

ANTITRUST MODERNIZATION COMMISSION

PUBLIC MEETING

Thursday, January 13, 2005

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

The meeting 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
DENNIS W. CARLTON, Commissioner
MAKAN DELRAHIM, Commissioner
JONATHAN M. JACOBSON, Commissioner
DONALD G. KEMPF, JR., Commissioner
SANFORD M. LITVACK, Commissioner
JOHN H. SHENEFIELD, Commissioner
DEBRA A. VALENTINE, Commissioner
JOHN L. WARDEN, Commissioner

ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director and
General Counsel

WILLIAM F. ADKINSON, JR., Counsel

TODD ANDERSON, Counsel

MICHAEL W. KLASS, Economist

ALAN J. MEESE, Senior Advisor

HIRAM ANDREWS, Law Clerk

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

P R O C E E D I N G S

CHAIRPERSON GARZA: I'd like to open today's meeting of the Antitrust Modernization Commission.

Firstly, I'd like to welcome the Commissioners, staff, and members of the public who have come to observe the Commission's deliberations today, including any members of the Senate and House staffs that might be here.

I'd also like to introduce Bobby Burchfield, who is on my left at the end of the table. He is the newest member of the Antitrust Modernization Commission, replacing Debbie Majoras, who, of course, is now the chair of the FTC.

And Andrew has just reminded me that I ought to note for the record that we do have a quorum. In fact, all of our Commissioners are here today, which is gratifying.

The purpose of the meeting today is for the Commission to determine issues for further study by the Commission consistent with its statutory mandate, to examine whether the need exists to modernize the antitrust laws, and to identify and study related issues. To assist

in our deliberations, the Commission staff, working with several working groups of Commissioners, undertook to collect and organize issues proposed to the Commission by the public following our requests for input and suggested by Commissioners themselves. Staff and members of the working groups researched and analyzed the issues and, having in mind the discussion of the Commissioners at our last meeting, recommended to the full Commission whether certain issues should be studied or not.

Each of the Commissioners has had an opportunity to review and consider the memoranda of the working groups, and we hope today to have a discussion of those recommendations, leading, I hope, to a consensus on at least some issues on which the staff and Commissioners can begin to work.

I'd like to note that, because the purpose of this meeting today is for the Commission to deliberate on what issues it will study, there will not be an opportunity for participation by the audience. We, of course, are pleased by the interest in the Commission's work that's demonstrated by the people who are here today, and we have appreciated the thoughtful comments we have

received from the public to date. There will be, of course, opportunity for the public to further comment on our proceedings, and we welcome anyone who has any reaction to today's meeting to submit any comments they would like in writing.

I also want to note before we begin that whatever slated issues the Commission decides on today should not be taken as being preclusive. We will remain flexible and open throughout our process. It may be that time and circumstances will suggest issues to us later that we have not considered or cause us to re-evaluate the study of certain issues not selected today. It may be that representatives of Congress or the Executive Branch request us to assist them in considering certain issues, and the Commission will be prepared to do that.

The way we'll proceed today is according to the agenda, which I think the Commissioners have and which I think the public should have as well. We have an order of the working group recommendations that we're going to address; and the working group leaders in each case, I will turn to you and ask you to begin to lead the discussion.

We are going to try to keep to the time limits set in the agenda so that we can achieve everything that we want to achieve today. And Andrew will help us to meet that goal. At such point as when we come to having Commissioner comments, if you would like to be recognized to make a comment, can I ask that you just push your name plate forward or something. Oh. They don't stand very well. I guess you can. You have to be careful. Hopefully it won't get too noisy, but if you can stand it up, then I'll know to recognize you.

All right. Any questions before I turn it over to our first working group?

Okay. Then we'll begin with the International Working Group recommendations, and, Makan, will you do the honors?

I. International Working Group Recommendations

COMMISSIONER DELRAHIM: Thanks, Deb, Madam Chairman.

The International Working Group considered the various issues, like each of the other working groups, that were suggested by the Commissioners, the public, members of Congress, and other comments we had gotten from

the outreach efforts. We considered each of the issues through several conference calls of the working group and evaluated and put together a memorandum for the whole commission on what issues to consider and what issues that the working group recommends not to consider.

I will briefly go through and mention those issues that were identified by the different Commissioners. I should say at the outset that not all of the recommendations were unanimous. There was a lot of debate, and some of them were close calls, to study or not to study, and I'll identify those.

The first issue is whether or not the Foreign Trade Antitrust Improvements Act should be amended to clarify circumstances in which the Sherman Act applies to extraterritorial and anticompetitive conduct. This has been highlighted by the Supreme Court's recent decision in *Empagran* which continues to live on and is currently pending at the D.C. Circuit. There have been other cases. Several courts of appeals have identified the legislation which was passed in 1982 as inelegant – and I quote that, inelegant – and a number of commentators had recommended – and I believe within our working group, this

was probably the issue that was most suggested for the Commission to study.

This was a unanimous view, that we should examine what should be the reach, the jurisdictional reach, of the Sherman Act and look at the issues, not only of the FTAIA, but also some commentators had mentioned what has been known as Footnote 159, and that is anticompetitive conduct abroad which affects competition in export commerce, and I think the way the working group recommendation is stated is broad enough to encompass the study of those.

The second issue is whether or not the antitrust exemptions for exporters in the Webb-Pomerene Act and the Export Trading Company Act should be eliminated, and the recommendation for the Commission to study that was unanimous in the working group, and we do recommend that it be studied whether it makes sense currently.

The third issue recommended to be studied are whether or not there are technical or procedural changes that the United States could implement to facilitate further coordination with foreign antitrust enforcement authorities. This one bears a little bit of discussion.

There was a lot of discussion in the working group on this issue, and it is whether or not there are not only efforts, but a number of efforts that the Department of Justice and Federal Trade Commission undertake in order to see convergence of procedural and substantive standards to the extent possible with our foreign antitrust bodies. Those efforts and relationships have been praised by the ABA Antitrust Section. Numerous commentators think it's a reality that there are a hundred antitrust authorities now that have some jurisdiction over global mergers or just conduct by any company in this new economy, and whether or not the Justice Department and FTC's efforts currently can be improved is an issue to be studied by the Commission, and the working group, a majority of the working group, did recommend that the Commission did study that.

There are some statutory impediments, as well, to some of the international cooperation efforts. For example, the International Antitrust Enforcement Assistance Act that was passed in 1994 has a provision dealing with the use of information that is disclosed as part of the agreement between the different antitrust authorities, and that has been identified as an impediment

to obtaining agreement between the United States and some of its foreign trading partners, Canada and the E.C. to name two, and perhaps the Commission could recommend modifications to that law.

The next issue which did require a lot of debate which was recommended by the working group majority to be studied, and since it has been identified, the Commission has gotten further public comment, is whether or not the antitrust laws need to be re-evaluated.

CHAIRPERSON GARZA: Antidumping?

COMMISSIONER DELRAHIM: Antidumping laws – I'm sorry – should be re-evaluated. I guess our current mission is to re-evaluate the antitrust laws. And that has been motivated by a lot of commentary on whether or not there needs to be – whether or not the antidumping laws currently do not promote free competition in and of themselves and whether the standards similar to the – whether the recoupment standard like in *Brown & Williamson* should be adopted within the antidumping laws. Again, this was a close call of whether or not the Commission had jurisdiction to look into this and whether it should, and currently the working group recommendation is to do that.

The three issues that are recommended that the Commission not take up are whether the U.S. should support a creation of an international antitrust regime or body. For the past decade or so, the WTO has had a competition working group, trade and competition working group. This has been an issue that has been studied and is a live issue. Whether competition will be at some point a chapter in the WTO agreement, I think remains to be seen and will continue to be a live issue, but there are some concerns about that. Partly, it's the capacity of some of the newer antitrust enforcement authorities and whether or not they – requiring all the WTO signatories to enact antitrust laws is a good idea at this time and whether at some point if there is a trade dispute, a three-panel decision of the WTO should be imposing the proper standards for U.S. antitrust authorities or other developed countries' antitrust authorities to be following.

Currently, a lot of antitrust enforcement by the agencies is animated by discretion, prosecutorial discretion; for example, in the Robinson-Patman Act, the number of cases that have been brought in the last four

years is indicative of that discretion as it is exercised, as well as a criminal case for some conduct, and if those are the laws, would we be in violation if we didn't bring a case like that if we were subject to a WTO review.

The next issue is whether or not private parties should be able to obtain discovery in the United States when they have a matter in foreign tribunals. This is an issue largely decided recently by the *Intel v. AMD* case of the Supreme Court, and there hasn't been a consensus that this is a real problem at this stage, and the working group recommends that the Commission not study that.

And the last issue is yet another issue that continues to attract a lot of debate both in Congress and some academics in whether or not the antitrust laws should be changed or other doctrines should be changed to permit claims in U.S. courts against OPEC, and the working group recommended against the Commission taking up that issue.

That is my report, Madam Chair.

CHAIRPERSON GARZA: All right. I think what we had wanted to do at this point was, initially before discussion, to run through the issues quickly by a show of

hands, determine where the Commissioners were, and whether they agree with the recommendations of the working group. Before I do that, does any Commissioner have a question for Makan about any of the specific recommendations?

Mr. Shenefield.

COMMISSIONER SHENEFIELD: I was a member of the working group. I would simply like to say, and Makan may not be aware of this, that personally I would recede on issue number four, the antidumping issue, and not at this point support studying that. So I don't know whether you were aware of that, but that is now a fact.

CHAIRPERSON GARZA: Okay.

Don Kempf.

COMMISSIONER KEMPF: Yes. I'll comment on that in due course, but for now, I just have a question.

CHAIRPERSON GARZA: All right.

COMMISSIONER KEMPF: It is issue number five, creation of international antitrust regime and body. Many, many people have suggested we take a look at the interface between the U.S. and foreign antitrust law, some substantive, some procedural, without suggesting that we go so far as having like a world court of antitrust, and

I'm wondering what, if anything, your working group is or is not recommending with respect to harmonization, for example, at least on a procedural side, for example, in the forms required for pre-merger clearance.

CHAIRPERSON GARZA: Before you answer that, Makan, because I had a similar question, I was wondering whether item three was sufficiently broad in the minds of the working group to cover the kinds of issues that Don had identified, particularly on the issue of convergence on the sort of procedural.

COMMISSIONER DELRAHIM: That's a good point. I believe, at least in my mind, number three is intended — in fact, to include multi-jurisdictional mergers, cross-border mergers, and that issue was recommended by numerous parties for us to study. Number three is intended to include that, and as part of this study, we would be looking at the cooperation agreements with respect to mergers as well as cartel investigations and the filing, but if we need to make that any clearer, at least we have it on the record now that number three should include review of mergers.

CHAIRPERSON GARZA: Do you have a question?

COMMISSIONER VALENTINE: I guess I need a little clarification on that. I was on the working group, and we discussed whether it should be broad or narrow, and because there are so many groups working on these convergence harmonization issues, whether it be the agencies themselves, the ICN, the OECD, the trade and competition group at the WTO, we specifically narrowed Section 3 to two specific technical issues, thinking that we could actually make positive contributions there and that we would devote a lot of time and perhaps not make much contribution in a much broader vaguer area.

I'm not saying I'm unwilling to look at some broader set of issues, but I do think that we are going to fall into a morass of cross-border work without a clear focus if we don't address this a bit more than was just glanced at.

VICE CHAIR YAROWSKY: Well, as so often happens, there is some overlap, and I think in the Mergers Working Group, some of the same issues have arisen. We'll get to that shortly. I would ask for folks to think about what Makan sketched as appropriate in some context, particularly at least in the merger context, because I

know that there will be probably some congressional hearings, not that we necessarily will participate, but I think there is some hope that the Commission might be able to contribute some thoughts to it in a near-term time frame, whereas some of the other bodies considering this, that may not be possible in the near term.

But I do hear what you're saying about your internal deliberations.

