarcerate those individuals who are involved in cartel activity. While we believe that substantial fines to take away the monetary benefit of cartel participation are important, we also believe that incarceration will get the

attention of business executives more quickly than virtually any other penalty.

These two charts are included as attachments in my written statement, but I thought it was worth displaying them for you briefly. The first chart about total prison days imposed, and as you can see, there is a gratifying trend here--The red line is the total number of days imposed on all defendants. The second exhibit charts average prison days imposed, and you can see that both are increasing.

We also have broken out the prison sentences imposed on U.S. citizens as well as on foreign defendants. As you can see, the green line, the bottom line, was quite low until recently. It has been a priority of the Division to go after individuals who are citizens of other countries living outside the United States who nonetheless participate in cartel activity that harms American consumers.

We are achieving greater success. Just this month, we had four Korean citizens plead guilty and agree to serve time, five to eight months in prison, in our DRAM investigation. And as you can see from the chart, we believe that this is a positive trend and one that is likely to continue.

Finally on cartels, let me just mention that there

have been a number of changes that we strongly support, and we hope that the Commission will endorse. In 2004, for example, Congress increased the penalties in terms of jail sentences and statutory fines. That increased our flexibility. We recently obtained authority to engage in wiretapping operations, which puts the penalties and the enforcement tools available to us on par with white-collar criminal fraud statutes, and that's an important message.

Price-fixing, bid-rigging, and cartel activity is essentially fraud, and that's the way it should be looked at, and that's the way it should be treated. We would welcome a statement from the Commission to that effect.

Let me turn now to merger enforcement, and while, again, there are a lot of topics that one could discuss, I'm going to elaborate a little bit on the merger review process.

I certainly commend Chairman Majoras and her colleagues at the FTC for the initiative that they announced recently to reduce burdens. I also agree with and endorse her assessment that, at the end of the day, while it's an important issue, it's an issue that I do not believe can be fixed legislatively. It's a very fact-specific, very process-specific issue, and the agencies are focused on it and, I think, have made progress.

In 2001, the Antitrust Division launched an initiative to increase the communication and transparency of what we were doing to make better use of the initial HSR waiting period. The initiative indicated to the parties what voluntary information they could provide to help us make decisions more quickly, and, for the second-request phase, set up expectations and processes for improving that communication, something that's difficult to legislate.

The process is working. If you look at this chart, it shows the average number of preliminary investigations (i.e., transactions in which we preliminarily think there might be an issue) each year that have ultimately led to a second request. As you can see, since 2001, when the initiative was put into place, that average has dropped by about 40 percent. That is tremendous progress. We're very gratified by it.

Second, this chart shows the average length of second-request investigations where there was no challenge in court. This focuses specifically on matters where we ultimately concluded that there was not a problem. How quickly are we resolving matters, even though we had substantial initial concerns and issued a second request? Once again, you can see that the average has dropped quite

dramatically since 2001. Enhanced communication and cooperation is effective.

Can more be done? Absolutely. And the example of the FTC is a good one. The Antitrust Division has been looking at the issue as well, and we expect shortly to announce further enhancements to our merger review process initiative, which we believe is the best way ultimately to address this issue.

Madam Chair, may I also ask for a few minutes to address-

CHAIRPERSON GARZA: Yes. Please do.

MR. BARNETT: I will mention very briefly that, as you know, the FTC and the Department of Justice have been working on improving transparency in this area, and we hope soon to issue our commentary on the Horizontal Merger Guidelines that will further enhance the transparency of our enforcement analysis and decisions.

Finally, it is important that I talk about the international situation. There is no more important arena, given the proliferation of antitrust regimes around the world. I think it's over a hundred now. There are 70-some jurisdictions that have merger notification regimes of some sort, and these are relatively new agencies. These are

people who largely are trying to do the right thing but don't necessarily know how to do the right thing, and so work in this area is extraordinarily important.

How best can we do that? I think ultimately that, again, this is an issue that does not lend itself well to legislative fixes or static fixes. We believe that the best way to address this issue is through constructive engagement with the individual jurisdictions involved.

The International Competition Network has proved itself to be very effective. It's effective because it provides a means of communication between competition enforcement officials. It also provides an important voice for the business community and to non-governmental representatives to give us input about how to improve our merger review processes, how to reduce the burdens. That type of forum and that type of discussion has already produced substantial benefits. The recommended practices adopted by the ICN, the best practices, have led a number of countries to improve their regimes.

Similarly, we engage other jurisdictions through the OECD, through bilateral arrangements, and through informal contacts. Indeed, my international deputy, as we sit today, is in Beijing talking with the Chinese government

about their draft anti-monopoly law.

All of this is extraordinarily important, and I hope you endorse the importance of devoting resources to this issue, but again, at the end of the day, I see the best way to address it is engagement on an individual persuasive level as more effective than trying to address international enforcement issues through some sort of a legislative fix.

And with that, Madam Chair, I want to thank you again for the opportunity to address you, and we look forward to your questions.

CHAIRPERSON GARZA: Great. I want to thank you both again. It was really worth waiting for your testimony. It's been very interesting, and now I will start the questioning with Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Welcome. I'm going to be one of many voices, of course, singing your praises for how you've led your respective agencies, and I would do it even in a more wholesome way, except I learned this morning that we're going to have five minutes rather than eight minutes. So, I'm sorry.

CHAIRPERSON GARZA: Well, you can greet them after the hearing.

VICE CHAIR YAROWSKY: For another three minutes?

Okay. I will do that.

When we have talked about the role of the agencies in our other hearings, certain words have come up over and over again. We hear words like convergence, duplicative, parallel, and preemption, words that you probably run into a lot too.

But there are two or three issues that I think are cutting-edge issues for us, threshold issues. One area about which I have a larger and a smaller question: are you comfortable with a system of shared responsibility and shared jurisdiction with the state attorneys general, the state level? Or do you believe that a more structured system should be crafted or recommended by this Commission where, in certain instances, there should be preemption or even preclusion of activity if in fact the federal agency has stepped in and started to make some actions or taken some decisions?

Larger question—comfortable, or should change be made?

MS. MAJORAS: Well, first, I will say that, like many issues that are discussed, the amount of discussion of the issue sometimes stands as a proxy for how serious an issue it is, and sometimes it really does not. The truth of

the matter is that, just like with respect to international convergence, the same examples are raised repeatedly about when there has been an issue, and we have dozens and eventually hundreds of examples where things have gone quite smoothly.

So the same is actually, I think, true in working with the states. We have developed over time very good mechanisms for sharing work with the states. I think we work very effectively with the states. There are occasional bumps in that system. I think certainly on the consumer protection side where there is a lot more legislative activity, we have seen instances in which Congress has brokered a compromise by allowing the states to enforce the federal law but preempting any conflicting state laws, and we are always supportive of the states' being able to enforce those federal laws, because it is of great assistance to us and our consumer protection mission.

So, at this time, while I certainly would work with you and be interested in any specific proposal to make sure that the needs of enforcement are covered, I do not have any specific inclination toward change.

VICE CHAIR YAROWSKY: Yes?

