

**STATEMENT OF
JOE SIMS
JONES DAY
WASHINGTON, D.C.**

**BEFORE THE
ANTITRUST MODERNIZATION COMMITTEE**

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Introduction

No sensible person would design a federal government with multiple, independent, overlapping sources of the same regulatory power. But our federal system today is the result of multiple political, economic and social forces, and not the product of anyone's intelligent design. I suppose it could be interesting to redesign our federal government with a clean sheet of paper, but it is not going to happen. So I start from the proposition that, whether it makes sense or not, the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (ATD) will each continue to exist, and will continue to have essentially the same jurisdictional reach as they have today. That means that, with the principal exceptions of criminal jurisdiction for the Antitrust Division and consumer protection jurisdiction for the FTC, each agency will continue to have separate, overlapping jurisdiction over competition policy issues.

I have been asked to offer my views on two questions: (1) dual federal merger enforcement, and (2) differing federal merger standards for obtaining preliminary relief.

I. Allocation of Responsibility

A. Institutional Background

For many years, this was not an apparent problem. The FTC and ATD each basically stuck to their knitting, with lines of demarcation understood and generally followed. It helped, frankly, that for many years the FTC was fairly passive on the antitrust front. But the Kirkpatrick Commission reinvigorated the FTC, and simultaneously (at least in geological time) antitrust enforcement became more obviously political, with a small "p" -- meaning that politicians and the media became more focused on antitrust enforcement decisions and actions. In addition, the economy became more complex, and what had been relatively clear lines in the past became fuzzy and sometimes disappeared entirely. For all these reasons, the two agencies began to become more competitive, especially with respect to very visible matters. While this is easiest to see in the merger area, which is why this area gets most of the attention, it also applies to conduct investigations as well. Indeed, the specific clearance battle that led to the abortive clearance agreement in 2002¹ ("2002 Agreement") involved proposed investigations into joint ventures in the music industry.

Of course, there are issues that arise from dual enforcement even if the allocation process works smoothly. The FTC and ATD are different entities with different cultures and attitudes. They employ different processes and, of course, they have different decisionmakers. All these factors mean that FTC antitrust enforcement is different -- and generally more complex -- from ATD antitrust enforcement, at least in terms of

¹ Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (which can be located at www.ftc.gov/opa/2002/03/clearance.htm)

process, and thus it can make a practical difference to which agency a matter is allocated. In the most extreme cases, this difference can be outcome-determinative, but even where it is not, it can affect the cost and timing of the process. Unfortunately, this problem is not solvable so long as we have dual antitrust enforcement, so I will spend no more time on it.

The current allocation process works relatively smoothly most of the time. Of course, the definition of "most" depends on who you ask. Those at the agencies will tell you that the process works as it is supposed to work in the great majority -- 90% or more -- of the matters, but this depends heavily on the criteria applied. I would be quite surprised if 90% of matters were resolved in two business days, which should be the standard, or even in five calendar days, the period that would have become the standard under the 2002 Agreement. Those outside the agencies, on the other hand, would probably say that the process works acceptably quickly more often than not, but imposes unnecessary and costly delays much more frequently than it should. In any event, we should understand that we are not talking about nuclear meltdown here, but rather how we make an ungainly structure work as smoothly as possible, which should be a universal goal.

Unfortunately, on those occasions when the process does not work, it sometimes does produce the clearance version of meltdown. For HSR matters, this means coming to the very end of the initial 30-day waiting period before an allocation decision is made, which inevitably produces a Second Request (and thus automatic extension of the waiting period) where one may not have been necessary. For matters that are not on a clock, it can mean even worse results -- months or years delay in investigating possible antitrust violations, with the accompanying risk of consumer harm just because the feds cannot get their act together. This kind of bureaucratic mess gets very visible when dealing with hurricane recovery and relief; it is less visible but also potentially very harmful, especially when it results in potentially illegal conduct not being investigated while the consumers who are the subject of the conduct continue unknowingly to pay for the illicit exercise of market power.

I believe that the starting point for any discussion of this issue should be agreement that one day of unnecessary delay is unacceptable. After all, both agencies share the same mission -- protect consumers from anticompetitive conduct. The important thing is accomplishing the mission, not which agency does it. In the vast majority of situations, it should make absolutely no substantive difference which agency handles the matter. And even where it might make some difference, that cost is likely to be far outweighed by the benefits of a clear, efficient allocation system. So the goal is obvious: make the allocation system as automatic as possible, and create a dispute resolution system for those matters that cannot be automatically allocated that is equally efficient. The objective is to get the antitrust enforcement process moving ASAP, and there is no place in this discussion for bureaucratic parochialism.