COMMISSIONER VALENTINE: Well, I just would like this phrased more specifically.

VICE CHAIR YAROWSKY: Yeah. I understand.

COMMISSIONER VALENTINE: What is it that specifically we're going to study? We have 500 issues here, and I have no problem looking at procedural convergence, perhaps, but if we start talking about substantive convergence, we're going to be talking until the next century.

CHAIRPERSON GARZA: Right. I think we were talking about procedural convergence. For the purpose of voting, if you will, we can either take three with the narrow definition that's presented in the working group memo and address the issue that's been raised about

convergence of processes to the merger area, if people feel it's primarily relating to the merger area, although there may be Section 2 monopolization-type investigations as well. That would merit some kind of additional steps being taken to ensure comity and lack of conflict.

So I guess the question I have is for the purposes of polling the Commissioners is what we're talking about with three.

Sandy?

COMMISSIONER LITVACK: Yeah. I would agree with Debra. I would like to see, for voting purposes at this point, it narrowed as specified in the agenda and then consider separately the additional questions to the extent to which and if so with respect to what should be expanded.

CHAIRPERSON GARZA: All right.

COMMISSIONER VALENTINE: Thank you.

COMMISSIONER JACOBSON: Madam Chair.

CHAIRPERSON GARZA: I'm sorry. Jon.

COMMISSIONER JACOBSON: The working group recommendation - I'm endorsing what Debra said - really was much narrower than we've been talking about. If the

decision now is to defer the discussion of substantive and procedural aspects of merger review coordination to the merger group discussion, I'm in favor of that. I want to say this is a hugely important issue. The fact that it's a hugely important issue does not mean it's an issue that is appropriate for this Commission to review. We do have 25 to 30 issues, and this has been the subject of analysis by agencies at the Federal level, prior commissions, ICPAC, and a number of other bodies, and could easily become a full-time exercise for this group and swamp everything else we do.

So I'll be interested in hearing further discussion on it, but I am wary of getting into these issues.

CHAIRPERSON GARZA: Okay. Anyone else? Based on that, then, I think what we'll do is - oh. Don.

COMMISSIONER KEMPF: I seem to recall - I don't have the transcript with me - but there were three or four things that the Chairman Sensenbrenner, who was one of the driving forces in establishing this Commission, spoke to us about at our first gathering, and it's my recollection that the international disconnect of the antitrust field

was one of them that he thought, at least as one of the architects of this Commission, perhaps the primary architect, that was important, and I'm influenced by that.

So the reason for my initial question was I feel the strong need for harmonization in technical form fillings and things like that, which I now, with clarification, understand is contemplated, but I don't want to foreclose looking at the subject of convergence.

From a personal standpoint, my current inclination is that our country does not want to converge toward European thinking in antitrust enforcement generally or in the merger area in particular, but it is a matter of great concern, not only to Congress, but much of industry, which has been subject to a number of rulings in the merger area. Three of the past four major rulings have all been overturned subsequently in Europe, and I certainly don't want to foreclose us looking at that. It's one of the most important things in the antitrust field right now.

CHAIRPERSON GARZA: For the purpose of just going through this, and I think just to be clear, I think what Debra had indicated was that her sense that item three,

the recommendation itself, does not necessarily include, Don, the issues you've been raising, but I also sense that there are Commissioners who would like to discuss that as an issue. Whether it's in the context of this working group or the merger working group really isn't all that relevant.

For the purposes of trying to see where we are in these recommendations, can I get an agreement from everybody that we will, by a show of hands, vote on three in its narrow construction so that we will know, just going through these issues, that the issues Don raised and others have raised will be addressed as a separate issue?

COMMISSIONER VALENTINE: Fine.

CHAIRPERSON GARZA: That having been said, by a show of hands, can Commissioners indicate whether they agreed with the recommendations of the working group on issue one?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: All right. There appears to be complete agreement on that.

Can I get a show of hands in respect to the Commissioners agreement with the recommendation of issue

number two?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. Sandy, we'll note that. We'll come back.

Can I get a show of hands in respect to issue number three then, that you support the recommendation?

COMMISSIONER KEMPF: So it's clear --

CHAIRPERSON GARZA: Narrowly, yes.

COMMISSIONER KEMPF: That does not mean that I don't --

CHAIRPERSON GARZA: Exactly, yes.

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. Can I also get a show of hands on issue number four?

[Commissioners vote by show of hands.]

COMMISSIONER KEMPF: I want to comment on that.

CHAIRPERSON GARZA: Okay.

COMMISSIONER KEMPF: A number of -- two Commissioners have at least expressly said that they've changed their position on that. I think the record should reflect that we've received a large number of letters or whatever number it is. It's certainly much more than we received on any other issue, and while the letters come from

disparate sources, many on Capitol Hill, many from special interest groups, they strike me as what I'll call Manchurian Candidate letters.

As you may recall from the film, when the character who was the bad guy, the whole – I'm talking about the original Frank Sinatra movie, not the more recent one with Denzel Washington. This group had been captured in North Korea and brainwashed by the Chinese communists, and their platoon leader, Raymond something or other, when anybody ever asked his name, they would all say, "Raymond was the finest, most wonderful human being I have ever met and a great American," and these have that ring to it. They may come from multiple points, but they look to be all by the same fine Italian hand, and if you read them, many of the phrases are precisely identical.

So I put less stock in the content of the letter, which I view as one letter, not many, than I do in the fact that many people agreed to send us a letter, and that is no small accomplishment and it is not something we should view lightly. The letters raise several points. One is that this is outside our mandate, something that did not occur to a single one of the twelve Commissioners previously. Second, they say that it's beyond our area of expertise.

They have other criticisms as well, some being that things are hunky dory as they are and we shouldn't meddle with them.

In any event, I have read them with care, and in the aggregate, I am persuaded that we should drop this, but I just wanted to have the record clear what the background for this shift by the Commission is.

CHAIRPERSON GARZA: Just to be clear -- let me clarify that -- I think that, as Makan had indicated, there was actually extensive debate within the working group before recommending this, and it wasn't -- not all members of the working group agreed with the recommendation. If you look at the comments in the memo, they were for the very reasons that I think are addressed or some of the very reasons addressed in the input that we've gotten from folks on the Hill.

There was a serious question, in fact, as to whether or not anybody had anticipated in creating us that we would look at -- that looking at the antidumping laws as opposed to looking at the antitrust laws was actually something that we were intended to cover. So it's not really a completely accurate thing to say that none of the

12 Commissioners considered it. We did, and it wasn't clear whether or not it was in our jurisdiction. I think that we've gotten an indication now that at least some members of the Hill did not view this within our jurisdiction, and there are other issues as well relating to our expertise and the political sensitivities, and various other things.

So just to be clear, I think that my position, for example, from the beginning was not to recommend it. I haven't changed my position as a result of the letters, but I think the letters reflect some of the concerns that I have.

Debra.

COMMISSIONER VALENTINE: And if I could make a comment for the record as well, please, I was one of the people who voted for considering this in contrast to what the letters say, which there the claim is that the dumping laws and the antitrust laws have are very distinct. In fact, price discrimination issues in the Robinson-Patman Act are very similar to price discrimination issues in the dumping acts. The letters also claim that any study of the issue by this Commission would undermine the work of

the WTO trade and competition policy group addressing this issue.

I actually think we might offer some helpful advice and perhaps enlightenment, and while I do respect the views of Congress that this issue is perhaps not at the core of what people wanted us to do, and I will defer to those views, I think it is somewhat unfortunate that people simply do not even want to hear a perspective that might represent the interests of consumers, who are admittedly a more dispersed voice in our community, that might be set – help to set in a more fair and accurate context the views of certain producers who do tend to be quite concentrated and vocal.

So I regret not having the opportunity to be able to enlighten the public in this area, but I will defer to the members of Congress who have asked that we not study the issue.

COMMISSIONER SHENEFIELD: May I make a statement for the record?

CHAIRPERSON GARZA: Yes.

COMMISSIONER SHENEFIELD: As long as we're creating records here, and it will be very brief, the

antidumping laws are enforced in a profoundly anticompetitive and anti-consumer way. Somebody should take a look at it. It's not one of the top 25 items on this commission's agenda in my judgment, and that's why I've changed my mind.

CHAIRPERSON GARZA: That's fair. Anyone else?
Dennis.

COMMISSIONER CARLTON: I wasn't on this subcommittee, but it seems clear that one of the motivations was that the antidumping laws are a set of laws that often harm consumers. There may be greater strategic international interests which some of the letters raise, and it may be beyond what people thought we should study. I think the main point is the subgroup thought it was an important issue to study, primarily because they were worried that consumers in the United States are being harmed, and I too obviously will to defer to what members of Congress think, but I think it should be taken from this discussion, and I suspect all the Commissioners would agree, but they can speak for themselves, that this is an issue that someone should study carefully to make sure that consumers aren't being

harmed.

CHAIRPERSON GARZA: Okay. Great.

All right. And, Sandy, I wanted to come back to you and ask you whether there was anything you wanted to say on issue number two.

COMMISSIONER LITVACK: Yes. My negative indication really is based on the factor, which will come up as we go along, and it's prioritization. One of the problems with voting as you know go is that you can vote yes to everything, and then at the end, you up and say we just have a slate that's unmanageable.

With that in mind, it seems to me this is issue is among the less important or less pressing issues. It has limited effect, as has been noted, on U.S. consumers. It really is directed toward a different issue, and again, if we had infinite time and infinite resources, I probably would feel differently about it, but given that we don't and given the fact that I am trying to discipline myself as I vote, this is one I would not do.

CHAIRPERSON GARZA: Okay. Go ahead.

VICE CHAIR YAROWSKY: And, Sandy, I understand this is a distinct point for this working group. It will

come up again when we talk later about the immunities and exemptions as part of a much larger group, and it may be that just from an efficiency time point of view, we may deal with those. We don't know how we're going to deal with those – we'll all have to decide that – but in a larger group way so that we can allocate appropriate amount of time and not undue time.

And the last thing I would say, I know we've talked a lot about the antidumping laws, I certainly value the views of Congress and what everyone has said here about the need to maybe review these statutes. I certainly do not have expertise in them. So when those letters came in, they were really talking to me. I would certainly like to be diligent to study another area, but unlike Debra, you may have some real background. I don't. It doesn't mean I can't become enlightened. I do think overall that the decision that we've all made is the right one.

CHAIRPERSON GARZA: In the interest of time, let me ask with respect to the issues not recommended for study whether any Commissioner would like to discuss promoting any of those – aside from the issue, discussion

we had on issue number five, whether any Commissioner wanted to discuss promoting any of those issues to the recommended.

Makan.

COMMISSIONER DELRAHIM: I was in the minority on issue number five, and I do feel strongly that even though it is being studied in areas what where they would expand the jurisdiction, like the WTO and there is a competition and trade committee, it is important partly because of the fact that it is still a live issue. There is a group within the trade world, and if we do see divergence between the U.S. regime and E.C., there will be even a stronger push to have competition be in another chapter. We continue to see that in the various free trade agreements that the United States has recently signed with Chile, Singapore, and now with the Latin American efforts that are going on in the Central American Free Trade Agreement.

So it is an issue that I think is important because we're going to face it. In fact, with the Mexican telecom decision of the WTO, it largely centered on some side letters that dealt with antitrust issues, and we're

going to see this and might be able to – now, in order of priority, is this one of the issues we should? I think it's one of the cutting edge issues that will affect our practice, whether it is a larger WTO chapter like intellectual property or whether it is going to be an issue that is going to be raised as part of the free trade agreements that we have signed and each country, now that we engaged in our negotiations, is requesting that competition be a chapter of that free trade agreement.

So I think that is one that merits, if not study, at least some comment here. I would be interested in the knowing what the full Commission thinks of the issue.

CHAIRPERSON GARZA: Jon.

COMMISSIONER JACOBSON: I agree with everything that Makan said, everything, but I vote no on the issue because I think there are bodies better suited than us to deal with these issues, and given the magnitude of the task before us, we are better off and do the American public better good by punting this issue to those other bodies, one of which is the Department of Justice.