MR. BARNETT: I was just talking a moment ago about

the proliferation of antitrust regimes, and there is certainly the potential with not only a hundred regimes around the world but 50-some regimes in the United States for the overlapping jurisdiction to create problems. But having said that, I think the way we address this issue—and I recently spoke to the National Association of Attorneys General, and I told them the same thing—is that it is incumbent upon us to reduce those burdens and to coordinate and cooperate with each other in such a way that, in the ideal situation, to the parties who are being investigated it almost feels like there's a single agency pursuing them. And if there's an enforcement action, preferably there is a single complaint so that you avoid a lot of the repetition. I have to agree that, for the most part, we've been reasonably effective in doing that.

I also think that there are certain issues, specifically certain transactions, that may have a particularly localized effect and where it might be a more efficient allocation of resources to have the state attorney general focus or take the lead in looking at it. So, I can see them having particularized roles.

So, although this is an area of potential concern and certainly one worth thinking about, I think we've done a

reasonably effective job of working with the states for the most part.

VICE CHAIR YAROWSKY: Thank you. Secondly, looking at the allocation of responsibilities for mergers, I know you're both engaged in a lot of activities to try to streamline the process of review.

We won't talk about the 2002 Agreement too much, except to say that in another hearing where we did have some former officials and other very keen observers of the process, there seemed to be an emerging consensus that at the very least, there should be some ground rules on the procedural process level.

Putting aside the thornier question of substantive division, should there be some type of understanding about the number of days it takes to get an allocation decision, and if one goes beyond that, there should be some type of expedited system of resolution of that, so that at least you don't have the anomalous result of someone at the end of the 30-day waiting period getting a second request kind of imposed upon them just because no decision has been made?

Are you sympathetic, both of you, to trying to work out some procedural ground rules that would apply across the board to both agencies?

MR. BARNETT: Well, I'll take the lead on this one. Let me start by saying I am certainly open to any recommendations or suggestions that the Commission wants to make on this front.

As a general matter, and as Debbie was saying—the number of times that it becomes a problem is a small percentage of the overall number of investigations or transactions that we have. So, the amount of discussion about it is probably disproportionate to this issue, although I share her view that it's certainly not my favorite topic, and I'm not sure it's anybody's favorite topic, and I agree, it's incumbent upon us, and we really should work hard to get things cleared promptly.

I would observe that there are some complications. Sometimes the products that are at issue—the experience-based allocation makes good sense for efficiency reasons—but sometimes the products that are most likely to be at issue aren't clear on the day that an HSR filing is made, and only become evident later. That is sometimes a source of, if you will, delayed resolution, but at the end of the day, it's not a perfect process.

We have been working, and we will continue to work, to make it better, and if you all have suggestions, we'd

certainly welcome them.

MS. MAJORAS: Can I just add very briefly? We are working actively. I have now been in one of the two agencies most of the time over the last five years, and I feel like I am always working to make it better. Sometimes, I feel like I am pushing a rock up the hill. It is maddening to me that we cannot make greater gains in this as we did try in 2002. It is embarrassing, and it can be at times a display of bad government when we do not get it resolved quickly.

So, with that, I would tell you that if there are suggestions for procedural change, I am open to them.

CHAIRPERSON GARZA: Thank you very much.

Commissioner Burchfield?

COMMISSIONER BURCHFIELD: Thank you, Madam Chairman.

Chairman Majoras, you mentioned in the course of your presentation—and I should add thank you both for coming. I thought the presentations were very helpful.

In the course of your presentation, Chairman Majoras, you mentioned a concern about the number of exemptions in the antitrust laws, and I just wanted to give you the opportunity, if you have particular exemptions that you were more troubled by than others, to tell us which ones

those are and explain why you're troubled by them and what the Commission should do about them.

Mr. Barnett, I'll give you an opportunity to answer that as well.

MS. MAJORAS: Thank you, Commissioner. That's a very fair question, and I wish I could do a better job of saying target this exemption, this exemption, and this exemption, in particular, but, unfortunately, we are hamstrung by a couple of factors in doing that.

First of all, part of my feeling so strongly about this issue is my general support for competition in our society, whether I am sitting at this agency, that agency, or in the private sector. The FTC does not actually currently work with some of the industries that are subject to exemptions. Indeed, quite frankly, some of that is because of exemptions, and so therefore, I do not have the expertise that I think is needed to identify for you very particular exemptions and immunities.

What I do know, though, is that, in general, there are lots of industry-specific exemptions, for example, that have been on the books for a long time, and I think, while I recognize that these have become perhaps what some people would want to refer to as "sacred cows," the political

process exists so that we can talk in the open about whether laws that may have been on the books for several decades actually still make sense in a modern economy.

I apologize that I cannot give you many more specifics. I will say that I hope any review would include any carve-outs to the Federal Trade Commission's jurisdiction because, quite frankly, in today's modern economy, we face problems with some of these carve-outs that just do not make a whole lot of sense in our work. That tends to be more of a consumer protection concern than it is a competition concern, because we do have our sister agency to handle antitrust matters that we cannot, but I think those should be looked at.

COMMISSIONER BURCHFIELD: Thank you.

Mr. Barnett?

MR. BARNETT: Well, I certainly agree that competition is a fundamental guiding principle of our economy, and exemptions accordingly should be construed narrowly or created only sparingly. I also endorse the general notion that it is well worth revisiting that issue and examining whether, in light of current market conditions, the exemptions and immunities that are on the books are still worthwhile.

I have not tried to canvas the various exemptions that are out there to do the due diligence necessary to make a specific recommendation. I certainly commend that effort to you all.

I would mention one area where we have had some dealings recently. The state action doctrine is one that some courts have construed more broadly than other courts, and I think it's well worth examining whether or not the Commission feels that doctrine is being construed more broadly than it should be. That, I think, is consistent with some of the actions that we have taken, and I don't want to speak for the Chairman, but I think with actions that the FTC has taken. We are concerned about the overly broad application of that particular exemption or immunity causing harm to consumer welfare and reducing the net wealth in our society.

COMMISSIONER BURCHFIELD: Let me follow up in the minute or so I've got remaining on a question that Vice Chairman Yarowsky asked, and that concerns state activity with a slightly different slant.

One of the most controversial issues, as you know, among the private bar is indirect purchaser litigation. That is not something over which your agencies or department have

control, but I am interested in knowing whether, as institutions, you have a view on it and also if you find indirect purchaser litigation to be helpful, harmful, or neutral in your efforts to enforce the antitrust laws.

MS. MAJORAS: Tom may want to start, because the cartel follow-on cases are where these appear the most frequently.

MR. BARNETT: At the outset, I would observe that I'm not aware that the current administration has taken a position on whether the indirect purchaser doctrine should be changed or repealed, but it is quite clear that the current system that we have involves a lot of administrative costs and complexity with, for example, class actions being filed with sub-classes in many different states here and there.

It does seem like that's—if you were drawing on a blank slate, it's hard to believe that that would be the most efficient or effective system that you would set up. So, I would, encourage you to take a strong look at that issue.