B. The FTC/DOJ Clearance Agreement of 2002

I have attached to my testimony materials relating to the 2002 Agreement, including a contemporaneous talk I gave dealing with the controversy that the 2002 Agreement produced. These documents explain that the 2002 Agreement happened because of a confluence of events -- two old colleagues and friends becoming heads of the two federal enforcement agencies, and each inheriting a clearance dispute more than a year old that had prevented either agency from investigating important joint ventures in the music business. Tim Muris can speak for himself on this, but my perception was that both were somewhat embarrassed when they came into office and found this mess sitting there. Since both had the luxury of prior experience at their agencies, neither faced the same learning curve that many such appointees face, and both had a sincere desire to take advantage of their experience to leave their respective agency a better place than they found it. But this experience also taught them that it would be very difficult for those within the agencies to agree to a clear allocation process, given the history of conflict and the inevitable parochialism that would attach to such a discussion. So they reached out to four agency alumni -- two from the FTC and two from the ATD -- and asked them to study the process and offer a recommendation for how to solve the problem.

That outside group included two persons who had served in Democratic administrations, and two who had served in Republican administrations (although I had actually served in both). They were given no instructions, complete access to records and personnel at both agencies, and complete freedom to suggest what they thought was the most sensible solution. After several months of work, and considerable debate among the group, they unanimously agreed on a set of recommendations to Tim Muris and Charles James. Those recommendations were supported by 11 former heads of the antitrust agencies from the previous four administrations and the Antitrust Section of the American Bar Association. Perhaps less surprisingly but still important, the leading associations of the business entities that are the frequent target of antitrust investigations -- the U.S. Chamber of Commerce, the National Association of Manufacturers, and the Business Roundtable -- all welcomed the proposed process as a significant improvement likely to reduce unnecessary burdens on their members. Muris and James quickly accepted and implemented the recommendations, which immediately produced remarkable improvement in the process -- virtually eliminating disputes and reducing average clearance times to about 2 days.

Notwithstanding all this, the 2002 Agreement was abandoned less than three months after it went into effect, the victim of political blackmail by a Senator willing to at least threaten to impair homeland security in order to get his way. It was an outrageous example of Washington at its worst -- a disaffected FTC Commissioner teaming up with special interest lobbyists and an unprincipled politician to kill what was unquestionably a significant improvement in the process of antitrust enforcement. There is little point in

refighting that fight, however, and more potential value in asking whether something can be done today that might improve the existing process. Frankly, I am dubious.

The reaction to the 2002 Agreement has convinced me that the two agencies could never negotiate such an agreement on their own. The staff at both agencies did not like the 2002 Agreement, thinking that the division of responsibilities favored the other. Most alumni of both agencies that I spoke to had the same reaction -- that the agency other than the one where they had worked had gotten the better of the deal. Actually, the four alumni that recommended the 2002 Agreement had to work through these same kinds of instincts and reactions, but because it was a small group with a lot of mutual respect and without any current enforcement responsibilities, we were eventually able to get our minds around the fact -- which is critical to any such agreement -- that it really does not matter in the long run which agency does which matter. Yes, it might matter on any given deal, or even for some period of time, while expertise is accumulated that might already exist elsewhere, but over time and on balance, any such costs are minimal compared to the cost -- in time, money, and frankly in the adverse effect on mutual self-respect and collaboration between the agencies -- that the current system produces. Since there is no real merits-based way to allocate these responsibilities that could possibly produce agreement, you have to start from the premise that it really doesn't matter who does it -- and I doubt that current agency employees, or for that matter politicians with oversight or fundraising blinders on, could ever do that.

Could we set up some other process that could produce a decent result? Sure, in concept, but I wonder how realistic this option is. This Commission could make a recommendation, but it would either have to be embodied in legislation or accepted voluntarily by both agencies. I despair of getting a coherent result from the legislative process, given our prior experience, and frankly I wonder how likely it is that the leadership of both agencies would be willing to spend the capital, both external and internal, required to accept this Commission's recommendations, even if they were as sensible as the 2002 Agreement? The 2002 Agreement succeeded (while it lasted) because of the personal relationships of the heads of both agencies and the fact that, despite various efforts to paint the allocation as politically motivated, everyone involved knew that it was a fair-minded effort to equally share the responsibilities (and the glory) of federal antitrust enforcement. Whether those circumstances could be replicated today is not at all clear to me.

This Commission could do a service by clearly stating that delayed allocation decisions are inconsistent with sound enforcement policy, and that it is much more important that the enforcement process be efficient than which agency actually carries it out. Perhaps that would encourage the agency leadership to bite this bullet again, although it will take some courage to do so given the previous outcome.