CHAIRPERSON GARZA: Don.

COMMISSIONER KEMPF: I'm not sure. I was not on the committee and I don't know precisely what's intended. Let me give you my views or why I think it would be worth studying and not worth studying, and you can tell me whether it's covered or not covered by the proposal.

I do not think it's worth studying whether we should have a body like an international antitrust court. I agree with Jon that there are other groups who are better suited to do that than us. And I'm not sure what regime means, whether that is like an international law of antitrust, which again I don't think is worth investing time in.

I am concerned about the disconnect between what I'll call the efficiency and competition-focused model in the United States and the what I'll call protectionist model in some other places, which is anti-consumer, and encouraging further study of that, encouraging efforts to have other jurisdictions see the wisdom of a regime that has in its focus sometimes escaped us, but in the main served this country well for a hundred years now. And I don't know whether that is encompassed or not, but that's one I am interested in. The other two, I am not. I don't

know whether mine fits or not.

CHAIRPERSON GARZA: Any further discussion?

Can I have a show of hands where the Commissioners stand on including this issue on our initial slate of issues for study, if you agree with the working group's current recommendation not to study issue number five?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Can I ask for the same show of hands in respect to issue number six, if you agree with the recommendation of the working group not to study this issue?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Can I ask the same question with respect to issue number seven?

[Commissioners vote by show of hands.]

VICE CHAIR YAROWSKY: I'd like to comment on issue number seven.

CHAIRPERSON GARZA: All right.

VICE CHAIR YAROWSKY: Again, we've received comment throughout the course of the creation of this body. One of the, I thought, insightful letters came from

the Senate side came from the Senate Antitrust Subcommittee chaired by Mike DeWine and Ranking Member Kohl.

Some of their concerns in terms of the oversight they do on antitrust in the agencies – they hear this day in and day out – is are there ways to make time lines and considerations more efficient and do fairness to the parties who are involved and how to study that. It's a difficult task because you don't want to reach into internal workings that would disturb that. On the other hand, you need some element of transparency so that the outside public can understand what's going on.

One of the suggestions they have made in their letter that I think is posted on our web site is that the Commission look at both criminal investigations to see if there is a way –

[Chairperson Garza confers with Mr. Yarowsky.]

VICE CHAIR YAROWSKY: Okay. Well, I guess I should do what Gilda Radner used to do and say never mind.

CHAIRPERSON GARZA: Just to be clear –

VICE CHAIR YAROWSKY: We'll hold this for later, because I think it's a tremendous concern.

CHAIRPERSON GARZA: To be clear, issue seven was OPEC.

VICE CHAIR YAROWSKY: I'm sorry. This happens to be in the wrong slot.

CHAIRPERSON GARZA: Okay.

VICE CHAIR YAROWSKY: So I withdraw.

CHAIRPERSON GARZA: Okay. Until later.

Did you get our vote on seven?

MR. HEIMERT: Yes.

CHAIRPERSON GARZA: All right. Then that for now will conclude our discussion of the International Working Group memorandum. Obviously, after this meeting, staff will go back and – we'll talk later on at the end of the meeting. This kind of gets to your point, Sandy, I think. There is a risk when you do it this way, that it's more difficult to look at the whole thing and prioritize, and I agree with you, and if you had to really face your limited resources, there is some that you would cut off the list, and I encourage Commissioners that everybody has had an opportunity to look at all of the working group memoranda, and so I think that's appropriate to form your votes on the individual issues, but we will also come back to that

at the end of the day.

II. Criminal Procedure Working Group Recommendations

CHAIRPERSON GARZA: I'd now like to turn to the discussion of the Criminal Procedure Working Group recommendations, and I think that's you John, John Shenefield.

COMMISSIONER SHENEFIELD: Right. These recommendations should not long detain us.

The affirmative recommendations for consideration are two. One concerns one of the most notorious pieces of antitrust trivia that exists, and that is Section 3 of the Robinson-Patman Act, rarely enforced, barely known by most practitioners. It would seem to be a likely candidate for repeal, and therefore the working group recommends we study that issue.

More complicated is the issue of sentencing, particularly in light of the *Booker-Fanfan* decisions of yesterday. The issue is not essentially different in the antitrust area from other criminal law areas.

Nevertheless, the working group's thought was that we might be able to provide informative commentary as the process of adjusting to the Supreme Court opinions

unfolds. Therefore the working group, though we haven't taken any vote this morning, I sense continues to recommend that we put it on the agenda, but hold it, stage it, wait to see some of the dust clearing, and then make a separate determination as a Commission as to whether there is anything useful we can contribute.

Issues not recommended for study are six. There was a suggestion that there should be some more precision given to the language of Section 1, particularly, in connection with of the Sherman Act. The working group's judgment, strong consensus, was that existing jurisprudence plus prosecutorial discretion, the exercise of prosecutorial discretion, were more than adequate, and the problem wasn't quite as serious as some might think.

As to Section 2, criminal enforcement, again rarely, rarely pursued through criminal enforcement, Section 2. Nevertheless, the working group thought that it was important to retain the possibility in that very rare situation where it might be appropriate.

The question of corporations subject to criminal penalty is a serious question. By and large, the working group was persuaded that keeping the corporation subject

to criminal liability encouraged the corporation to maintain an atmosphere of compliance and that was beneficial and in the public interest.

Wiretap authority, under the Omnibus Crime Control Act of 1968, only Title 18 crimes are subject to wiretap authority. It would certainly be useful, but it's not a big deal since most or many cartel cases can be pursued under mail and wire fraud charges, which are violations of Section 18, Title 18, and so that was not recommended.

Can antitrust criminal investigations be made efficient and shorter, that's sort of related, Jonathan, to —

VICE CHAIR YAROWSKY: Yes, exactly.

COMMISSIONER SHENEFIELD: — the point that you make. I believe they are made as efficient and short as makes sense, and the agencies are more in charge of that than anything else. I think it's an illusion to suggest that they sort of meander forever beyond controls, and so I think the working group's view was this is not one of our top 25 or 30 issues.

Additional mechanisms being put in place to

enhance the detection of cartel activity, given the passage of legislation last summer to create a single damages option and therefore have further incentive to participate in the leniency program, the working group's view was that we should let that legislation work its way out, see whether it is successful, but that at this point, we did not recommend that subject for further study.

So, Madam Chairman, we recommended two issues for study, one on a kind of a slightly delayed basis, and suggested that the six other issues not be recommended for study.

CHAIRPERSON GARZA: Are there any questions for John?

Don.

COMMISSIONER KEMPF: Yes. We received a very thoughtful communication from the Assistant Attorney General in charge of the Antitrust Division, and on your first one, you have repeal of the Robinson-Patman Act, Section 3. Perhaps that's because that's the criminal part of it.

COMMISSIONER VALENTINE: Correct.

COMMISSIONER KEMPF: And I assume you did not

suggest – indeed your comments suggested otherwise – that it is not to be preclusive of keeping the rest of the Robinson-Patman Act.

COMMISSIONER SHENEFIELD: Correct.

COMMISSIONER VALENTINE: It's addressed by a different working group.

COMMISSIONER KEMPF: Yeah. Second, on the final one, recommendation eight, the voluntary disclosure as a means of enhancement of cartel detection, it is something that is – I agree with all of your comments on that, but my question is a broader one. Would it be productive to – did your working group look at other ways to enhance cartel detection that had nothing to do with the one that you specifically identified, and have you thought about whether that would be something useful for us to look at or not?

COMMISSIONER SHENEFIELD: Such as what?

COMMISSIONER KEMPF: I don't have anything in mind. I wasn't –

CHAIRPERSON GARZA: I think there was one.

COMMISSIONER SHENEFIELD: Qui tam action?

CHAIRPERSON GARZA: Exactly. I think that was

something that we had heard from other folks.

COMMISSIONER KEMPF: In other words, I started off with the proposition of enhancing cartel detection is a most worthwhile use of resources, and I'm not sure why we would not want to not look at that since my view is that Section 1 is by far the most important of the antitrust laws, more so than most of all the rest added together, and therefore I would think enhancing the detection of cartels would be a hugely beneficial thing to consumers.

COMMISSIONER SHENEFIELD: Without joining in all of that, the answer, I think on behalf of the working group, would be that while we all agree that Section 1 in some sense is the centerpiece of the antitrust laws, the detection of cartels is fairly formidable as it is. The leniency program has been a huge success. The qui tam action issue is a highly controversial one, and by and large, I think the working group's view was it was better to devote our resources to other more demanding issues than that on, but that's a judgment call.

CHAIRPERSON GARZA: Let me note that Jon and I have heard, I think, that this is an issue of potential

interest, the qui tam in particular, potential interest on the Hill. So even if we don't agree to address it now, I hope that we'll be sufficiently flexible that if we should get a request for input as to the wisdom of that kind of legislation, we would look at that. Indeed, it may be something that we cover when we look in general at private enforcement and other contexts.

COMMISSIONER SHENEFIELD: I don't think -- I guess I assumed, Madam Chairman, that in connection with all of these issues not recommended for study or recommended for study, there is no bar to having some mid-course correction if that seems advisable.

CHAIRPERSON GARZA: Right.

COMMISSIONER LITVACK: The only thing, if I may add, on the qui tam issue, and I agree we should keep an open mind on it, you do have a private civil damage action remedy, and I don't know what else the qui tam is really going to add, and I guess as a member of the subcommittee working group, I felt and feel that, as John said, this is an area where we ought to let things play out a little bit and see what more there is. I don't know that it's worthwhile at this point trying to particularly study how

qui tam actions really work.

CHAIRPERSON GARZA: Jon.

COMMISSIONER JACOBSON: I just want to make a brief comment about sentencing. I agree with John's point. The *Booker* case just came out yesterday. We need to spend some time to see how it's responded to. I have a particular concern, though, and that is that we have today an antitrust sentencing regime that has been upset, certainly, by *Apprendi*, *Blakely*, and *Booker*, but it's one that in terms of sentencing guidelines was largely put in place by people who were far more familiar with sentencing for narcotics cases than for antitrust defenses, and there are discrete issues that arise in antitrust sentencing, particularly demonstrating the amount of impact, gain or loss, under 3571, and I do think the Commission can make a positive contribution. I do think it's a contribution that is better done in terms of our hearings towards the end of the process so that we can see what the impact of *Booker* has been on the current regime.

CHAIRPERSON GARZA: Jon.

VICE CHAIR YAROWSKY: Yes. I won't have to speak long. I'm just going to renew my comments of a little bit

ago.

John, if you don't mind, can I just direct these maybe to you as a way of proceeding?

What I think I respond to is the need to have some sense of timing that goes on in the agencies. It may be different than to be prescriptive. It may only be an abbreviated look-see, so to speak, to see if the agencies have internal guidelines just to keep things moving. I don't really know the answers to that these days, and that's really, I think, the nature of the request coming from the Senate Judiciary Committee, just that someone among us or some folks among us would have some sense of that. So I don't want to create a mega-issue for the Commission, but on the other hand, I'd like to be somewhat responsive, but maybe we could tailor it a bit.

COMMISSIONER SHENEFIELD: Perhaps the solution, Madam Chairman, is for a couple of us to sit down with the Assistant Attorney General and the chair of the Federal Trade Commission, make the inquiries, bring the information back to this group, and if we feel differently about the recommendation in a month or two, we can come to a different result.

CHAIRPERSON GARZA: All right. That sounds good.

COMMISSIONER SHENEFIELD: As anybody knows, in the criminal area, there is a kind of almost, not entirely -- it's not definitive limitation because of the life of the grand jury, and that tends to be the objective, but I know, for instance, when Mr. Litvack was Assistant Attorney General, he had regular meetings with his section chiefs and he had a computer print out and he asked what's happening with this, what's happening with that, what's happening with that.