MS. MAJORAS: And just to very briefly answer your question, Commissioner Burchfield, I have not seen instances in which the indirect purchaser system has had ill effects on the FTC's enforcement efforts, but I do think that it is a fair question to take a look at a doctrine that is being used

frequently in 23 states but not the other 27, and given national economic and antitrust policy, examine whether that is that the best way to accomplish the goals of getting redress for consumers or other injured parties.

I think it is an absolutely fair question.

COMMISSIONER BURCHFIELD: Thank you.

CHAIRPERSON GARZA: Okay.

Commissioner Litvack?

COMMISSIONER LITVACK: Thank you, Madam Chair.

Again, briefly but no less sincerely, thank you both, both for your testimony and your answers.

Given the fact that we have a limited time, I basically have three questions, one for each of you and then one for the two of you. So, with that, I've labeled what I'm going to do.

Chairman Majoras, I too am fascinated, troubled, and interested in the interconnection between the patent system and the antitrust system, and I quickly confess as I ask my question that I'm not exactly sure what you have in mind, because I haven't studied it, but I was skeptical about your suggestion that the post-grant review would really accomplish anything, and I guess my question is, why would a post-grant review, other than being a later look, really do

much, since it's basically the same people giving the review with the same biases and the same thoughts and presumably ultimately the same appeal process?

MS. MAJORAS: I think our view on this, first and foremost, is to look at a better way than the litigation system that we have today.

We are looking at the front end, which is the grant of patents, and the fact that, if you look at the numbers, more and more and more patents are being granted. A lot of them are very good patents, but there are a lot that are of dubious quality, and there are real questions as to whether they are actually doing what the patent system was designed to do, which is reward innovation, and there is some evidence that they may be actually thwarting it.

At the same time, we do not think the resources of the Patent Office have kept pace with the granting and the number of patent applications and the grants.

We then look at the fact that litigation is prevalent and can cost anywhere in the range from \$500,000 to \$5 million, which often makes it very difficult, for example, for smaller companies to engage in it. We think—and this is something that has been supported by many others who are looking at patent reform—that if you maintained the same

system for granting patents but then had a system in which, without waiting for an infringement claim to be asserted, those who think that the patent should not have been granted would be able to more rapidly lodge a protest and have it examined. That is not really part of our patent system today.

It is a compromise, which is intended in large part to try to eliminate some of the litigation that we have today.

COMMISSIONER LITVACK: But if you were dissatisfied with that review and you were the protester, you'd have your judicial remedies, so that would be there, and I gather if you were successful as the patentee, you would have whatever the appeal process is for that, is that right?

MS. MAJORAS: Well, it all depends. The Congress is considering it, and they are looking at it in different ways, and this is one thing that ought to be considered, but the fact of the matter is, there are people who are forgoing some legitimate challenges to patents because of the expense of litigation, and I think that post-grant review would be easier and less expensive.

COMMISSIONER LITVACK: Thank you.

Mr. Barnett, a question for you: I was interested

in the fact that the averages were coming down on times for merger review and second requests, et cetera, but we all know the strengths and weaknesses of averages.

So, what's the longest length of time that you've taken, and what's the shortest, if I were to look at this chart?

MR. BARNETT: I don't have those numbers right here, but I can tell you from personal experience over the last couple of years, at least, we really have made a committed effort with the staff to try to reduce the length of these investigations, and the reason that those averages are going down is that there are a number of key investigations that we were able to close more quickly than we otherwise would have.

I'll give you the specific example of two investigations involving the New York Stock Exchange's acquisition of Archipelago and the NASDAQ's acquisition of Instinet. Working with the parties, we identified, post-second request, a discrete dispositive issue related to entry. The parties expedited information to us. We focused our investigation on that issue. We were able to resolve the investigation and close it down.

The overall number of investigations here is just

not that large. So, a small number of significant matters like that, which, if left unattended, if you will, could have easily gone on for a year, will bring the averages down.

So, I'm persuaded—I don't have the high and the low, but I am persuaded that the numbers are meaningful and really do reflect, at least in significant part, the progress we have made as a result of the merger review process initiative.

COMMISSIONER LITVACK: Are there still some that are taking a year or more?

MR. BARNETT: With respect to merger investigations that have not been resolved, but that do not result in a challenge, I'm unaware of any in the last couple of years that have taken more than a year, but I'd have to check, to be honest.

COMMISSIONER LITVACK: Madam Chair, can I ask one more question?

CHAIRPERSON GARZA: Yes.

COMMISSIONER LITVACK: Putting aside—although I recognize the realities—political considerations, would you both endorse the idea of a segmentation or division of merger investigations by industry?

MS. MAJORAS: Given that I endorsed it in 2002, I

would be hard-pressed to not endorse it now.

COMMISSIONER LITVACK: We all change our minds; where we stand depends on where we sit.

MS. MAJORAS: But nonetheless, I am still sitting on this side of the table. I thought it was a good idea then; I think it is a good idea now. I do think, though, that if such a division is done, it should be done so that it is not set in stone for all time.

There should be some flexibility, because these things can become obsolete as industries change over time.

COMMISSIONER LITVACK: Thank you.

MR. BARNETT: Certainly, we would be better off now in terms of clearance if the 2002 Agreement were in place. We would clear more matters more quickly.

I would observe, though, it still would not completely eliminate the issue. There are still complications that arise, which means that process-type issues would remain important.

COMMISSIONER LITVACK: Thank you both.

CHAIRPERSON GARZA: Thank you.

Commissioner Warden?

COMMISSIONER WARDEN: Thank you, Madam Chairman.

Mr. Barnett, you may or may not be aware, but we

just recently received a submission from United Airlines, which is much more of a petition for redress of grievances that should have been addressed to you about the merger enforcement in that industry than anything this Commission has been looking at, because we haven't gotten that specific. But it did bring to my mind—and Chairman Majoras' statement about practicing what we preach brought to my mind further—the existing foreign ownership restrictions in the airline industry, which I've become familiar with, representing BA over the years, which are totally protectionist and, as far as I can tell, don't really serve any national security purpose that couldn't be served by some other form of legislation. And my question to you is, would the Department support repeal of the foreign ownership restrictions in the airline industry?

MR. BARNETT: Well, that's an issue that I'd have to study in a little more depth. I can say that, as a general matter, all else being equal, and absent all other considerations, free and open capital markets are a good thing for consumers and for social welfare. That's part of the belief that free markets and competition are the best way to organize our economy.

You alluded to national security considerations

and, frankly, those are areas that are outside of my jurisdiction or bailiwick, and I would have to defer to others on those as to how serious they are in a given case. But from a competition perspective, I certainly agree that freer and more open markets are a good thing.

COMMISSIONER WARDEN: Thank you.

Chairman Majoras, I fully endorse your efforts on patent reform. My only concern is whether it's far too little. I think that the patent system has gone way off course in the triviality direction, and there can't possibly be hundreds of thousands of inventions every year. There aren't that many smart people around.

So, let me ask you. I also think there may not be an incentive for people to challenge post-grant, because they may not see it at that time that, five years from now, this is going to be a problem.