II. Differing Federal Merger Standards

A. The FTC Procedural Standards Should Be Reformed

Given the presence on this panel of people much more knowledgeable than I on this question, I am going to focus on the conceptual, not the legal. There is no doubt that, taken literally, Section 13(b)² of the FTC Act provides a lower threshold for obtaining preliminary injunctive relief than does the jurisprudence of preliminary injunctive relief under the Sherman and Clayton Acts. But there is also not much doubt that this has not been taken as a Congressional direction to give the FTC preliminary injunctive relief every time it asks for it, but rather simply provides a broader range of flexibility to a judge to reach the decision he or she feels appropriate -- see, e.g., *Arch Coal*.³ And query whether Judge Walker would have come to a different decision in *Oracle/PeopleSoft*⁴ if the transaction had been challenged by the FTC instead of the DOJ -- who really knows? I am sure that most private practitioners today advise their clients that the FTC may have a greater legal ability to block a merger, everything else equal, than does the ATD, so the language of 13(b) does have an impact.

This specific manifestation of the dual enforcement system we have today illustrates the costs and risks it imposes. Section 13 (b) applies to all FTC enforcement, not just to mergers, and indeed may well be useful and attractive when applied to various consumer protection efforts by the FTC. But does it make sense for a merger to be effectively blocked -- and remember that is the almost universal effect of a preliminary injunction in a merger matter -- based on one standard and burden of proof if it is investigated by the ATD and another if by the FTC? And the existence of this different standard has ramifications not just at a preliminary injunction hearing, but throughout the process. At any given time, at least some of the sitting Commissioners believe that, in most cases, they will need to show relatively less to obtain a preliminary injunction, and because of this they are more likely to be willing to accept a staff recommendation to challenge a transaction. Because the staff knows this, they are likely to be slightly more aggressive in recommending a challenge -- and slightly less willing to accept a proposed resolution of a problem. All this tends to exacerbate, rather than minimize, the differences between the agencies, and make the allocation process more like a lottery than simply an efficient method of sharing the same responsibility.

The rationale for a different, easier standard to meet for the FTC advanced by some is that, as an "expert" agency that has the ability to use its administrative process to investigate complex issues, it should have a low standard to maintain the status quo while it does just that. This is nonsense. First of all, there is no straight-faced argument that the FTC is more expert than the ATD. It draws from the same pool of talent, and employs the same economic analyses; those of us who practice before both recognize that each agency has very competent (and some less competent) lawyers and

² 15 USCS § 53 (2005)

³ *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004)

⁴ *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004)

economists working for it. If anything, given the more diverse backgrounds that some past FTC Commissioners have come from, you could argue that on occasion its decision-makers, at least, have collectively been less expert than those at the ATD.

More importantly, the administrative process is really irrelevant in the merger context, since in virtually every transaction, the entry of a preliminary injunction is fatal to the deal. The agencies know this, the parties know this, and the courts know this, so pretending that the availability of the administrative process somehow justifies a different PI standard is silly. An administrative trial could have some advantages in a non-time sensitive matter, such as the *Chicago Bridge*⁵ consummated merger challenge that the FTC just decided, but the normal HSR process is a pre-closing regulatory approval system. A file-and-wait system requires quick resolutions, and whatever the administrative process is, it is not quick.

B. The ATD Standard Should Be Applied

For all these reasons, there is no justification that I can see for different preliminary injunction standards for the two federal enforcement agencies. But if the standard should be the same, should it be the weak FTC standard or the harder ATD standard? The ATD (or general PI) standard is the correct one. If the current investigatory process remains the same, with the agencies basically having unlimited discovery with no constraints as to relevance or burden, there is absolutely no reason they should not be able to meet the normal PI standard if there is an appropriate basis for blocking the transaction. After all, since we are talking about conduct that is presumptively efficient, and the agencies will have already undergone a full and unconstrained discovery of all the relevant facts, it is proper that the agencies should have to meet a higher burden of proof to obtain injunctive relief. And even if the investigatory process was reformed in the way it should be -- to limit the reach of the agency's pre-complaint discovery to that necessary to make an informed decision about whether a transaction carries with it enough risk to competition to justify litigation -- the agency would then be entitled to post-complaint discovery, following which it should once again be forced to carry the normal preliminary injunction burden. If the agency cannot show a reasonable likelihood of success on the merits after full discovery, it has no business obtaining any relief, much less the abandonment of the transaction that inevitably follows the entry of a preliminary injunction.