VICE CHAIR YAROWSKY: And when we used to have Mr. Litvack come up to the House Judiciary Committee every year in April, he would say that in a certain general way. That's why I say I've lost a sense of whether that is going on.

COMMISSIONER LITVACK: I agree with Jon that we ought to try to get the answer. When the question is phrased as it is here, the answer is of course. Can we be more efficient? Sure. The real issue to me is, A, to get the facts and then to decide whether or not there is really something we can add to the process.

CHAIRPERSON GARZA: Okay.

COMMISSIONER SHENEFIELD: And maybe if you'd like to -- maybe Mr. Litvack and I can volunteer to have a conversation with Mr. Pate on that subject.

CHAIRPERSON GARZA: I'm sure Mr. Pate will look forward to talking to you.

COMMISSIONER SHENEFIELD: I'm sure he will.

COMMISSIONER LITVACK: Consider us volunteers.

CHAIRPERSON GARZA: Does anyone else want to make any comment before we try to gauge the consensus of the Commission?

COMMISSIONER BURCHFIELD: Can I just ask -- and I don't disagree with this comment, but I would just be interested in what John and Jonathan expect to learn over the course of time about the implementation of the *Booker* decision. I think I know that, but do you have certain things in mind that we are going to look for before we begin analyzing that issue more precisely?

COMMISSIONER SHENEFIELD: Well, I think the one that will happen quickest is something on Capitol Hill. I think there will be a fairly quick move to deal with the situation in which the sentencing regime now finds itself, and that's just going to change the world fairly

substantially and it may actually come through fairly quickly. If that's right, then it would be a total waste of our time to kind of be spending a lot of time studying something that's about to be changed pretty definitively.

COMMISSIONER JACOBSON: There is one other -- if I might, there is one other issue, which is the Department of Justice -- I think it's well known -- is proceeding on the basis of the guidelines, the guidelines in antitrust as of yesterday, and we don't know how the division is going to proceed. I do think it's worth some time to let the division decide how it is going to proceed in terms of sentencing, at least in matters of in excess of a hundred million dollars, before we start evaluating what we can add to the process.

CHAIRPERSON GARZA: For what it's worth, I agree as I well. I think with those decisions, it doesn't make any sense to go into this now. Those decisions have a very broad impact. There is likely to be some action. You know, it may be that we never get to this issue for a variety of reasons.

So I think I would be in favor of tabling it for now, if you will, and at some point if it seems

appropriate to resurrect it, then we can do that.

COMMISSIONER BURCHFIELD: Thank you. That's helpful.

CHAIRPERSON GARZA: Can I ask by a show of hands, then, which Commissioners agree with the recommendation of the Criminal Working Group – not describing the people on the working group, obviously – on issue number one?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. Can I ask – let me phrase it this way and slightly change the phrasing. Can I ask for a show of hands by the Commissioners of those who agree with the recommendation that Mr. Shenefield gave us, that for now, we table looking at the issue of sentencing guidelines and revisit as appropriate later in the process?

[Commissioners vote by show of hands.]

COMMISSIONER JACOBSON: That is not how I understood the recommendation.

CHAIRPERSON GARZA: Okay.

COMMISSIONER JACOBSON: I thought the recommendation to be to put it on the list, but to have it at the end of our process rather than to leave it off the

list, and maybe I misunderstood.

COMMISSIONER SHENEFIELD: I fail to detect any practical difference between the two. I'm happy with either formulation.

CHAIRPERSON GARZA: I take it that we do have a consensus that everybody believes that now is not the time to look at it, and at some point, whether it's on the list or off the list or on the list in brackets, we'll commit to revisit it at an appropriate time.

[Commissioners vote by show of hands.]

COMMISSIONER VALENTINE: So it's on the list?

CHAIRPERSON GARZA: We'll keep it on the list with the caveat that we don't think it's -- it's something that we may want to look at in the future depending on developments.

COMMISSIONER SHENEFIELD: On the list, but deferred.

CHAIRPERSON GARZA: Deferred. Very good. Thank you. That was word I should have found.

Can I ask, then, with respect to issues not recommended for study, three through eight, whether there is any Commissioner that wants to propose that an issue be

considered for study?

VICE CHAIR YAROWSKY: Except as modified by John and Sandy, that they'll make some inquiries on number seven.

CHAIRPERSON GARZA: Except with that modification.

So we'll take it, then, that all the Commissioners with that modification, the consensus is not to study these issues with that qualification. Could I have a show of hands just that people agree?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. Good.

Well, that concludes that, and this is actually pretty amazing, because we're exactly on time, which means that we've merited a ten-minute break.

[Recess.]

III. Mergers Working Group Recommendations

CHAIRPERSON GARZA: I'd like to try to keep to our schedule. We're going to move on now.

The next set of working group recommendations relates to mergers, acquisitions, and joint ventures. This was the one done by what we call the Mergers Working

Group.

We had six recommendations and six issues we recommended for study, three that a majority recommended against study. Because of the length or the number of issues, to allow discussion among the Commissioners, I'm not going to take much time in reviewing each of the issues right now. I would note, though, that issues one and two really are somewhat companion issues. We set them out as separate issues for purposes of addressing them in the memorandum, but, arguably, they really are one issue group. I would also point out that issue number eight, which is an issue not recommended for study, does go to the question we discussed earlier in the context of the International Working Group in response to Don Kempf's questions, and I think maybe some other people, but this was the one that was an issue that involved whether steps should be taken to attempt to harmonize further at least the procedural aspects of review of mergers by the U.S. and non-U.S. competition authorities.

So we may want to discuss that. Like I said, it's below the line right now in terms of the working group having recommended against its study, but given the

discussion earlier today, I think we'll want to discuss that a little bit further.

So before we vote or do a show of hands, I'd like to invite questions from the Commissioners on issue one and two, if there are any questions on things that people want to discuss.

Were there any questions that anybody had or wanted to discuss on issue three? This was the issue whether we should look at -- whether revision should be made to the Hart-Scott-Rodino merger review process.

COMMISSIONER JACOBSON: Madam Chair?

CHAIRPERSON GARZA: Yes, Jon.

COMMISSIONER JACOBSON: I actually want to go back to issue one.

CHAIRPERSON GARZA: Okay.

COMMISSIONER JACOBSON: I think issue two is an issue that no matter what we do, we need to consider. The allocation of responsibility between the Justice Department and Federal Trade Commission and particularly merger review is undoubtedly an issue of importance, and there have been steps taken in the recent past with Charles James and Tim Muris to address those issues that

proved to be ineffective. It was an issue that was raised by some of the most respected practitioners and former enforcers with whom we've had discussions during the outreach process, and I don't want to denigrate the importance of the issue.

It is one where I believe it is better suited for a different process, and that process would be for the senior officials at the Justice Department and the Federal Trade Commission to sit down with appropriate representatives of the Hill and look at an allocation of responsibilities that would be acceptable to the Legislative Branch and efficient in terms of allocation of responsibilities among the agencies. I think what Chairman Muris and Assistant Attorney General James started to undertake is clearly the right process. It was supported by a number of bipartisan groups. It was clearly a step in the right direction. It was taken before this Commission was even a gleam in anyone's eye, and given the other issues where I think we could make a greater contribution to the law and the policy, this is one where, notwithstanding the recommendation of the working group, I think we should give some consideration

to recommending here today that a different process be undertaken to achieve the same objective.

CHAIRPERSON GARZA: Can you elaborate what you mean by a different process to achieve the same objective?

COMMISSIONER JACOBSON: Just what I indicated before, have the Assistant Attorney General and his or her representatives and the chairman or chairwoman of the FTC and their representatives create a small group that works with the appropriate committees on Capitol Hill to come up with an allocation of responsibilities that the agencies believe is appropriate and that the Legislative Branch believes is appropriate.

CHAIRPERSON GARZA: I'm sorry. I misunderstood. I thought maybe you were addressing the issue whether the Commission should look at it.

John, I think you were next.

COMMISSIONER WARDEN: I think what Jon has said, basically, might be the end result of our study of the issue. I don't think that means we shouldn't study the issue.

CHAIRPERSON GARZA: Debra.

COMMISSIONER VALENTINE: Ditto.

CHAIRPERSON GARZA: Just to put my — I think this is part of what Jon was saying, to think that anybody is going to abolish either the Federal Trade Commission or the Antitrust Division is probably unrealistic. On the other hand, the working group recognized that there seems to be a perception, at least, by people that there is inefficiency caused by having two separate agencies looking at the same — looking in the same area and that this has caused problems where people either feel that they get different treatment depending on what agency they are at or that the fact of the split jurisdiction with no clear lines has caused delay in merger investigations, for example, that is undesirable.

So I think whether or not we actually go so far as to recommend a restructuring of the Federal antitrust enforcement institutions, there seems to be some worth to shining the light on the question of whether or not there are some significant inefficiencies and whether there are some steps along the lines you described or others that would help to remedy that.

Any other comments?

I think earlier nobody had wanted to address any

questions or comments on issue number three.

Were there any comments or questions on issue number four? This is the one that dealt with what role, if any, should private parties and State Attorneys General play in merger enforcement, should merger enforcement be limited to the Federal level or should other steps be taken to ensure that a single merger will not be subject to challenge by multiple private and government enforcers.

Jon.

COMMISSIONER JACOBSON: In the working group, I voted no, particularly on studying private enforcement. My own world view of things is that I don't see a problem in State enforcement either, but consistent with the legislative history of the statute that created us, I'm certainly comfortable with having that issue looked at; but I think question four could appropriately be restated as should the federal judiciary have any role in federal merger enforcement, which is almost a tautology, because the answer is yes, and we need to recognize that private enforcement is not self-effective. Private enforcement works only if a Federal judge grants a preliminary injunction or permanent injunction blocking a merger.

The number of cases where private enforcement has interfered with a legitimate merger transaction, I believe can be counted on no fingers, and given the minor role that private parties have played in merger enforcement, the potential benefits that can be had from private enforcement when Federal agencies say, you know, we're just too busy and the many, many, many other issues on which this Commission can do far more good, I think this is an issue that we should not study.

CHAIRPERSON GARZA: Don.

COMMISSIONER KEMPF: It's not "no hands," because I have both defended and prosecuted private merger actions. I represented, for example, Bell Atlantic and Nynex in their challenge to AT&T's acquisition of McCall Cellular, and we settled on the Saturday before the Tuesday we were to go to trial, and I think it was 1994, with substantial relief. In fact, the only relief we didn't get was to break AT&T into AT&T and Lucent, which I had taken the depositions of a number of the senior executives, including Rich McGinn, and I saw the documents that were on the horizon anyway.

So as I closed it out, I said, Gee, we're

getting delayed secondary relief before we get all the relief we seek. So just to correct the factual thing, though, those kind of actions do exist.

COMMISSIONER JACOBSON: And the Bon-Ton case actually resulted in a judgment, but the -

COMMISSIONER VALENTINE: For some reason, we can't hear you.

COMMISSIONER JACOBSON: I'm sorry.

CHAIRPERSON GARZA: It is on?

COMMISSIONER JACOBSON: I usually hear the opposite, which is stop talking.

There is also the *Bon-Ton* case in the Western District of New York where there was actually a judgment in favor of the plaintiff and the State of New York in that case.

My overall point is that the number of transactions that have been interfered with through private enforcement is small, and the only case where you're going to have private enforcement that poses a real threat to a transaction is where the parties believe the federal judge is going to believe that transaction violates the antitrust laws, and what's wrong with that?

CHAIRPERSON GARZA: We want to make sure, of course, that we don't get into discussing the issues as opposed to discussing whether to study, but with that –

VICE CHAIR YAROWSKY: Jonathan, I do admire your point and your continued advocacy to try to have vigorous enforcement at all levels. I certainly share that.

I wasn't on this group, but just reading the documents before me, as long as there is no presumptiveness, that just studying it is to try to reach a result to eliminate any of these enforcement mechanisms, then I have no problem with studying it as long as there is no presumptive quality behind the question itself, and I don't detect any.

So I guess during the debates in the working group, I assume that's what it is, just to study it.