Would you support real law reform in the patent area that would greatly cut down on the number of patents by tightening the standard for patentability or even an alternate measure, such as "use it, license it, or lose it," because no social purpose is served by putting patents on the shelf and then running around suing people, claiming they've used them?

MS. MAJORAS: I would be interested in looking at proposals for patent reform at the front end. The standard for patentability may creep over time like so many things in life, and I think that it is really incumbent upon us to take a very strong look at this as a society. And, quite frankly, we're looking now at other nations, like China, and trying to encourage strong intellectual property regimes abroad, but once again, we have some warts in our own system.

We really need to work on this, and I think we need to work on it quickly. I would certainly support looking, but I would have to see what the new standard is.

COMMISSIONER WARDEN: Sure.

MS. MAJORAS: On the second question, I do not want to say too much about this. I have concerns about the issue you raise, about the hoarding of patents for the purpose of bringing lawsuits. It is something that I want to do some further study into.

COMMISSIONER WARDEN: Thank you.

One final question for you, Mr. Barnett: is there any chance that the Amnesty Program, which I think has been very successful, as you say, might be modified so that the kingpin of a conspiracy can't be the one that comes in and gets amnesty? That seems like a bad system to me, to give

the instigator amnesty.

MR. BARNETT: Well, I would agree with you, and the answer to your question is there's no need to modify our leniency program. Under the current program, if you are the leader of the conspiracy, the instigator, you're not eligible for amnesty.

COMMISSIONER WARDEN: Okay, good. I'm glad to hear that. Thank you.

CHAIRPERSON GARZA: Thank you.

Commissioner Valentine?

COMMISSIONER VALENTINE: Good morning, both of you, and thank you very, very much for your statements. I particularly appreciated both of your willingness to work with us on comity issues, which I think may be useful both with the states and with foreign countries and foreign regimes, and on your commitment to the fundamental antitrust laws, which everyone seems to think are pretty much right.

We've had a number of issues that do affect your agencies, though, that neither of you touched on, and I'd like to try to do a little clean-up here and give you each a chance to address the issues. I'll raise them, I guess, for Chairman Majoras. I'd particularly like you to address the issue of assuming that we believe that just living with what

we've got, which is two agencies, makes the most sense—there has been much discussion about having those two agencies treat mergers as similarly as possible. And to the extent that there are perceived differences in the PI standards pursuant to which each agency operates, the question is, how should we best achieve harmonization, convergence, and uniformity between the two agencies, so that it really doesn't matter which agency ends up reviewing your merger?

Would the FTC be willing to adopt a PI standard that was essentially equivalent to what the Justice Department lives with? And would it be willing to, if it lost a PI proceeding, not proceed in administrative proceedings in Part III? I want to set aside entirely whether Part III should be used for non-merger and consumer protection cases.

MS. MAJORAS: As a practical matter, I think that the difference in the PI standard really does not matter in the courts as I read the modern cases. In fact, if anything, I think for both agencies, courts have tightened up and are making it difficult to the point where they are treating the PI hearing more like a trial on the merits, and that may be because courts are looking at it practically and know that if they decide to grant a PI, it likely will block the deal.

That is a reality we live with.

I understand, though, that to have a perception out there that we are operating under a different standard may be enough of a problem that it ought to be remedied. I would not, though, go in the direction of what is going to appear to courts like you are tightening up the standard and making it more stringent. I would not go that way. I would go the other way.

I actually think that courts, when they look at the DOJ cases, have gone closer to the so-called public-interest standard that you see, and the sky has not fallen. I think that courts have been largely looking at these the right way, though I think they make mistakes like we all do. Thus, if you are going to go in one direction or the other, that is what I would do.

As far as our use of Part III after a preliminary injunction, that is something that is available, that Congress has given us in wanting us to become an agency of expertise. I would not want to see the Part III process not be available for mergers, because I think it actually can be a valuable way to look at merger cases and potentially then get them to the court of appeals, which does not happen very often when you just have a PI in federal court. We can

continually use some good merger jurisprudence coming out of the courts of appeals.

I do think that the FTC needs to continue to be cautious on whether it should proceed in Part III. When we looked at the *Arch Coal* matter, we looked at it very closely. We applied the standards that the agency internally had set out, and we looked back in history to see how often, after losing a PI hearing, the agency had proceeded in Part III. In modern history, we could only think of one, which was the *R.R. Donnelley* case.

COMMISSIONER VALENTINE: My remaining questions—and to the extent that you don't have time to answer them, I'm more than happy to take written submissions—are, would the agencies find additional statutory authority for civil fines useful? Would you like any amendments to the FTAIA and/or the IAEAA to clarify, in the first case, a hideously unclear statute, and, in the instance of the IAEAA, to perhaps more easily reach cooperation agreements with foreign countries?

MR. BARNETT: I will, I guess, comment briefly on the civil fines issue. The one area that I think is the most worth thinking about in terms of civil fines is decree violations. I do think that compliance with decrees is extraordinarily important, and having clear authority to

impose fines in that situation, I think, could be a useful tool.

Outside of that area, I have some reservations about how useful it would be. I have some concerns about blurring the distinction between a civil violation and a criminal violation. We have worked very hard to keep those as separate as possible, so that criminal violations—when we go into court and tell a judge, you need to put this person in jail for five years, they're more comfortable doing it if it's a very narrowly circumscribed set of violations. So, the sharper the distinction, the better off we are at the end of the day.

MS. MAJORAS: I think, on the civil fines question, I agree with Assistant Attorney General Barnett's cautionary notes, but I do think that, as a matter of public interest, there are plenty of instances in which the U.S. public is looking to us and saying, I can't believe you're so easy on these antitrust violators, that you're not fining them. I do not take all of my own views from that, but it happens frequently enough. There are also instances in antitrust law where a conduct remedy (because no structural remedy is available) may actually be worse than the conduct that you are trying to avoid for the future. Consequently, there may

be some circumscribed instances where we could use civil fine authority, but I have not studied it closely enough, Commissioner Valentine, to tell you exactly what those would be.

CHAIRPERSON GARZA: All right. Thank you.

Commissioner Cannon?

COMMISSIONER CANNON: Thank you, and good morning, and thanks again for coming. We really appreciate it.

Let me echo, if I could, the comments of a couple of Commissioners here on the clearance agreement. We'd be glad to take credit for that, for helping you along the way, but I don't think, number one, we really need to do that, and, number two, we won't have our report out for another year or so.

All I would ask you is truly just to think about doing it. There are a lot of folks—we heard from a lot of people over the last few months who are really concerned about it, and I'm just wondering, do you see any impediment right now to truly getting—maybe this is in the works, and that would be great—to just going ahead and producing something?

I don't think in terms of us asking or giving you examples or giving you guidance on that is going to make much

difference. Tom, could you maybe address that?

MR. BARNETT: I can assure you we're not waiting on you to try to address this issue. As I think we both said, there is an ongoing effort to improve it on a number of fronts, and we certainly have talked about various options and alternatives, and those discussions are active and ongoing.