There is a related issue that is sometimes raised in this context, and again it goes back to the FTC's ability to hold an administrative hearing. On occasion, a district court, either on the motion of the parties or *sua sponte*, collapses the PI hearing into a hearing on the merits. If the FTC was subject to the same standards, it is argued, this might happen to it, and this would be bad because it would eliminate the option of an administrative hearing. In fact, that would be a good thing, not a bad thing, in the HSR context. As noted above, the administrative process might be useful in some contexts,

⁵ Chicago Bridge & Iron Company N.V., Chicago Bridge & Iron Company, and Pitt-Des-Moines, Inc., Docket No. 9300, October 25, 2001 (which can be located at www.ftc.gov/opa/2001/10/chicagobridge.htm)

but to subject merging parties to a multi-year process after losing a preliminary injunction would be irresponsible, especially given the current investigatory process. This was no doubt why the FTC chose not to proceed this way in the *Arch Coal* matter, even though it was clear that it disagreed strongly with the court's decision. For the same reasons, the ATD has in practice given up its right to seek a trial on the merits once it loses a preliminary injunction, even though it could pursue the matter much more quickly than the historical record of administrative proceedings at the FTC.

Conclusion

We are stuck with two federal enforcement agencies. If we were not, you could make a reasonable argument for consolidating in either the FTC or the DOJ. If the FTC, you could give all criminal responsibility to the DOJ, and leave everything else with the FTC. If the DOJ, you would move all antitrust enforcement to the ATD, and leave the FTC with consumer protection responsibility. There are pros and cons to either approach. A hybrid, once suggested by former FTC Commissioner Phil Elman, would be to make the FTC into a specialized competition court, but leave the DOJ with the prosecutorial responsibility. And there are probably infinite variations on these themes. But none of them are going to happen, for the same reasons that the 2002 Agreement was blown up -- too many people have too high a stake in the status quo. So, while this may appear cynical, I don't think there is much that can practically be done other than to try to tweak this imperfect system to make it work better. Good luck.

GEORGE MASON LAW REVIEW

**Spring 2002
ANTITRUST SYMPOSIUM**

**FEDERALISM
and the
Many Rights of Action in
ANTITRUST LAW**

Remarks of

JOE SIMS

**JONES DAY
WASHINGTON, D.C.**

on the

THE FTC/DOJ CLEARANCE PROCESS

May 17, 2002

Since the United States has the dubious pleasure of having two federal antitrust agencies with largely overlapping jurisdiction, common sense and principles of good government leads to the conclusion that they must find some way to ensure that they do not duplicate efforts or trip over themselves in a competition for the hot topic or transaction of the moment.

For the first time in literally decades, the current heads of the agencies have had the courage to bite the bureaucratic bullet, and reach an agreement that, if it survives, promises to essentially eliminate the unseemly and highly inefficient historical practice of literally haggling over which agency should do which investigation. The new agreement has already had spectacular results --virtually eliminating disputes, and reducing average clearance time to about 2 days, a dramatic improvement over historical norms. The agreement has been widely applauded by almost the entirety of the antitrust bar; all those knowledgeable about the antitrust enforcement process viewed the historical clearance "process" as a joke.

Nevertheless, a few Washington lobbyists (all of whom generally oppose all significant media transactions) have complained about the new agreement, asserting that their views will receive less attention on media mergers at the DOJ (which will handle all, instead of almost all, such mergers under the new agreement) than they have in the past at the FTC. While some might argue that this is itself a benefit of the transaction, others seem to find some merit in their views. A variety of other, obviously makeweight arguments against the new agreement have been advanced, but the real bottom line for these special-interest advocates is that they apparently believe that there will always be someone at the FTC who will lend a sympathetic ear for their views. Thus, they are fighting to undo the agreement, and to (somehow) ensure that at least some (over the last decade, it was a total of two major) media mergers find their way to the FTC.

This attempt at further politicization of what would optimally be a non-political part of economic regulation is partially the result of a too-encouraging attitude taken by the agencies to this kind of special interest pleading during the last administration, and partially just an opportunistic attempt to make some political hay. Whatever its origins, the only predictable result if they are successful would be to reduce the credibility of the FTC as a truly objective antitrust enforcement agency. If a few loud voices can compel the agencies to undo a demonstrably rational plan for dealing with an inherently irrational situation -- two overlapping and competing federal antitrust agencies -- it will be hard for the FTC to convince the rest of the country that these same voices don't have undue influence on FTC decisions on which transactions to challenge and why. It will be interesting to see whether the agencies (or more accurately their political superiors) will stick to their good government principles in the face of political heat, or will instead retreat to the political pragmatism that so often governs Washington decisionmaking. Don't bet on good government.