CHAIRPERSON GARZA: Right.

Makan.

COMMISSIONER DELRAHIM: If I could just say ditto to what Jon said. I think it's important, especially if we're going to be looking – you know, to the extent people, whether in this Commission or outside, look at international, when we're advocating eliminating

duplicative review of mergers, we should at least take a look and see at dual enforcement, particularly for mergers that have national impact.

COMMISSIONER KEMPF: If I may make one comment, Madam Chairman.

CHAIRPERSON GARZA: Don.

COMMISSIONER KEMPF: For those of you who have looked at the memorandum of this working group, which I was on, there is a notation on the first page that Commissioner Kempf does not join in the discussion and commentary of the issues. I had a feeling as we went through the various working groups that I was on, at least, that there was a concerted effort to the drive the ultimate conclusions in casting the work group memo. I was comfortable with all of the yes recommendations by the committee, but notwithstanding that, I did not want to join in the discussion because I disagreed with some of the substance that was set forth in the discussion.

I just wanted to explain why I had that notation in there.

CHAIRPERSON GARZA: Okay. Anyone else? Debra.

COMMISSIONER VALENTINE: One somewhat different

point, which is – and maybe it would be more useful to discuss this when we get to the civil procedures group, but there will be a similar proposal to study interaction among state, federal, and private actors there, and I guess I would want us at least to stay open to thinking about them in combination. There may, in fact, be certain benefits and efficiencies that the states and the feds have gotten in merger protocols that could be applied to non-merger matter or there could be reasons why mergers were distinct, and I guess that's a different kind of discussion than we want to have now, but I would like to raise that.

CHAIRPERSON GARZA: Also, just for the clarification of folks in thinking about this issue, the issue wasn't really intended to be framed to presume any conclusion, nor was it framed to necessarily assume that there would be a yes-no kind of decision. If you read the memo and I think some of the comments we've gotten, there are suggestions that have been made as to basically harmonizing in a sense the enforcement regime so that you don't have duplication, but that you don't necessarily exclude completely either enforcement actions by the State

AGs or by private parties, for example, with respect to the mergers and other actions that don't have affects beyond particular States.

So in looking at it and just to clarify in voting on it, I don't think any Commissioner should assume that any particular result is signaled by the recommendation to study.

Were there any Commissioners that wanted to ask a question or make a comment on issue number five?

Sandy.

COMMISSIONER LITVACK: Yes, and my question is why isn't it or is it subsumed in number six? I would have thought it was.

COMMISSIONER VALENTINE: Good question.

CHAIRPERSON GARZA: Well, I think -- let me go back to it. I think in a sense, it is, but I think that it reflects a perhaps difference of viewpoints within the working group, because I think that there may be some folks that felt that a general examination of the efficacy of U.S. merger enforcement policy was too broad or had objection to that, but other people felt that at the very at least, the questions of efficiencies and how

efficiencies will be treated would still be appropriate.

So you're right. There is some overlap, but that's why they're presented the way they are.

COMMISSIONER LITVACK: I would think if we're doing six, five would be within it. If not, then maybe five stands alone.

COMMISSIONER VALENTINE: The only difference, I think, between five being part of the efficiencies analysis in the merger enforcement process is that five also encompasses the courts, and I think there was some discussion as to whether the courts are, in fact, up to date in how they think about efficiencies.

Now, whether this group can do anything about that is a very different issue.

CHAIRPERSON GARZA: But if you look, too, at page 13 of the memo, you see that the thought with six was a fairly broad one as well. It included the possibility even in doing the kind of survey or study that, for example, Attorney General – Assistant Attorney General Hew Pate had recommended. So you're right. If you went with six, I think that would subsume five, but there were certain people that felt strongly about five and less

about six.

Did anyone want to -- Jon.

COMMISSIONER JACOBSON: As you know, I was at the center in the working group on both issues five and six, let me discuss them both briefly.

When we're talking about issue five and possibly when we're talking about issue six, we're talking about our first foray into the substantive guts of Section 1, Section 2, Section 7, and I think that is an area where we need to tread appropriately lightly.

There has been no indication that I've seen that this is a problem that requires review. The courts have begun to take efficiencies into account. As the common law process continues, that can be expected to continue. The agencies certainly do, although they have a consumer rather than total welfare approach to the evaluation of efficiencies. It's an area where I would stay out on the basis that I just don't see enough cause for the Commission to interfere, potentially interfere, in that area.

Issue six, I am content with the recommendation that just happens to come under single firm. It could

come under any number of working groups that we study, the so-called new economy issues. Again, that is one where I think the legislative history of the statute that created us would make it an abdication of our function not to study that issue. But I think for us to take up issue six, particularly as written, would be to convey the belief that there is some impairment of the competitiveness of U.S. companies through U.S. merger enforcement, which I view of as one of the most, you know, horrific false myths out there. I see Commissioner Leary here. He has a paper from a couple of years ago called the "Consistency of U.S. Merger Enforcement", and he analyzed merger enforcement over a number of decades, demonstrated the soundness of it, demonstrated the bipartisan nature of it. Why is this something that this Commission with its limited are resources needs to spend time to reconsider?

CHAIRPERSON GARZA: John Warden.

COMMISSIONER WARDEN: Well, I don't agree with the comment that to take it up suggests that there is a problem that has to be fixed, but having said that, I agree with most of the rest of what Jon said. I would

make five and six very low priority items; and six, it seems to me unless the review is very superficial, could be intensely resource consuming, and here I do associate myself with the comment expressly that if there isn't a problem, why try to fix it.

CHAIRPERSON GARZA: Dennis.

COMMISSIONER CARLTON: I think I disagree. More generally, as I think the point was just made, reviewing antitrust policy is the charge of this Commission, and I don't know how you can review antitrust policy if you only focus on what you think are problems. Not recognizing that what you're doing may be useless or harmful, even if no one else has raised it, is something that it seems to me we should be looking at. That is one of the broad questions, not just in merger policy, but in general.

I think it's essential that we ask are we on the right track, are we doing things that are correct, are we doing things that are incorrect. If you look at the commentary on item six, it's quite broad. It says you should look at are we defining markets correctly, are we correctly inferring a relationship between concentration and competitiveness of markets, which, by the way, might

be quite different in high-tech industries than in low-tech industries.

Well, I don't see how we can take our charge seriously unless we have an answer to that question for merger policy as well as what I will argue this afternoon for vertical policy also; and, therefore, I think it is important that we look at it, we look at whether, for example, market definition is articulated in the guidelines, which has made its way into the courts, is it sensible, is it not sensible.

Although many people I've spoke to on the Commission as well as elsewhere seem to have an understanding of how they define a market, it turns out to be different than what the economic definition is in the guidelines. That tension seems to me to be something that could lead courts, as distinct from maybe the agencies, which have a lot more experience than courts, into a trap, and it seems to me it's precisely those types of areas that we should identify.

And as far as what the consequence of merger policy has been on international competitiveness, I don't presume to suggest that it's had an anticompetitive effect

necessarily, but item five is closely related to that topic. That's all I would point out. If you focus only on a consumer standard, you could be impairing mergers that create efficient firms globally, and that could impair our ability to compete. That is an issue that some countries, like New Zealand for example, have taken very seriously, and I think it is, you know, perhaps, as Sandy said, more generally part of item six, but that's why I think a topic like six is an important one for us to look at.

CHAIRPERSON GARZA: Yes, Don.

COMMISSIONER KEMPF: Ditto as to both five and six with two additions.

COMMISSIONER VALENTINE: Ditto to Dennis?

COMMISSIONER KEMPF: Ditto to Dennis, yes.

I support having them on the list for all the reasons Dennis enumerated and I won't re-enumerate them. I would make two additions: One, in what I called earlier a thoughtful letter by Assistant Attorney General Pate, he lists this and, indeed, it is the very first thing he lists. So if the chief antitrust enforcement officer in the United States thinks that this is not only worth

study, but puts it first on his list, that certainly influences me.

Secondly, picking up on one of the things Dennis says, and that is the issue of whether enforcement is currently useless or harmful, there is recent and respected scholarship by people like Bob Crandall and others to suggest that's precisely what the effect of antitrust enforcement is. So against that recent scholarship, I think it's particularly important we do this.

CHAIRPERSON GARZA: Anyone else?

Debra.

COMMISSIONER VALENTINE: I actually would like to concur with the views of John Warden. I think these are very low priority items, ones on which we could spend lots of time without making any significant contribution at the end of the day. I think that particularly with respect to number six, the agencies have recently held several-day symposia. The view that one will hear from the agencies, the ABA, virtually anyone, is that, in fact, U.S. merger enforcement policy is effective and is operating well, and without -- you know, we were to spend all of our time on

that alone, we might say something somewhat different and interesting, but I would not put five and six on the list of issues to study.

CHAIRPERSON GARZA: Do you want to respond to that or can I have a say?

COMMISSIONER LITVACK: Sure.

CHAIRPERSON GARZA: Okay. I find myself agreeing with Dennis and Don, and I'm losing track who else was there, but not to re-articulate what they said, but I'd add a few other potentially less important things to consider; but one of the things, to me merger enforcement is a such a large part of antitrust and has such a potentially significant affect on our economy that it would be odd not to look at it. I mean, I take our charge as being to look at the antitrust laws and determine whether issues exist and changes have to be made, and there is a tendency within the antitrust bar to be very comfortable with where we are in merger enforcement because we think we understand it, but there are recurrent issues outside the antitrust bar, and the stakeholders and people who tend to be clients of many of us, but also people who represent consumer interests, I don't think

that they are as comfortable as are we of whether or not the enforcement policy right now is exactly what it should be or at least they would like to get the assurances of a commission such as ours and looking at it to say, yes, we think it's on the right track, we've looked at these things, or, no, these things may need to be adjusted or government should consider this.

This is also somewhat unique in the merger area where obviously the courts are involved in enforcing merger – anti-merger law. Unlike Section 1 and Section 2 cases, it is an area where law is made and decisions are taken, certainly, by the antitrust enforcement agencies without the involvement of any court, and so you do have a transparency issue as well that I think we could address through the work of the Commission.

Finally, while it is true that the DOJ and the FTC, and they are to be commended for it, have themselves taken efforts to review their own policy and the efficacy of enforcement programs, which is great and they're to be commended for it, but I think there is something that we can add because we aren't the enforcement agency and we're in a position to basically report to the President and to

the Congress whether we think antitrust merger enforcement is on the right track or not.

So that's why I find myself on the side of Dennis and Don and perhaps others.

Sandy.

COMMISSIONER LITVACK: I'm not going to add anything to what you said. I agree with Don and yourself. I think the last point you made is telling to me, and that is it is fine for the agencies to declare that everything is wonderful because they're doing a great job. Our mission is different and our make-up is different and our composition is different for a reason, and the point you make, I think is telling and at least to me dispositive that we should look at this.

CHAIRPERSON GARZA: Debra.

COMMISSIONER VALENTINE: Can I make one more comment?

I think there's something of a misrepresentation of what Mr. Pate's letter said, and I don't think -- I hope that if we even do take on five and six, that does not mean that we are doing what Mr. Pate said in his first item in his letter. I agree that it is a very thoughtful

letter. His first request is for an empirical study of all antitrust enforcement. That would cost a ton of money. Whether we could recommend that the agencies or that someone else should do that, whether that would be or could be done consistent with the Paperwork Reduction Act even is a big issue.

So I hope that by voting on five and six, the fact that someone here misstated what Mr. Pate's letter said does not mean that we would be necessarily recommending to do what is in the Pate letter.

CHAIRPERSON GARZA: Bobby.

COMMISSIONER BURCHFIELD: I agree with the comment that Assistant Attorney General Pate's letter is thoughtful and well stated, but I also agree that Don's comment about addressing merger enforcement encompasses only one component of that letter. I read the letter as encompassing that, as Don does, but I agree with you that that's not all that it says in that first point.