I am not suggesting that we may not make some modifications in the future, but I guess I'm not quite sure what else to say to your question, other than we're trying as hard as we can. We think we've made progress, and if we're able to identify steps we can take that we think will make the process even faster and more efficient, we're certainly going to take those steps without waiting for the Commission.

MS. MAJORAS: Commissioner Cannon, if part of what you are asking is whether implementing something like the 2002 now-defunct Agreement requires any help from you, I think as a practical and political matter, it probably does.

Among other things, when I was in my confirmation hearing, the Chairman of the Commerce Committee wanted to get that issue off the table, and I believe, not wanting it to be an impediment to my confirmation, said, "You won't go in immediately and reinstitute that Agreement now, will you?"

and I said, "No, I won't."

So, at the moment, the reforms that we are working on internally are to speed up the time—which, of course, the overall agreement would do, too—but more specifically to have a better process in place to determine quickly that we are at an impasse, and we just need to have a mechanism to just decide it, using the fundamental principle that either one of these agencies is fully capable of taking on any merger, any antitrust matter, and we need to keep that in mind.

So, those are the things we are doing. An allocation kind of scheme is not what we are currently working on, just to be clear.

COMMISSIONER CANNON: Thanks. So, a phone call to the Hill might be helpful is what you're saying. Great.

General Barnett, let me ask you on the—I noticed your chart on the average and the total days of sentencing for criminal violations. It took a dip pretty precipitously around 2004. Is that because of the Sentencing Guidelines, or to what do you attribute that?

Now, obviously, with the change in the law now, I'm sure that line will continue to go up.

MR. BARNETT: Right. It is worth mentioning briefly, the 2004 Act only applies to cartel activity that

took place in 2004 forward, and the Sentencing Commission didn't revise its guidelines until last fall. So that really hasn't kicked in.

The dip is really attributable to the lumpiness of our cartel investigations. Many of these are very large, and so I don't look at any one particular year. I look at it over a longer period, and I think you see it going up. That would be my bottom line explanation.

COMMISSIONER CANNON: Okay. I wanted to follow up— Chairman Majoras this morning probably created a little news herself, saying, let's repeal the Robinson-Patman Act. Does the administration have any position on that?

MR. BARNETT: I don't believe the administration has formed a formal position on that, but I'm not in a position to argue with or disagree with the analysis set forth by my illustrious colleague.

COMMISSIONER CANNON: Well said. Thank you.

That's all for me. Thank you, Madam Chair.

CHAIRPERSON GARZA: Before we move on, I think one of the questions that Commissioner Valentine had asked has not actually been answered, and it could probably be answered quickly.

Debra, you asked about the IAEAA and the FTAIA, is

that right? (I just wanted to see if I could do it.)

COMMISSIONER VALENTINE: 10 points.

CHAIRPERSON GARZA: Would the two witnesses like to respond quickly to that question?

MR. BARNETT: Sure. Well, talking generally about the application of the U.S. antitrust laws to activity that occurs outside the United States, if I can focus on that, I guess I would not recommend that you all recommend congressional action on this front.

The courts seem to be moving in the correct direction, and I think the *Empagran* decision was a very sound decision. The lower courts seem to be following it, both in its actual holding and arguably in its implication for the issue that it left open. And we have taken the position that that was the right result or right approach.

As long as that is working, that might be better than opening up the issue and creating a new law that could create new complications that are very hard to predict.

MS. MAJORAS: I don't disagree with that. With respect to the IAEAA, the United States has only entered into one formal agreement so far under that Act, with Australia, which I know would give one pause. But I think that if you look at the reasons behind that, those are reasons that we

largely cannot do anything about through legislation.

For example, the fact that we have differing views around the world about criminalization of antitrust limits our ability to enter into this type of agreement if any of the shared information could be used in a criminal matter. But I do not think, as a practical matter, that it has been a strong impediment in any way, shape, or form to our cooperating with other competition authorities.

There are other tough challenges, but this is not one of them. Moreover, given *Empagran* and its progeny, I do not think that the FTAIA presents problems, even though many of us would say it might not have been the best-crafted statute to begin with. Right now, we are not seeing any practical problems from it.

CHAIRPERSON GARZA: Thank you.

Commissioner Shenefield?

COMMISSIONER SHENEFIELD: Delighted you're here.

Let me ask you a few questions, and brief answers would be appreciated, given the extraordinary limitations.

Illinois Brick: do either of you oppose reversing that?

MS. MAJORAS: It all depends on what that means and whether you allow the mirror doctrine as well.

COMMISSIONER SHENEFIELD: The thought would be to bring indirect purchaser cases into federal court.

MS. MAJORAS: And you're able to use it as a defense?

COMMISSIONER SHENEFIELD: No, no. It would just take state indirect purchaser cases and bring them into federal court. If you combine reversing *Illinois Brick*—let me give you the whole scenario.

Reverse *Illinois Brick*, reverse *Lexecon*, and preempt state indirect purchaser law.

MS. MAJORAS: Would the direct purchaser be able to use the pass-on defense?

COMMISSIONER KEMPF: *Hanover Shoe*.

MS. MAJORAS: That's the question.

COMMISSIONER SHENEFIELD: You would have a trial that would in effect determine liability, then determine gross damages, and then divide up the damages.

MS. MAJORAS: I think there could be some real efficiency in bringing the damage calculation and redress into one proceeding. Yes, I have never thought that anyone should have to pay multiple times for the same offense, except if it is a treble-damage liability scheme, which obviously we have.

MR. BARNETT: Well, as I indicated, I think the current system we have is certainly not the optimal system. To be honest, I'd have to think through the specific proposal you put out there. It would have some significant efficiencies. That could be a very good thing.

I guess I would say it's worth examining and evaluating some of the empirical assumptions that the Supreme Court made in *Illinois Brick*. I know that there's some scholarly research out there that questions whether some of that is valid or not. I actually haven't independently assessed that. If it is valid, then that would drive in one direction or the other.

I guess the basic concept of trying to bring this under one roof, so that you can look at the big picture and manage it, seems like a good idea, but I'll be honest; I just haven't worked through all the details of the specific hypothetical.

COMMISSIONER SHENEFIELD: Okay. Is there anything about the new wiretap legislation that makes it less than permanent? Is it wholly in Title Three?

MR. BARNETT: Well, I know it was passed as part of the Patriot Act, but I have not specifically examined it, but I was unaware of a sunset provision.

COMMISSIONER SHENEFIELD: I don't know the answer either. So, if there is anything, perhaps somebody on your staff could let us know, because we would want to endorse making that permanent, I assume.

Next, the convergence and comity issue. You've, I think, dealt helpfully with the relationships between governments. I worry a lot more about private suit litigation in this country and the extent to which it is sort of a chaotic mess when viewed from abroad.

Is there anything you might suggest that we consider that would help resolve that or simplify it, such as giving a federal judge the power under a *Timberlane* kind of rule to dismiss cases in favor of whatever proceedings are going on abroad? Have you thought at all about that, or do you want to punt?

MR. BARNETT: I want to make sure--You're talking about if, for example, there were a private action in Europe against company X and similar actions were brought in the United States?