I. The Real Issues

A. Quick Background

1. Tim Muris and Charles James arrived in office with one real advantage over most of their predecessors -- they had been there before, either actually running the agency (James was Acting AAG for about a year) or in very senior positions (Muris had run both the Bureau of Consumer Protection and the Bureau of Competition). So neither had much of a learning curve. And both knew from personal experience, both at the agency and in private practice, that the clearance process had become a bad joke -- eating up time and resources, and generating inter-agency jealousies and animosities that were impairing effective antitrust enforcement.

2. They also found one pending matter, involving a proposed joint venture, that had been pending in the clearance process for more than a year. In the old clearance process, if all else failed, the FTC Chair and the AAG would decide it; apparently, the previous heads of the two agencies could not reach agreement on this matter, and left it pending for their successors. James and Muris quickly agreed this state of affairs was unacceptable, and unsuccessfully tried to resolve the dispute themselves. Unfortunately, the arguments for both agencies had force, and both were under considerable pressure from their staffs to not give in -- in large part because under the then-existing clearance system, once an agency gave up a matter, it largely gave up all future matters that were in the same industry area. In desperation, they come up with the idea of going to a neutral arbiter, selected a local law professor, had each agency present their arguments, and let him decide. He decided that the DOJ had the better claim, and on that basis it was cleared to the DOJ.

3. Although this solved this particular problem, Muris and James had absolutely no desire to go through this again, and certainly not on a regular basis. In addition, both of them were committed to fixing what they saw as a variety of procedural problems for the agencies that, in their view, had gotten in the way of effective enforcement, and reduced the bar and business support for the agencies that is critical to long-term enforcement success. This commitment has already resulted in a reorganization of the Antitrust Division, a new approach to HSR investigations and second requests at both agencies, and now this attempt to fix the clearance process.

4. Given the historical inability to get the agencies to agree on a fix to the clearance mess (agency staffs had become more competitive than cooperative, caused in large part by constant disputes over clearances), Muris and James decided that it might be useful to seek help from respected former agency officials -- from Republican and Democratic administrations, and from both agencies -- to come up with a workable plan. The theory was that they would have useful experience and knowledge, but (hopefully) less parochialism, since they now practice before both agencies. I hope the theory behind the particular selections -- Arquit, Baer, Sims and Sunshine -- was also that these particular people would be neutral honest brokers -- willing and able to suggest the right thing from the perspective of federal antitrust enforcement in the

aggregate, and not be in the position of, as those in the agencies too often found themselves, negotiating on behalf of a client.

5. This outside expert group talked with both agency heads, and with the people who actually do the clearance processing. They got statistics and information relating to the historical clearance process. And most importantly, they approached the problem with the starting assumption that it was generally irrelevant which agency did which matter -- since both are fully capable of doing any antitrust matter (taking into account the limited statutory and constitutional exceptions, of which the most important is all criminal matters must be done by the DOJ), having matters done in a timely and effective way is much more important than which agency does them. This group then produced an initial report and recommendations that dealt with the entire process -- from original input to internal agency handling to communicating between agencies. As part of this report, it also suggested updating the existing historical commodity allocation list to (1) make it more effective -- broader categories of like matters grouped together, and old exceptions rationalized, and (2) create an essentially even distribution of matters between the two agencies, emphasizing wherever possible historical patterns.

B. The Attacks

1. This matter was handled the way it should be -- the two persons with administrative control over each agency dealt with each other and with the relevant staff. On the DOJ side, this was non-controversial; there, everyone knows who the decisionmaker is. But on the FTC side, it was a different story. Some reacted badly to the new agreement, complaining that they were "giv[ing] up all the hot stuff," and trading the New Economy for the Old Economy. Of course, like so much of the rhetoric on this subject, this is a significant overstatement; under the new agreement, for example, the FTC has jurisdiction over bio-tech, the pharmaceutical industry, the computer industry and health care. The last time I looked, these were all part of the New Economy under anyone's definition. What the FTC was giving up was something it had, as a practical matter, only very occasionally had -- review of media mergers. Still, someone quickly sounded the alarm on the Hill, reaching out for politically sympathetic ears. As good fortune would have it, the Chair of the Senate Commerce Committee, with oversight jurisdiction over the FTC (and coincidentally with appropriations jurisdiction over both the FTC and DOJ) was one of those sympathetic ears. The result was a cacaphony of political finger-pointing, some of it clearly turf-protecting, and some of it no doubt motivated by a sincere -- if misguided -- notion that the record of the previous administration tenure at the FTC was (or should be) the model for the future.