But I do hope, Madam Chairman, that we'll have the opportunity to discuss the Assistant Attorney General's suggestion that an empirical study be done by this Commission because I think it's a thoughtful and

productive suggestion. The resource issue is going to be part of that discussion, I think, but I think we ought to discuss that. If the head of antitrust enforcement at the Department of Justice believes it would be productive for us to do an empirical analysis of whether enforcement over the last several decades has shown benefits to consumers and promoted competition in this country, I take that to heart.

CHAIRPERSON GARZA: Yeah, and we do plan to address that recommendation and perhaps others this afternoon in the general discussion of issues, since it was one that didn't easily fall into a working group and we got it a little bit – well, we got it after the working groups had considered their issues.

COMMISSIONER BURCHFIELD: Correct.

CHAIRPERSON GARZA: Okay. Mekan.

COMMISSIONER DELRAHIM: Just to make a point of clarification –

CHAIRPERSON GARZA: Do you want to compliment Hew for the record?

COMMISSIONER DELRAHIM: I think it's a very brilliantly written letter.

One thing is that I think it is important, what he did raise in that first issue, but I don't think the recommendation should be taken as the Commission necessarily implementing that study rather than suggesting that such a study be established by some group of experts, which might take, as his letter says, several years to do, but not so much the Commission undertake the whole study, but something that could be useful to the enforcement community.

CHAIRPERSON GARZA: Okay.

COMMISSIONER JACOBSON: Ditto.

CHAIRPERSON GARZA: Ditto. Good. That's good, Jon. We've made progress.

COMMISSIONER VALENTINE: Vote.

CHAIRPERSON GARZA: Did I hear a noise over there?

COMMISSIONER SHENEFIELD: Vote, she said.

COMMISSIONER VALENTINE: Vote.

CHAIRPERSON GARZA: All right. Let us, then, by a show of hands -- I'll try to figure out whether we should do these first. We'll discuss the issues not recommended for study.

On issue one, which was the divided responsibility for enforcing antitrust laws between the FTC and the DOJ, can the Commissioners indicate by a show of hands whether they concur with the recommendation to study that issue?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: And the related, somewhat related, issue number two, to the extent that dual enforcement continues, should steps be taken to eliminate differences in treatment, can I have a show of hands to indicate concurrence on that recommendation?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: On issue number three, review the Hart-Scott-Rodino merger review process, can I get a show of hands on consensus on that recommendation?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Issue number four, enforcement by private parties and state attorneys general, can Commissioners indicate by show of hands whether they agree with the recommendation?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Five and six, I'm going to

ask for a show of hands separately with the understanding, however, that five is somewhat subsumed in six. Can I get a show of hands for those Commissioners who would be in favor of a recommendation to study at least the efficiencies aspect of merger review?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: And can I get an indication of Commissioners who agree with the recommendation in item six?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. There were three issues not recommended for study. One of them was number eight, which was the harmonization of procedural issues.

VICE CHAIR YAROWSKY: I think we talked about that earlier, but let me --

CHAIRPERSON GARZA: John?

COMMISSIONER WARDEN: I was just going to move that we amend that to get rid of the words "at least" in the first line so that we're talking only about procedural harmonization.

CHAIRPERSON GARZA: All right. We'll do that. All right. Let's go through the three issues then. With

a show of hands, indicate whether you with agree with the recommendation not to -

COMMISSIONER KEMPF: I'd like to make a comment.

CHAIRPERSON GARZA: I'm sorry. Don.

COMMISSIONER KEMPF: On number seven, which is in the no category right now, my concern is this: There is a - well, first of all, I have a real question whether the guidelines make any sense at all, but even if they do make sense, there is such a disconnect between the guidelines and what actually occurs that the guidelines really serve principally as a trap for the unwary right now. Anybody, any firm that looked at those and took serious guidance from them, would be misguided in what they do, and so my reason that I wanted to look at that was that right now, not looking at it disserves everybody except those who are very sophisticated and pay no attention to the guidelines and look to actual practice.

But, supposedly, the guidelines were written as something people who could look to with confidence to determine, to know, what federal antitrust enforcement policy was, and they don't reflect that, and someone has to step up and say that. I don't understand why we

wouldn't do that.

CHAIRPERSON GARZA: Dennis.

COMMISSIONER CARLTON: Comment: Is it possible to
— the point Don is making seems like it might be the
conclusion of what you want to say in seven, and the
commentary on seven, you know, makes the point that the
agencies have issued reports explaining exactly what
they're doing, and an alternative to having them as two
separate issues is to have seven encompassed as part of
what we say in six, and we say something like, see what
the agencies have said about how they enforce the
guidelines. I don't know whether that would satisfy Don.

COMMISSIONER KEMPF: It would satisfy me.

CHAIRPERSON GARZA: Yeah. It occurs to me as
well that to the extent that the Commission engages in a
study of issue number six, it's likely that the question
of whether the agency merger guidelines accurately reflect
what they're actually doing will come up.

COMMISSIONER KEMPF: That's fine.

CHAIRPERSON GARZA: Okay. On eight, can I get a
— I'm sorry.

Jon.

VICE CHAIR YAROWSKY: I'm on eight.

CHAIRPERSON GARZA: Okay.

VICE CHAIR YAROWSKY: I just want to harmonize number eight, which talks about harmonization. We talked earlier in the international discussion about an issue which touches the same – goes in the same direction. I think with John's suggested modification of just to study the harmonization of the procedural aspects, I certainly would support that. I think that would be very useful. I said that in the earlier discussion, but I just wanted to be sure we sync up.

CHAIRPERSON GARZA: Right.

COMMISSIONER KEMPF: It strikes me that it is, in fact, subsumed within the issue three in international which we adopted.

COMMISSIONER VALENTINE: No.

CHAIRPERSON GARZA: No.

COMMISSIONER DELRAHIM: I think there was some debate that it was not subsumed.

CHAIRPERSON GARZA: No. Three, we voted on and it was very narrowly construed. So the question, I think, is that there appeared to be some Commissioners who would

vote contrary to the recommendation of the working group to include eight, striking the words "at least" from that, and include that as an issue for study.

Can I get a show of hands of Commissioners who agree with that?

COMMISSIONER CARLTON: I'm just a little confused.

CHAIRPERSON GARZA: Okay.

COMMISSIONER CARLTON: Could you answer Don's question as to why? I thought item three on international was specified to be just the technical and procedural changes.

CHAIRPERSON GARZA: Right. Exactly. And that's why --

COMMISSIONER CARLTON: Isn't that what eight says?

CHAIRPERSON GARZA: No. If you go to the memo on the international, you'll see references specifically to the IA --

COMMISSIONER VALENTINE: IAEAA.

CHAIRPERSON GARZA: Yes. And also that was the second thing. There were two specific, very specific --

COMMISSIONER VALENTINE: One was technical assistance and one was the IAEA potential requirement to share merger-related materials with non-antitrust agencies being a possible thorn to the accomplishment of additional cooperation agreements with other countries.

CHAIRPERSON GARZA: Right. So I think, Dennis, it has not been covered by three, is the point. So the issue now is whether Commissioners would vote to recommend eight for study, and that covers the procedural. I'm sorry. Jon Jacobson, do you have a quick comment.

COMMISSIONER JACOBSON: My comment is that since we can't change -- we can't change any laws, but the only recommendations we can make that will get any traction whatsoever, if any, are going to be to change U.S. law. So why is this the correct body to address harmonization issues? I suggest it isn't, and I will vote no to that.

CHAIRPERSON GARZA: Just one point, and you may want to make it, I mean, I think that we understand that there may be some sentiment up on the Hill to include this as part of their agenda.

COMMISSIONER VALENTINE: I have a proposal for that, perhaps. I happen to agree with Jon, that as

phrased it says, should steps be taken to attempt to harmonize further procedural aspects of reviews of U.S. and non-U.S. competition authorities. Now, if the E.C. has one statute that says you have to file a Form CO with certain kinds of documents and materials and they have a certain time line and we have another statute, a Hart-Scott-Rodino Act, that says we file certain materials with certain time lines, we can't change either of those statutes and we certainly can't change the European one. If Congress wanted to direct specific questions or issues to us, I think it would be highly appropriate for us to encourage that and to respond to it. I don't think we can pontificate about what other countries should be doing with their merger laws. We could do it, but we would have absolutely no affect.

CHAIRPERSON GARZA: Right. I think the motion was not that we would do that, but rather we would help to advise the Congress whether we perceived that this was a burden, the lack of – or the extent to which it was a burden, the lack of convergence and what areas might be suitable for there to be diplomatic solutions.

Makan.

COMMISSIONER DELRAHIM: Yeah, and also, I mean, we can pontificate on the U.S. government's efforts in this region. I mean, just like trade laws, we do not go abroad and force countries to change their laws; however, we do take efforts through the trade rep's office to either enter into agreements - I think Congress in enacting this statute that created us, as well as Chairman Sensenbrenner's comments - you know, he authored this bill. They really did have in mind our review, and I think when we were talking about number - when we were discussing issue number three in the international memorandum, you know, we did vote to limit it to the two specific examples; however, those were examples of - not exhaustive examples of the procedural efforts by the United States.

Now, technical assistance is one. Those are some of the efforts that the agencies engage in, but also, you know, there are agreements, not just the IAEEA, but merger comity agreements or civil enforcement comity agreements that we have with the E.C. and we've had for ten or 15, years.

I think the Commission should study, overall

survey, the various efforts the United States has been taking and see what works, what doesn't. We mentioned, you know, some of the funding issues. The agencies do communicate with, as Debra knows better than anyone here, with the foreign authorities, and what are some of those efforts, I think should be the subject of the study of this Commission.

CHAIRPERSON GARZA: Sandy.

COMMISSIONER LITVACK: I guess I'm constrained to agree with Job Jacobson and Debra, because – and maybe I just got this all wrong. I read the question and the answer is sure, yes.

COMMISSIONER VALENTINE: Sure. Yes.

COMMISSIONER LITVACK: Yeah. Should they be harmonized? Why not? Of course. So okay. Now we're done. What are we going to do? Are we going to then go on to say let me tell you how you do this? I don't know that we have any particular expertise in doing that or why we should be doing it, and if Congress is looking to us to tell them how that should be accomplished, I think they're looking at the wrong place.

So as much as I'd like to broaden our task, I'm

constrained to agree that this is not up our alley.

CHAIRPERSON GARZA: Jon.

VICE CHAIR YAROWSKY: I completely hear what Sandy is saying in terms of that set of recommendations, how to do it. I mean, we're not telling sovereigns anywhere how to do anything. I think my sense of what's going on the Hill is, one, they certainly want our view of the various efforts going on, kind of a survey that Makan has sketched.

The other side of it is simply in a global economy where merger transactions today often involve review by multiple jurisdictions, what are the costs of multiple review where there aren't harmonized procedures and does this have some positive or negative consequences. I think that's what they want to know, and then they can make a decision about whether to implement or begin negotiations or things like that. I mean, it's a more constrained area of inquiry.

COMMISSIONER JACOBSON: In 30 seconds, the answer to that is self-evident: The larger the transaction, the greater the cost. The more countries, the greater the cost. So the answer, again, as Sandy put it, is yes.

So they now have that answer because I think we can all agree on that. I like Debra's suggestion, if you have specific questions, please pose them; we'll do our best.

CHAIRPERSON GARZA: Let me ask, because I wanted to take up on Deb's suggestion and ask whether it's realistic for you and others to have conversations with the folks on the Hill who suggest this may be on their agenda and determine from them whether this is something useful and get a better sense of what we might usefully do for them in this area so we have a better target to shoot at.

COMMISSIONER DELRAHIM: In one of the two agencies, I think, who engage in this.

CHAIRPERSON GARZA: Right. So why don't we do -- similar to what we did in the other earlier group where we had John and Sandy agreeing to do some leg work, why don't we agree to do that. John and I and perhaps others will do that on this issue.

VICE CHAIR YAROWSKY: Okay.

COMMISSIONER VALENTINE: And I'd be happy to help with that also.