COMMISSIONER SHENEFIELD: Exactly. Yes.

MR. BARNETT: Well, an immediate question that comes to mind is whether the European proceeding is going to grant relief to American consumers who may be harmed by that

action. I guess I have some initial skepticism as to whether or not they would even feel entitled to do so, and I'm not sure I would encourage them to do so, given the sort of *Empagran*-type principles that we were talking about.

So, I'd have some reservations, but I will readily confess I haven't thought it through very deeply.

MS. MAJORAS: I am afraid I have not either, John. I think that we are going to continually encounter more and more issues in which courts are going to have to adapt, and the *Empagran* Court, for example, mentioned comity principles, and I think that there is going to have to be a look at some of that as we go forward.

But on this specific issue of referring to a piece of private litigation, I am afraid I just have not spent enough time thinking about it to give you a fair answer.

COMMISSIONER SHENEFIELD: Switching topics, the detrebling legislation related to leniency is a sunsetted piece of legislation.

Would it be helpful for the Commission to endorse its becoming permanent?

MR. BARNETT: I believe so. It's still fairly early on, but we are seeing companies who are even more interested in getting leniency because of the detrebling. We

sometimes deal with situations where companies have come in and said, we really did commit a price-fixing violation, and we looked at the evidence and said, we're not so sure, which is an interesting dynamic when you think about that, but that underscores, I think, the effectiveness of the policy, that it's having its intended effect of further destabilizing cartels and that it has created an even stronger incentive to come in.

COMMISSIONER SHENEFIELD: Can I ask one more question, please?

CHAIRPERSON GARZA: Please.

COMMISSIONER SHENEFIELD: One of the things that's notable about the dockets of both agencies in recent years is what I'll call the deregulation or the anti-immunity and exemptions or programs seem to have slid down the primacy level a little bit.

Would it be helpful for the Commission to strongly encourage the agencies to start a systematic investigation of specific statutory immunities and exemptions with a view to assessing whether they are net procompetitive, anticompetitive, or neutral?

One of the things that's notable about the testimony is that everybody certainly thinks we ought to

seriously consider various exemptions and immunities, but nobody has any very crisp recommendations, and the question is, can we get from here to there?

MS. MAJORAS: Well, I think that is right, although I do want to make one thing clear about whether anything has slid down. I can assure you that both agencies—from my experience in both—are constantly fighting new immunities and exemptions. We are really quite engaged, and a lot of that goes on behind the scenes, and most of you would never necessarily see it, but in lots of legislative proposals, this comes up, and we typically are pretty successful in having it go nowhere. So, I just want to make that clear.

You are right that evaluating each of these exemptions and immunities would be very resource-intensive, and that is one of the reasons that I am sure so many of us are so willing to sit here and say to you, Commissioner, how about if you all take this on, and I do not know whether you can or you cannot.

Having said that, if we are given the adequate resources, then I would consider studying the exemptions and immunities. Congress gives the FTC lots of studies to do every year, and a lot of them can be really effective in moving the ball forward in our knowledge of markets, but we

need the resources to do them, because we remain a relatively small agency.

MR. BARNETT: I guess I would observe that evaluating individual immunities and exemptions is resource-intensive, which is part of why we haven't done it. You all may feel that you can't do it, and while such a study, I think, could be quite helpful, there are other considerations about how to treat these immunities, for example, frankly, political considerations.

So, you might consider whether or not you should recommend that Congress re-examine some of these specific immunities itself.

COMMISSIONER SHENEFIELD: Thank you.

CHAIRPERSON GARZA: Thank you.

Commissioner Kempf?

COMMISSIONER KEMPF: Yes. My first question is to General Barnett, and you may not want to answer me, or want to get back to me, and that's fine.

When we were charting what we would look at, your predecessor, Hew Pate, sent us a letter that said one of the things he urges us to do is undertake a study of what the effects of the antitrust laws have been, and we declined to do that.

In the hearings, various people, including him, no longer in his post, said that we should undertake it as something coming out of our work, and I don't remember his precise articulation of what it was he wanted to study, but I was reminded of that again when I read last week's op-ed in the *Wall Street Journal* by Crandall and Winston that said, the antitrust laws are either irrelevant or worse, and one of the things they again reiterated was their view that there's no intellectually respectable study showing that there are any benefits to the antitrust laws.

I don't think General Pate's thing was slanted one way or the other. It was just saying, you ought to study this. What I'd like to know is whether that recommendation was, or is it, something we should undertake? Would the Department currently have a position that maybe that's something we ought to urge be done as part of our report?

As I say, you can get back to me now or later. It doesn't make any difference.

MR. BARNETT: I've thought about the issue, and I understand why this Commission has decided that it doesn't have the resources to do such a study itself.

I personally agree with the sentiment behind then Assistant Attorney General Hew Pate's letter of

recommendation, and I believe it had two aspects to it. One was a broader aspect, which is to try to do some sort of assessment: is antitrust enforcement in general a good thing, a net positive, or is it a net negative? That would directly address the op-ed piece you referenced.

The other thing that it could shed light upon is the allocation of priorities within the area of antitrust enforcement. For example, I believe that cartel enforcement is the best place to put our highest priority and focus, but if one were able to do some empirical studies, you could help justify and confirm or calibrate how we focus on enforcement.

If this Commission, notwithstanding its limitations, were able to identify either methodologies or ways in which a study might be done, even if you didn't do it yourselves, or even if this Commission merely recommended that such a study be provided for, I think that that very well could be a useful thing.

As you say—I don't know, having not done the study, exactly what the outcome would be, but it could well be useful.

COMMISSIONER KEMPF: Thank you. My next question is also for you, and it's on what Commissioner Litvack asked you about, Attachment Five to your submission about the

average length of the second-request investigations.

I was troubled both by the footnote explaining the chart and by your comment, which echoes it, where it has average length from investigation to investigation closing without a challenge, and it strikes me odd that you would eliminate from your calculation those that resulted in challenges.

I have long felt that one abuse by the agencies routinely is to take the time, provided by Congress for the review after first and second requests, and expand that or seek to expand it exponentially by calling up and saying, if you force us to make a recommendation, we will, but it might be in your interests to give us a little bit more time, and that sometimes that may be reflective of a desire to investigate it further, but it also might be reflective of a desire to provide the staff with additional time to build the case that is stronger in court than otherwise might be the case.

So, I'm curious as to why you excluded those that resulted in challenges and, secondly, if you want have any comments on my observation, you can.

MR. BARNETT: Let me start with your observation first, and I guess I disagree with your characterization that

our staff would seek to abuse the process to obtain more time.

We make it a priority to try to work within the statutory guidelines. I have certainly had conversations with my staff in which we talk expressly about the fact that parties are perfectly entitled to put us to the limitations set forth in the statute, and, if they choose to do so, we'll live with that.

With respect to the chart, the intent was to focus on—there're sort of two buckets, as I look at this. In one bucket are the transactions that ultimately do not threaten harm to consumers or competition, and one of my goals as the Assistant Attorney General is to try to get those transactions cleared as quickly as possible, recognizing that the other bucket, which is a very small bucket relative to the first bucket, is going to take more time.