2. In the short run, all this screeching caused a delay in the signing of the agreement. It was eventually finalized, but the complaining continues, with Senator Hollings issuing various threats to use his appropriations authority to eliminate funding for positions or programs if the agencies do not come around to his way of thinking. In fact, the agencies are never going to come around to his way of thinking; the agreement is both sensible and appropriate, and the arguments against it, as detailed below, are remarkably unpersuasive. Unfortunately, this is not to say that the political people in the agencies may not ultimately decide that the pain is not worth the gain, and compromise

what they really think just to buy peace, or to get some other things done. In the end, those with the final decisional power here are politicians, so it would hardly be shocking to see merits and substance get overwhelmed by political pragmatism. After all, this is Washington, and good government is mostly rhetoric, not reality. Muris and James were bucking a strong tide in just trying to do the right thing, and once again we learn that no good deed goes unpunished in Washington.

3. Whatever the eventual outcome, it should be clear that it has nothing at all to do with antitrust enforcement on the merits, and everything to do with the fact that (with the unfortunate acquiescence of the prior administration) antitrust enforcement is today highly politicized. This is not a purist's lament; antitrust is economic regulation, not law enforcement in the normal sense of that phrase, and politics are and will always be an integral ingredient in government regulation. We have had periods of politicization before, in both Republican and Democratic Administrations. Partisan politics is a bi-partisan sport. But it is rarely as open and notorious as this issue has revealed, and part of the blame for that has to go to the prior administration, which went out of its way to open the agency doors to competitors and advocacy groups as full participants in antitrust decisionmaking. When antitrust enforcement officials go on recruiting tours specifically to generate complaints about a practice or company they would like to attack, or insist on "field-testing" proposed consent decrees with competitors of the parties to see if those competitors find them satisfactory, it should be no surprise when politicians decide that they should be able to play in this game too.

4. Thus, the real issues here have nothing to do with media mergers, or differences in enforcement patterns, or far-fetched political conspiracies, or fictional conflicts of interest. The real issue is good government: how do we make a system that is irrational on its face work as efficiently and effectively as possible, and what is the proper role of political participation in the inner workings of what are least technically supposed to be law enforcement agencies.

II. The Political Issues

A. Media mergers are different

1. From what? Why? Where do the antitrust laws distinguish media mergers from any others? How are they defined? What exactly are the different standards that should be applied? What statute do they come from? How are they to be tested? If the First Amendment is the basis, shouldn't that mean less regulation rather than more?

B. This was a secret, back-room deal.

1. Give me a break. The clearance process has been in place for more than 40 years. It has never been a secret. The only things that have been opaque are the processes and standards the agencies use to make decisions. The main difference in the new modifications is that they were actually announced to the public, while other agreements over the years were generally not.
2. There has been a commodity list that divides up commodities between the FTC and the DOJ for decades. But over time, it has become essentially unusable, with obscure distinctions and the accumulated weight of many years of disputes and compromise. The new list is remarkable only for its clarity -- which would normally be desirable but in today's political climate appears to be a detriment. The great benefit of a clear commodity list is that the parties will know in advance, in the vast majority of situations, which agency will handle that matter; this will eliminate the forum shopping, confusion and delays that have characterized the clearance process for decades.

C. The FTC is historically tougher on media mergers

1. Give me a break #2. The FTC has had two -- count them, two -- significant media mergers in recent memory: TW/Turner, and AOL/TW. I was directly involved in both. Another common thread was Bob Pitofsky, the FTC's Chairman when both deals were done. As a result of the latter fact, both matters were characterized by very creative theories of liability, (in my view -- of course, Bob disagrees) largely having nothing to do with the facts. This was NOT indicative of a core difference between the FTC and the DOJ; it reflected Pitofsky's approach and perspectives, not institutional ones. Does anyone really believe that Jim Miller, or Dan Oliver, or even Tim Muris would have approached these transactions in the same way that Bob Pitofsky did? The notion that the FTC is uniformly and institutionally tougher than the DOJ is nonsense.
2. I defy anyone to explain to me what exactly was "tough" about the FTC's handling of these deals, other than the seemingly interminable process itself. News Flash: THE DEALS WENT THROUGH! Notwithstanding the rhetoric, the FTC recognized that any competitive issues were marginal, and called for only marginal relief. As a result, the deals were consummated, with very few conditions and none that go to the core economics of the transaction. If the results in these cases are "proof" of the "unique" role that the FTC plays in this area, I would not be in a hurry to abolish the FCC.
3. And what about the FCC? I thought it was the agency whose job it was to apply the "public interest" test to media mergers; the FTC's job is to

enforce the antitrust laws. Do we really need two FCC's -- which, by the way, is basically what the AOL/TW matter devolved into? Seems like a waste of taxpayer dollars to me, but apparently not to those to whom the real interests of consumers' (i.e., taxpayers') have been mysteriously revealed.