CHAIRPERSON GARZA: Okay. And just to formalize this issue, can I have a show of hands of people who agree with that approach?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: All right. Then nine, because we're running a little tight now, can we I have a show of hands for Commissioners who agree with the recommendation not to study the question of tying the issue of filing fees to the antitrust budgets?

COMMISSIONER KEMPF: I don't think we took a vote on seven, did we?

CHAIRPERSON GARZA: Didn't we take a vote on seven?

VICE CHAIR YAROWSKY: Well, the discussion was going about how six and seven —

CHAIRPERSON GARZA: Right, right, right.

COMMISSIONER VALENTINE: Although seven is two questions. So it gets a little more confusing. I think everybody would vote against.

CHAIRPERSON GARZA: Let me just ask. Can I have a show of hands for Commissioners who agree with the recommendation not to separately study the issues

presented in seven?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: All right. Thank you. Sorry that this has gone on a little bit long.

IV. Civil Procedure Working Group Recommendations

CHAIRPERSON GARZA: We want to turn now to Civil Procedure Working Group recommendations.

COMMISSIONER VALENTINE: Okay.

CHAIRPERSON GARZA: Is that you, Debra?

COMMISSIONER VALENTINE: Yes, that is me. I will go as quickly as possible.

The first issue: Should substantive law and procedures applicable to indirect purchaser litigation be modified? I think everyone has read the memo. Everybody knows *Illinois Brick* and its consequences. If there are any questions, I'm happy to answer questions.

Number two, what changes, if any, should be made to the enforcement role that States play with respect to the federal antitrust laws? Comments?

Number three, what should be the remedies and legal liabilities in private antitrust proceedings? Here, this question covered a panoply of issues, and, in fact,

we thought it would be wisest to look at them together, subjects such as treble damages, joint and several liability, prejudgment interest, attorney's fees, and standing to pursue injunctive relief.

At the time that the working group was looking at these issues, we actually chose to put down as a not recommended issue number seven, should government remedies be expanded, restricted, or clarified. At the time, we thought that the FTC had recently done a fair amount of thinking about disgorgement and that there was perhaps not much more to do there. Subsequently, we did receive Mr. Pate's letter. He raised the issue of civil penalties and other government remedies, and I think several members of the working group have subsequently suggested that perhaps it makes not much sense to study private remedies without putting them in the context of also looking at government remedies.

And so I think what I would do is recommend that the issue three be combined with issue seven and voted as an issue jointly in terms of are remedies appropriate to deter and punish, are they accomplishing their objective or not.

And then let's see. I guess any questions or issues on that we want to discuss?

CHAIRPERSON GARZA: Let me just say that I agree with that approach.

VICE CHAIR YAROWSKY: I hate to back you up, but I do want to just back up just for a brief discussion and understand the context of the *Illinois Brick* discussion. *Lexecon*, and I wasn't, of course, in that group, so I wasn't privy really to your discussion. I mean, I do see kind of the logical train to include *Lexecon*, but that begins to become a long reach, raises a whole set of issues kind of beyond just *Illinois Brick*. Is that -- I mean was that thoroughly discussed? I see the logical train of it, but it's a large reach over there.

COMMISSIONER JACOBSON: Can I respond to that? I think I was the proponent for putting the *Lexecon* issue in for this narrow purpose, and the narrow purpose is if we are going to consider some means of consolidated private actions that involve both direct and indirect purchasers or otherwise tinkering with indirect purchaser liability, even if we have a removal provision, the current problem being that you get sued in 33 States and the District of

Columbia, if you have a removal provision, that still allows for the potential at least for gamesmanship because people can refuse to settle and say I'll wait until I get back to my home jurisdiction. It's important at least to consider. No one is making any determinations. We're just putting the issue on the agenda, consider the potential for an overall consolidation so that a single court will have substantive control, not just procedural control, of the entire case, and that's the reason for inclusion of the issue.

VICE CHAIR YAROWSKY: Okay. It's just that there is a lot of overtones with *Lexecon* if you're following it on the Hill. The Judicial Conference has studied it in other contexts, a pretty definitive study. State court judges have studied it.

As I said, I do see, Jonathan, how you got there. I'm just saying it's a huge area fraught with a lot of concerns.

COMMISSIONER VALENTINE: I think the concept would be that at this point, obviously, we don't know what any final recommendation here will be. I mean, there could be a recommendation to have federal indirect suits

and no state ones. There could be a recommendation to do anything.

COMMISSIONER JACOBSON: Right.

COMMISSIONER VALENTINE: And so at the end of the day, if one aspect of the recommendation were to require -- it would be in that context -- excuse me -- desirable to have consolidation. I think it should be open to us to look at it, understanding, of course, that like so many of these issues in the civil procedure area, you fall over into general tort reform and class action issues, and we would not necessarily presume that it would have to be part of any final recommendation, but that it might be a desirable aspect of one.

CHAIRPERSON GARZA: Don.

COMMISSIONER KEMPF: *Illinois Brick* is one of two decisions that are really married at the hip. The first is *Hanover Shoe* and the second is *Illinois Brick*. *Hanover Shoe* said that if you're an indirect purchaser who suffered damage --

COMMISSIONER VALENTINE: Direct purchaser.

COMMISSIONER KEMPF: -- excuse me -- an indirect purchaser who suffered damage -- excuse me -- a direct

purchaser who did not suffer any damage, you could still recover. To make it symmetrical, they then held that if you were an indirect purchaser that suffered severe damage, you can't recover.

The result of the two cases is that many people who are injured can't recover and many people who are not injured can. And the States quickly said this is a nutty outcome and have their own reversals within the States of the *Illinois Brick* half of that pair of cases. So you have massive forum shopping, fights between federal and state things, all the problems that Jon alluded to, but they really derive from a fundamental set of decisions that ought to be looked at, and we ought to make a recommendation on it.

CHAIRPERSON GARZA: Any other comments?

Bobby.

COMMISSIONER BURCHFIELD: Debra, when you proposed that – and I hope that this isn't changing topics, but when you proposed that number seven be incorporated into number three as a result of Mr. Pate's letter, did you mean to incorporate seven as a whole or just the potential for civil monetary remedy for the

government? Because I had read his letter as being limited to that, and if these other issues about the broad scope of remedies have already been thoroughly studied and in particular in light of the *Booker* decision, I think probably a civil damages remedy becomes more pertinent now than it was six months ago.

COMMISSIONER VALENTINE: I mean, I'm happy to limit it to that. I'm happy to defer to other members on this. I don't want to make any authorial decisions here.

COMMISSIONER WARDEN: I think seven meant civil remedies.

COMMISSIONER VALENTINE: Right.

COMMISSIONER WARDEN: Government civil remedies. The others were studied elsewhere.

CHAIRPERSON GARZA: Yeah. So civil remedies. We'll just insert "civil" between government and remedies then so people are clear about what the proposal is.

COMMISSIONER WARDEN: Right.

COMMISSIONER JACOBSON: If I could just make a brief comment on three, I will vote for consideration of number three. In the working group, I was an advocate of a more limited analysis of certain aspects of the remedial

scheme. I understand the will of a significant majority of the Commission to look at issues more broadly, and I will accede to that.

I don't want our review to suggest that there is a presumption that there is anything wrong – or for that matter anything right, with the existing regime, simply that it's sufficiently important to the administration of the antitrust laws that this Commission should take a look at it.

CHAIRPERSON GARZA: Okay.

VICE CHAIR YAROWSKY: Again, this is going to sound rather technical, but I'm sure I know the answer, but I do want to ask and direct it to the working leader of that group.

On number one, I do understand the discussion about *Lexecon*, but, again, looking at the broader field, the word "antitrust" really doesn't appear in one. It appears in everything else. I assume you're talking about indirect purchaser antitrust litigation.

COMMISSIONER VALENTINE: Correct.

VICE CHAIR YAROWSKY: Because I'd like to keep it

COMMISSIONER VALENTINE: Absolutely, correct.
Yes. Yes. Yes.

VICE CHAIR YAROWSKY: All right. Thank you.

CHAIRPERSON GARZA: Okay.

COMMISSIONER WARDEN: Might I just inquire what other kind of indirect purchaser litigation you might have in mind? Because I might like to include it.

[Laughter.]

VICE CHAIR YAROWSKY: There is some creative pleading going around, but, no, I think if we just agree to the antitrust side, I think we're in good shape.

COMMISSIONER WARDEN: Can you answer my question, Jonathan? Is there some other form of indirect purchaser litigation of which we should be aware? Because it comes up under the rubric of state unfair competition laws or something that really shouldn't be encompassed in this, and wouldn't be if that word were inserted.

VICE CHAIR YAROWSKY: Can I answer that?

CHAIRPERSON GARZA: Yes.

VICE CHAIR YAROWSKY: I don't know all the consumer protection statutes in the states. I mean, those phrases could come up in other areas, and I just want to

be sure we, you know, have our –

COMMISSIONER WARDEN: Well, to the extent that state consumer – quote, consumer protection, closed quote, statutes are, in fact, disguised antitrust statutes or disguised Federal Trade Commission acts, I would not like to exclude the interrelationship of those with the ones brought under laws expressly captioned as antitrust laws from our consideration.

COMMISSIONER KEMPF: I don't think this does, because what you're saying is that they're disguised antitrust.

VICE CHAIR YAROWSKY: Right.

COMMISSIONER JACOBSON: Brief comment: There are of late – if you look at the indirect purchaser cases that are being filed today, a number of them are not filed under the state antitrust laws. They are, in fact, in the State of New York, for example, filed under consumer protection-type statutes because, for example, in New York, you cannot get class certified in a Donnelly Act case. You can in a general business law case.

I think John's suggestion, though, is accurate, and we're talking about antitrust-type claims. So what we might do

is modify the language to say indirect purchaser litigation based on claims arising out of competition-related offenses, and I think that would achieve all of our objectives.

COMMISSIONER WARDEN: That's okay with me.

CHAIRPERSON GARZA: Okay. Did the staff get that?

COMMISSIONER VALENTINE: Thank you, Mr. Jacobson.

CHAIRPERSON GARZA: Thank you.

COMMISSIONER VALENTINE: Let's see. Where did we leave off?

Number four of issues recommended: Should the FTC be given greater authority to weigh antitrust and economic expertise when selecting administrative law judges? Yes. We all thought this was a no-brainer.

And should use of neutral experts in antitrust cases be encouraged is the final recommended issue.

Issues not recommended are: Should the agencies establish timetables for investigating and deciding civil non-merger matters?

We've discussed number seven, which is the government civil remedies.

Eight, should the Federal Trade Commission be provided be a limited exception to the Sunshine Act so that its Commissioners could deliberate matters without going through formal Sunshine Act procedures? While we're sure this is all very desirable, we decided not to create individual agency exemptions and to let the agency address that.

And, finally, number nine, should the Commission recommend different standards for filing or certifying class actions for separating common injury and common damages issues or propose other changes in class action procedures in light of evolving jurisprudence or increasingly evident problems with the current system? And here, it was generally agreed among the working group that there are many other forums addressing tort reform these days and that it would be the wiser side of valor to defer to others on those.

CHAIRPERSON GARZA: Okay. Debra, I'm inclined when we get to voting on the recommendations to vote against the recommendations four and five just because of, again, the sort of the notion of limited resources and where it would be a priority, but I wondered whether

anyone on the working group had anything to say that would suggest that they really felt that it was a high priority which should be included.

John.

COMMISSIONER WARDEN: Well, I think four isn't very important, but should be included because it won't consume any resources in my judgment. Five could be dropped so far as I'm concerned.

CHAIRPERSON GARZA: Sandy.

COMMISSIONER LITVACK: I'm on the working group and I would vote against four and five, and, again, in good part, it's a prioritization issue. I just don't think it rises to that level.

CHAIRPERSON GARZA: May I ask a question? Has the FTC requested legislative change or any kind of change itself that would allow it greater authority to select ALJs with experience?