Now, if your supposition was correct—that we might extend the time artificially in some way to investigate but then ultimately not bring a challenge, you would expect that average to stay higher and be going up.

The fact that that average is going down means that, in those investigations where we ultimately conclude that there is not a problem, we are getting to that answer

more quickly. I view that as a success.

Does that mean there are not other areas where we continue to try and make improvements? Absolutely not. We're trying to make improvements across the board, but for the purpose of what I was trying to convey to you, I think that the chart has the numbers that one ought to look at.

COMMISSIONER KEMPF: One quick comment--

CHAIRPERSON GARZA: Go ahead.

COMMISSIONER KEMPF: --to Chairman Majoras, and that is, in response to something Commissioner Valentine said, you said you weren't that familiar with the cases where the Commission had lost a preliminary injunction and then proceeded with a Part III proceeding, and you studied the modern antitrust enforcement.

Let me give you two cases: *FTC v. Weyerhaeuser*, which the Commission lost in the Part III proceeding, and *FTC v. Great Lakes*, which they settled during that.

Now, I'm familiar with those since I handled them, but they may have been before the modern era began.

COMMISSIONER WARDEN: They were.

MS. MAJORAS: Lost PIs and then--

COMMISSIONER KEMPF: In each case, they lost a PI, and proceeded with the Part III, one to conclusion. Since

the Commission lost within the Commission, there was no—the staff does not have a right to go to the court of appeals. So, there was no court of appeals jurisprudence coming out of—

MS. MAJORAS: Right.

COMMISSIONER KEMPF: And in the *Great Lakes* case, it was settled while the Part III proceeding was going on.

MS. MAJORAS: What year was *Weyerhaeuser*? Do you recall?

COMMISSIONER KEMPF: '83 was the argument before the D.C. Circuit, and *Great Lakes* was probably '82.

COMMISSIONER VALENTINE: I think that's about right.

MS. MAJORAS: Thank you.

CHAIRPERSON GARZA: Thank you.

Commissioner Jacobson?

COMMISSIONER JACOBSON: Modern is in the eye of the aged.

This has been extraordinarily helpful, and most of my questions have been posed, but I do have three. The first is that this Commission decided over a divided vote to study various exclusionary conduct issues, and the agencies have recently set forth a program for hearings on exclusionary

conduct issues, which suggests that maybe what the Commission might do or say will not be the last word.

Do you have any recommendation for us? And to say, stay out or say the common law process is working would be a sufficient answer, but maybe not the answer that you would suggest for us.

MS. MAJORAS: I think, in particular, helping us to identify the areas that are most important for exploration in our hearings would be very useful to us, and we will be getting a Federal Register notice out in the not-too-distant future that will solicit some feedback, and obviously, you can give us any informal feedback you would like outside that process.

I think that our hearings are highly likely to explore the common law for each different type of practice that we see at issue today. I do not want to prejudge, but at the moment, we are not looking to make recommendations for changes to the statute.

One of the things that we are trying to do, though, is recognize that in the global economy today and with all of these new antitrust agencies we are dealing with, a hundred or so, this has become the issue that the agencies are most interested in. We have a lot of experience in these areas

and we think it is important that the United States remain on the cutting edge of thinking on these issues and that is one of the main reasons, although I should not speak for Tom, that I want to do the hearings.

MR. BARNETT: Well, in addition to endorsing Chairman Majoras' comments, I would go a little further and say that we don't know the answers to exactly what the standard ought to be in every instance of potential exclusionary practice, which is one of the reasons for having the hearings. I am confident that it is important to say that the rules here need to be objective, not based on subjective evidence. They need to be clear, predictable, and I think that—even if you're not able to sort through all the issues of exactly how you evaluate a bundled discount or a royalty rebate or other practice—a statement setting forth those general guiding principles as to what the standard should be is a valuable service that this Commission could provide.

COMMISSIONER JACOBSON: Thank you.

Chairman Majoras, with regard to the post-grant review of patents, my sense is there's general sympathy, even in the patentee community, for the post-grant review process. The dispute is largely between one that would have a time

limit, say 90 days or 180 days after grant, versus a time limit after notice of infringement.

Does the Commission, or do you, have any thoughts on that particular issue?

MS. MAJORAS: Well, I do not necessarily have the expertise to tell you exactly how much time should be given for a post-grant process, but part of the reason to have one is so that those who oppose the grant of the patent can do so without waiting for a notice of infringement. That is one reason I think that we would support such a process. It is to change it from today, where you have to wait for the infringement to become an issue.

COMMISSIONER JACOBSON: I think I understand. So, you would support a process whereby there's a post-grant review, 90 or 180 days after grant by the Patent Office, as opposed to a Patent Office review after notice of infringement?

MS. MAJORAS: Correct.

COMMISSIONER JACOBSON: Okay. Thank you.

General Barnett, first of all, let me say I think the Division has done an extraordinary job of cartel enforcement, and I think the issues that were raised at the hearing that we had are really ones that are at the very

edges and designed to make the process even better.

I think you were referring to the concerns that Tefft Smith expressed, and it's not one that the Division is failing to focus on, jail as the number one deterrent to cartel behavior. His criticism was that the effect of uncertainty in the corporate fines is leading some companies to trade, in effect, a pass for the higher-ups and pay, in return, a more substantial fine; and the result of that is that the fines are higher, but the individuals being incarcerated are not at the apex of the corporate pyramid but rather are middle-level managers.

In particular, let me get to the point of the question, the concern was that the uncertainty in the corporate fines is leading to that result—and he singled out in particular 3571(d), which has the provision for double-the-gain, double-the-loss, which is the only basis to get above \$100 million, and there is a substantial dispute in the community as to whether that provision applies to the entire cartel's sales or just the sales of the defendant.

Wouldn't it make sense from all sorts of policy perspectives just to have some clarity on that particular issue?

MR. BARNETT: I think the comments, with all due

respect, reflect a fundamental lack of appreciation for how the process works in practice. We do not trade off fines for individuals.

What I was trying to convey is that our number one priority is to put the individuals in jail, and while I didn't say it, I will say it now: the higher the level of the individual, the better for our deterrent effort.

So that is our goal now, and we are not going to accept a higher fine to let somebody else off the hook, if you will. It just doesn't happen, and so I guess I reject the assertion or idea that this is something that goes on.

Then with respect to the uncertainty over the level of the fine, I'm not sure that there's any more uncertainty here than there is in other areas where fines are imposed, and given the myriad set of facts that you're going to have to address, I would be concerned about hamstringing us too much with some sort of fixed formula, if you will.

I think, as I sit here today, I don't see that as necessary or beneficial. I see it as potentially harmful, and then, finally, I guess I'd just reiterate that a trade-off is just not the way our Criminal Section approaches the whole issue.

COMMISSIONER JACOBSON: I think what Mr. Smith was

saying was it's the perception of the targets, not that this is the bargaining strategy of the Division. I don't think anyone has suggested that.