D. The FTC has a broader statute to enforce

1. Give me a break #3. The FTC does have another statute, the infamous FTC Act. And its language does indeed seem to leave more room for FTC discretion than the Clayton Act does. But there are at least three problems with this argument:

-- The last time the FTC tried to argue that the FTC Act gave it greater discretion in the antitrust area than did the Sherman and Clayton Acts, it almost got disbanded. This was in the Mike Pertschuck era of the 1970's, when the FTC earned the name "National Nanny" by its expansive readings of its authority to tell everyone else what they could and could not do -- all in the name of the "public interest." Now, it is one thing to attempt to use the FTC Act in non-merger contexts; while the wisdom such an effort is itself highly questionable, any such standards that became part of the existing jurisprudence would at least (presumably) be applied to all industries, much like criminal penalties are universally enforced by the DOJ. Thus, there would not be a different standard applied to merger transactions in different industries simply because of which agency is assigned the enforcement responsibility. But to have some mergers evaluated by the DOJ under the Clayton Act, and some others by the FTC under a different standard would likely revive the calls for reform that were generated by the last effort to use the elastic language of the FTC Act as, in effect, a way to unilaterally extend the reach of the primary antitrust laws.

-- If it wants to get a transaction enjoined, the FTC has to go to court -- just like the DOJ, and it must do so using the same substantive legal standards as the DOJ would have to use. This is the principal difference between the FTC and the EC, and is the main factor (other than general good judgment, which is too highly variable to be a reliable cap) that restrains all American antitrust enforcers. Judges are, as a group, not inclined to allow the government to stop otherwise normal business behavior without a persuasive showing that the public interest is going to be adversely affected if the transaction goes forward. Put yourself in the judge's shoes: the FTC comes into court, and says "We don't have a good case under the Clayton Act (the anti-merger statute that both we and the DOJ normally use), but here's a theory under the FTC Act, that prohibits not anticompetitive mergers but "unfair

methods of competition". Please enjoin (and as a practical matter kill) this merger), or if the parties want to go forward, we can go back to our administrative hearing sandbox and play around for a couple of years with some new, not-quite-antitrust theories of why this merger is bad for the 'public interest'." Do you think there would be a competition within the FTC for the speaking role in this case?

-- Finally, if it was ever the case that the FTC and the DOJ actually did apply different standards in merger cases -- so that the outcome depended not on the facts and the law but on the bureaucratic roll of the dice that decided, on whatever criteria, which agency would review the transaction -- that would be an intolerable situation that would have to be fixed. The US antitrust laws are already screwed up enough, with two federal agencies, state AGs, and specialized agencies like the FCC, the DOT, and the FERC. If the two federal enforcement agencies actually started using different rules, thus producing different outcomes based not on the facts but merely because of the identity of the agency, that would be a disaster that would immediately generate pressure for a fix. Compare the outcry over the different results in the US and the EC on GE/Honeywell; imagine if that same kind of discrepancy could happen on two similar deals in the US because we had two federal agencies applying different standards?

-- Indeed, this may be the real objective here: to try to create pressure to move all merger enforcement to the FTC. After all, for groups like the Center for Digital Democracy and the Center for Media Education (which may be the same thing under different names -- these advocacy groups seem to have gone to the same naming school as those who create the titles for legislation. The main objective is to be identified with something that people cannot possibly be against -- Digital Democracy or Media Education -- while never indicating that the actual legislation (or in this case, the advocacy group) may be trying to accomplish something that, if properly disclosed, would find less support than the homilies of the titles), a multi-headed, bi-partisan commission structure is a lot easier to penetrate than an Executive Branch agency, where there is a single decision-maker and a clear line of authority and accountability. In a multi-member "independent" agency -- an oxymoron to anyone who has been in Washington for more than 90 days -- there are pretty good odds of there being at least one person who is either ideologically sympathetic or has political ties or ambitions that make him or her receptive to being approached by the special interest pleader -- who after all makes his or her living

by claiming some kind of special knowledge, access or ability to influence Washington decisionmakers.