MR. BARNETT: Well, a target could propose that. What I'm conveying to you is they wouldn't get anywhere with us.

COMMISSIONER JACOBSON: Thank you.

CHAIRPERSON GARZA: Thank you.

Debbie, you started off your testimony referring to what the appropriate principles guiding merger enforcement should be and suggesting that we shouldn't try to fit standards to particular industries, which brings to mind some legislation that Senator Specter didn't introduce but rather put out to the public for comment. I think it was last week or the week before.

Would you care to comment, or can you comment? I assume you've seen the draft legislation and, in particular, for current purposes, I'd like you to tell me what you think about—if you can—the specific proposal and, therefore, merger standards. I think the standard suggestion was "appreciably diminishes competition;" I'm not sure. But would you, and then Tom, care to comment on that?

MS. MAJORAS: I am never able to testify anywhere

without talking about gasoline.

COMMISSIONER VALENTINE: It is the curse.

MS. MAJORAS: We have been in close contact with the Senator's office about our views on this and appreciate that he has put things out for discussion as opposed to in a bill that automatically takes on a life of its own.

We have said it before, we will say it again; as oil mergers have come before the FTC, the FTC has reviewed them quite rigorously, and challenged them at the lowest concentration levels of any industry that we review. When the response comes back, well, okay, but that hasn't been good enough to block these mergers, so therefore let us come up with a new standard, I have to ask the question, but why? Where is the empirical evidence that in fact these mergers are producing the high prices—relatively high, because relative to the rest of the world, they are not high—that we are seeing in the United States today?

I understand they are of concern to U.S. consumers, but we have around us lots of evidence as to why these prices are going up, and the evidence does not point to mergers as the reason. Therefore, I do have real concerns about our energy policy on a going-forward basis and what we are going to do about our energy needs in the future. I am just not

sure that spending time on changing the merger standard is going to get the best results for consumers. I do not see anything that tells me that.

As far as the standard itself, we are taking a look at it, but I think what will happen, if this legislation is passed, and we have to deal with such a standard, is clearly the expectation will be that we will block oil mergers at a lower threshold level and what that will mean will be something that we will have to work on at the FTC.

I do not know how much guidance that will have, and that will be something that we, and then ultimately, I suppose, the courts, will have to sort out. We are looking at the proposal, but I do not think there is any question that its intention is that we should block mergers at a lower threshold. So, we will continue to look at this issue.

There is no other industry, maybe other than health care, in which we are more focused, and we are going to continue to work with members of Congress on their issues of concern.

CHAIRPERSON GARZA: Tom?

MR. BARNETT: My short version of my answer is, this is one area where clearance is not an issue. We readily clear all such matters to Debbie, and while it hasn't been

proposed, the administration hasn't formed a position on this particular legislation, so I won't comment on it. I will generally observe that, for example, when we are talking with other countries that are developing their antitrust regimes, we routinely advise them against industry-specific statutes or provisions, and encourage them to work with foundational principles, the same general principles focusing on consumer welfare maximization, and some of the principles I set out at the beginning of this hearing, and that that's generally the best policy.

CHAIRPERSON GARZA: Would you care to comment on the NOPEC part of the proposed legislation?

MR. BARNETT: Well, as you know, this proposal has been around for a long time, and I guess my observation is that there are a lot of considerations that go into whether or not one ought to pursue OPEC as a cartel.

Clearly, cartels are a bad thing. I've spent half my time here saying that cartels are a bad thing, and they can inflict enormous damage on consumers, and I wouldn't exclude OPEC from that characterization.

But trying to pursue it where you have sovereign states involved raises foreign policy issues. It can raise national and homeland security issues. All of those things

need to be taken into account and they are all outside of my area of responsibility, and so you'd want to think through those issues carefully before proceeding on anything.

CHAIRPERSON GARZA: Aside from whatever principles might guide the government's enforcement discretion, do you feel there's any need to have legislative reform to enable the U.S. government to pursue enforcement action?

MR. BARNETT: Well, as I said, I don't think we've taken a position, the administration has not taken a position on the specific proposal, and I think until you work through the various other considerations I cited, I don't see how you come to an informed decision about whether there is any need to change anything.

MS. MAJORAS: I am just going to tell you flat out, I do not see OPEC as a law enforcement issue. It is an issue of foreign policy; there is no question. If we believe that we are going to solve our energy problems and be able to do anything about high prices of gasoline in this country by suing OPEC, I submit that we are looking in the wrong direction.

CHAIRPERSON GARZA: Thank you. One more thing real quick. Debbie, you mentioned repeal of the Robinson-Patman Act. Do you think it would also be appropriate then to have

state preemption?

MS. MAJORAS: Not necessarily. Fundamentally, what I think is that this statute and the aims of this statute are outdated and indeed that if there is anti-competitive, meaning harmful to consumers, price discrimination, going on, it can be covered under the Sherman Act and under other, even state, statutes.

But if our own Congress or any state believes that this is actually a policy that should continue, then I would prefer that we put it out into the political process, whether it is federally or in individual states, now, and it can be debated out in the open and that if in fact we are going to continue to have a statute, which I think is really out of step with the rest of our antitrust laws and is protectionist in nature, then let us be explicit about it in the political process today, not 50 or 60 years ago, and let us be honest about it as a society, that this is what we have decided. Today, I do not think we have that.

CHAIRPERSON GARZA: Tom, would you care to respond on preemption?

MR. BARNETT: I don't think I can add anything to what the Chairman said.

CHAIRPERSON GARZA: And finally, just really

quickly, on the issues of immunities and exemptions, one of the things that one of you mentioned was the need to—the battle to resist, if you will, the enactment of new immunities and exemptions.

So, one of the things that this Commission did was take testimony and proposals on a methodology that might be recommended to Congress to consider before it did rush ahead to enact any additional immunities or exemptions.

In principle, if we requested your comments on that study, would you be willing to provide us with additional input?

MS. MAJORAS: Absolutely.

MR. BARNETT: Certainly, certainly.

CHAIRPERSON GARZA: Thank you. All right. I think with that, then we will, unless a commissioner tells me they have a burning urgent question for one short moment, then —

COMMISSIONER VALENTINE: Actually, could I ask one quick question? This is in response to something that Mr. Barnett raised, and it's with respect to state action. Actually, both of you are free to answer this.

There is an FTC-State Action Task Force report out there. It was not issued by either of you. It is the staff's recommendations. Do you embrace the proposals in the

FTC-State Action report?

MS. MAJORAS: Yes.

MR. BARNETT: Well, to be honest, while I've read the report, as I sit here, I'm not sure I remember every specific recommendation. So, what I will say is I certainly embrace the spirit of the report and the general notion that the state action doctrine should be read reasonably narrowly, so that the benefits of competition can be brought to the most consumers in this area.

COMMISSIONER VALENTINE: Okay. Thanks.

CHAIRPERSON GARZA: Thank you very much. Thank you again for your testimony, for being here today, and for your cooperative responses, and we'll bring an end to this hearing.

Thank you.

MS. MAJORAS: Thank you.

[Whereupon, at 11:54 a.m., the hearing was concluded.]