E. Getting Advice from Private Practitioners is Improper

1. The hyperbole has been at its best (or worst) on this point. As it happens, I have been singled out as the evil Rasputin here, but not because anyone really believes it. No, the real reason for the focus on me is that I was the only person on the group that represented either of the parties in the AOL-TW merger, and that is the only significant media merger that the FTC has done in the last half-decade. So, if you are a politician or a special interest advocate trying to find something to use as a media hook, and get people to pay attention, and not coincidentally not have to explain your real reasons for being upset, then a nice juicy conflict of interest story tied to the biggest media merger in history is an attractive media hook.

2. The most common attack has been that it is outrageous that Muris and James asked private practitioners for their advice, and did not ask Senator Hollings, or Jeff Chester, or maybe Julia Roberts. This is portrayed as somehow avoiding scrutiny or finding a way to do something secret and nefarious. In fact, of course, they asked us and not them because we actually had something to contribute to solving the problem -- experience both in and outside the agencies, a resulting understanding of the clearance process and the agencies, and a collective reputation based on that experience and knowledge that would presumably provide some credibility to any recommendations we made. Whatever their other accomplishments, those that are complaining the loudest about not being asked for their views do not share those attributes.

3. The complainers have argued that the recommendations are designed to serve the interests of my clients -- presumably AOL/TW, but maybe other media clients as well -- in avoiding the FTC because it is a tougher enforcement agency. We have already disposed of this canard -- Pitofsky may have been tougher than some other Chairmen, but the FTC, just like the DOJ, reflects its leadership, not its bureaucratic identity. When Anne Bingaman was the head of the Antitrust Division, I don't recall complaints from this crowd that she was not tough enough. And there are other problems with this argument as well. Let's assume that my clients would prefer to go to the DOJ rather than the FTC, when they are trying to get a merger done. But what about when they are complaining about a merger? If the Jeff Chester's of the world are right, then they would want to be at the FTC. And what about energy or health care clients; is the argument that I sold them down the river to suck up to AOL/TW? Would the validity of that argument be affected by knowing whether I (or my firm, since I do share in Firm profits) makes more money from media

companies, or health care and energy companies? Would you like to take a guess as to the answer? And by the way, this argument completely ignores the fact that this report and recommendations was not a personal effort; rather, it was the product of the collective judgments of four senior antitrust practitioners, all of whom have a wide variety of client interests and have not generally been known for being easily led around by a ring in their nose, which is the impression that one would draw from the hyperbolic focus on me and AOL/TW.

4. Finally, if there was any doubt about the good faith of this outside expert group, I feel confident that each would say -- and be backed up by every experienced antitrust practitioner in the country -- that we would all make more money if all matters were handled by the FTC. A multi-member agency structure is inherently more complex and expensive to deal with; the easy example is five commissioners to visit with rather than one agency head. So the economic incentives would run toward favoring the FTC, not the DOJ. But of course, this is all complete nonsense. None of the members of this advisory group is starving, and none could possibly predict the economic impact of the application of any set of rules on them or their firm. Indeed, one would hope that this likely indifference to either client or personal interests, along with their experience, is what made them attractive to Muris and James in the first place.

III. Conclusion

For those of us who have been around Washington for a while, the ultimate outcome of this imbroglio is unfortunately pretty predictable -- a determined politician with power and little to lose can have disproportionate weight in the process. For both agencies, having to spend precious front office time on this is a real cost. None of the various threats to eliminate funding have much effect; these are just Washington code for "I am going to keep on this until you change to suit me." But on the list of priority issues for the DOJ, it is unfortunately true that good government initiatives in antitrust are likely not high on the list. When international and domestic terrorism are on your plate, the allocation of industries between the FTC and DOJ is likely to get little attention, and to spending few chips.

And there are also quite perverse incentives on the FTC side. The FTC is fighting to keep from getting more jurisdiction. This is admirable on Tim Muris' part, but one has to wonder how long he can keep it up, especially since the entire staff of the FTC would prefer to keep having the opportunity to deal with high-visibility media mergers? Muris showed great principled courage in agreeing to this deal, but it is not clear that he can indefinitely hold back both his staff and a determined senior politician. And if he eventually gives up, and allows himself to be thrown into that briar patch, is it likely that the DOJ will fight on alone?

As the old saying goes, "If you want a friend in Washington, get a dog!" (I have had one since 1972.) A codicil might be, "If you want to take some jurisdiction away from a veteran politician, be prepared for a war." None of the outside expert group ever thought about this kind of a political reaction; we were blissfully, and apparently ignorantly, focused on what made sense for good sound antitrust enforcement. My guess is that the same was true for the agencies. Time will tell how unfortunate the results of this naïve focus on the merits will be for what is becoming the endangered species of professional, objective, non-political antitrust enforcement.