COMMISSIONER VALENTINE: I think it has certainly considered that. We know that the Patent Office does that. I think that given separation of powers issues, it actually might look better for us to make that kind of a recommendation than for the Commissioners who are the

reviewing body of the ALJs to be making recommendations about what comes to them.

I do think that the quality of the ALJs, if we are going to have a Federal Trade Commission as an independent agency with supposed expertise in antitrust and consumer protection law, I think the quality of the ALJs is very important and particularly as the Commission seems to be doing more activities in part three proceedings in its agency proceedings, that it would be extremely beneficial to have intelligent, rational, thoughtful, economically informed people working on those cases.

Now, I think many of us thought exactly as John Warden did, that this should not consume any resources. If you want to ask the agencies further as to what their past efforts have been, feel free to go ahead and do so. I'm not as specifically aware of when the last time they may have gone to the Hill is.

CHAIRPERSON GARZA: Don.

COMMISSIONER KEMPF: I'm going to vote against both four and five for a slightly different reason. Back when I was trial lawyer, people used to say to me, Well,

when you're trying these antitrust cases, wouldn't you rather have a judge than a jury, and I would always say which judge, because antitrust, much of it is not factual or legal, but what I'll call religious in the sense that it's not a fact question; it's a question of fundamental beliefs, and I always found great comfort in juries. I think they bring a collective common sense, and whether I want an administrative law judge who has more or less or antitrust or economic expertise depends where he sits on that spectrum, and I would rather not encourage that one way or the other.

And with experts, I've had a lot of expertise with neutral experts, some positive and some negative, and so if I were framing the question, I would frame it as should that encouraged or discouraged. One of the problems, is that some of the judges hire an independent expert and it is all *ex p  t  *. Some have it some *ex parte*. Some of them, he never testified; he just confers with the judge in chambers and neither side knows what the heck is going on.

So my own view is it should be discouraged, but I don't think it's something that -- I don't think either

one warrants any of our time.

CHAIRPERSON GARZA: Makan.

COMMISSIONER DELRAHIM: Ditto.

CHAIRPERSON GARZA: Okay.

VICE CHAIR YAROWSKY: I just wondered from the full Commission whether we could really get some bang for the buck so that when John Shenefield and Sandy Litvack sit down with Hew Pate for 15 minutes to talk about timetables on criminal matters, could they also maybe bring up timetables on civil non-merger matters, and then we'd had a good sense of where the agencies are on both.

COMMISSIONER KEMPF: If the question is can we expand our charter, I'm very comfortable with that.

CHAIRPERSON GARZA: Okay. Can we just formalize that? Can we have a show of hands of the people who agree?

[Commissioners vote by show of hands.]

COMMISSIONER JACOBSON: I'd like to participate in the small group as well.

CHAIRPERSON GARZA: Okay.

COMMISSIONER VALENTINE: Okay. Are we ready to vote?

CHAIRPERSON GARZA: Then can I have a show of

hands, then, for those Commissioners who agree with the recommendation of the working group on issue number one with the modification that was discussed?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. And what about number two; can I have a show of hands for those who agree with its study?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. And then on three paired with seven as was discussed, can I have a show of hands of Commissioners who agree with its study?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. Can I have a show of hands for Commissioners who agree with the study of recommended issue number four?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: All right. And can I have a show of hands for Commissioners who would agree with study of recommended issue five?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay.

COMMISSIONER KEMPF: Did four fall off too?

MR. HEIMERT: Yes.

CHAIRPERSON GARZA: I don't know where the vote tally is.

MR. HEIMERT: Yeah. It appeared to me that there was not a majority who thought we should study that.

CHAIRPERSON GARZA: Six, we've already voted on, and we'll expand the task of John and Sandy and whoever else to also cover this area.

Seven, we've already dealt with.

Can I have a show of hands of Commissioners who agree with the recommendation not to study issue eight?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: All right. And can we finally have a show of hands of those Commissioners who agree with the recommendation of the working group not to study issue nine?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: All right. Great. With that, then we will break for lunch and hope to resume the meeting at 1:30.

[Whereupon, at 12:22 p.m., a lunch recess was taken, to reconvene at 1:30 p.m. this same day.]

AFTERNOON SESSION

[Whereupon, at 1:30 p.m., the meeting reconvened]

CHAIRPERSON GARZA: I'd like to reconvene the meeting of the Antitrust Modernization Commission and begin with discussion of the Intellectual Property Working Group recommendations, and I'll defer to Dennis Carlton, who is the leader of that group.

V. Intellectual Property Working Group Recommendations

COMMISSIONER CARLTON: Okay. Thank you.

This subcommittee was concerned about the intersection between intellectual property and antitrust. This is a topic that motivated in part the formation of this Commission, and therefore we kept foremost in our mind the concern about innovation and whether the antitrust laws were doing a good job in dealing with industries where there was a lot of technological change.

The first issue that we voted to study was the following: Should industries involving significant technological innovation be treated differently under the antitrust laws than other industries? As I said, this is a

topic that both the ABA Antitrust Section and the House Judiciary Chairman Sensenbrenner had high on their list, and it was topic that we thought was an appropriate one for the Commission to study, and there was uniform consensus to study this topic.

So I would be happy to answer any questions, but if there are no questions, in the interest of saving time, I could go on.

The second topic was how the current intellectual property regime affects competition. The issue here is whether the changes in the last decade or two in the creation of intellectual property and the creation of patent rights has led to some adverse affects on competition because of the granting of patents that either aren't true intellectual property or because of various types of cross-licensing agreements have that have arisen.

There was some discussion as to whether we could say much about intellectual property law because that's, obviously, beyond our charge, but there was also a strong feeling that we could say something to the extent that patent pools and cross-licensing raise antitrust issues

that are more important now than they were before and, in particular, whether there has been a misuse of the patent law, adversely affecting competition.

There were several other topics we examined and at the subcommittee meeting voted not to study. Let me just go down some of them, and I have some new information on at least one that I want to report.

The first topic that we voted not to study was whether there should be a duty to deal in intellectual property, and what we thought about were circumstances in which there should be such a duty versus circumstances in which there should not be such a duty, indeed, whether any such circumstances might exist for either category. There was a debate on the subcommittee. The subcommittee was divided, and I was in favor of studying this topic. It struck me as an important one in light of the concerns people have about the property rights you need in order to motivate innovation and, therefore, if you reduce those property rights, whether it would have an adverse affect on innovation. Like I said, this was a close call, and I think it would be appropriate to have a discussion of this topic if people wanted to. Like I say, that was a close

call.

On item four, there have been several cases involving abuse of the standard-setting process recently. The subcommittee examined the issues that these cases raised and did come to the conclusion that they thought ultimately the consensus of the subcommittee was that maybe these issues would be more appropriately handled by the private parties as they learned what the cases implied.

Since that, writing this report, we've received a number of letters from private parties in which they raised not only that issue and probably disagreed with the consensus of the subcommittee on that issue, but they raised one additional issue which the subcommittee had not discussed, and that has to do with the fact that in several standard-setting organizations, one of the terms is that you will license your patents on reasonable and non-discriminatory terms; however, you are not allowed in the deliberation of the standard-setting procedure of many standard-setting organizations to discuss what you mean by reasonable royalties. And several commenters since this subcommittee report was issued raised the question whether

that was appropriate, whether their fears of discussing royalties in a common setting were justified. They say they are and they urged us to reconsider.

Several people on the subcommittee have contacted me and said that likely would have changed their vote. So I would say item number four probably would have been above the line had we thought of the issues that were raised in the letters.

The next issues, I'll go through relatively quickly. There has been a Standard Development Organization Advancement Act that was recently passed. The question is should this Commission evaluate it. It was the decision not to evaluate it. It just recently was passed. We don't have much history with the act. It also is quite narrow in that it applies only to the standard-setting organization and not to its members.

The sixth issue was whether the antitrust laws should deal with certain problems that arise in particular industries, in particular, efforts in the drug industry to use patents to foreclose competition. The sense of the committee was that although these are definitely serious issues, they weren't of a general enough concern to apply

broadly to merit our consideration given our limited resources, and also there was a feeling that these would probably be worked out by the courts.

The seventh issue was to investigate whether the FTC and DOJ diverge on antitrust and IP and whether we should reconcile those differences. There was a sense that is being worked out now between the FTC and DOJ, and it was unclear whether we could add much to resolve their differences, to the extent there are any.

The eighth topic was whether the patent system should be replaced with something else. Although an interesting suggestion, that seemed well beyond the charge of this Commission. So we voted no on that one. Then, finally, there was a question as to whether we should institute or recommend programs to collect data from researchers interested in intellectual property. The feeling was that to the extent we thought that was necessary, while we were studying these other issues, we wouldn't feel precluded from mentioning that, but that as a separate topic, we did not think it would be appropriate. So I'm happy to answer any questions if there are any.

CHAIRPERSON GARZA: John.

COMMISSIONER WARDEN: I have one. I read the supporting memorandum to cast issue number two, which I support, in a much broader way than your description, Dennis, which seemed to narrow it to a couple of specific issues like patent pools and so on. I favor it in the broader way that it's articulated in the memorandum.

COMMISSIONER CARLTON: Let me just say I didn't mean to narrow it from necessarily what it was in the report.

COMMISSIONER WARDEN: Thanks.

CHAIRPERSON GARZA: Jon.

COMMISSIONER JACOBSON: Yes. As a member of the working group, I understood it to be in the broader sense, and I think the memorandum accurately reflects our discussions.

The discussion we had was not to replicate, but to build on the prior work that the FTC had done in terms of its hearings and its report. Its report had a number of recommendations which do go to the substance of the patent laws as well as their interface with the antitrust laws. I don't think it is comprehensible to study the

affect of intellectual property on competition without delving at least into what the patent laws do, and I view that as entirely within our province and support that examination.

CHAIRPERSON GARZA: Any other comments?

COMMISSIONER VALENTINE: Yes. Only one small question, which is Dennis has proposed placing issue number four above the line, which I think in light of some of the letters received is certainly a nice way of reconciling what we've chosen to study with what others are urging us to study.

My only issue there is that four as phrased is quite broad in terms of misleading conduct and possible abuses of the standard setting process. I think that the one issue that the various companies, organizations, etc., who wrote and fairly highlighted was that this refusal ex ante to even discuss reasonable royalties. I think a lot of the other issues in terms of disclosure and possible abuses, let's say, that Dell and other people got out are now being addressed by those standard-setting bodies and probably are best addressed by them.

I also think that the FTC and DOJ held hearings

on this, and presumably they'll come out with a report saying something about all of that. So I'm just not sure we want to take on as broad a range of things as is potentially encompassed by four.

CHAIRPERSON GARZA: Sandy.

COMMISSIONER LITVACK: I'm almost going the other way and asking are you really suggesting that item four be added to focus on one question, whether or not discussions in these standard-setting contexts of the royalty rates is permissible or not, and if that's what we're doing, why? Why would this Commission be answering that question? Let the enforcement agencies, let the court, let somebody else answer it.

COMMISSIONER CARLTON: What the letters indicated is that many standard-setting organizations have taken the position and instructed people not to talk about reasonable royalties, and, therefore, the members of those standard setting organizations have said that has delayed and in some sense gutted the value of a standard-setting procedure.

COMMISSIONER LITVACK: The only point I'm making,

and I'll just make it and move on, is it would seem to me that there are ways to get that resolved, that is not the function of this Commission, to give advisory opinions.

COMMISSIONER WARDEN: How about a business review letter?

COMMISSIONER LITVACK: There are lots of ways. Business review would be one.

CHAIRPERSON GARZA: I have a question in that regard, because it wasn't clear to me whether four and five were somewhat linked. I thought that maybe part of what the proposal was that the Standard Development Organization Advancement Act maybe wasn't sufficiently broad and didn't cover those kinds of activities, only covered the standard-setting organization and not the members.

So my question is whether or not it makes sense in light of the input that we've gotten after publishing the working group memos to look more broadly at whether there is any need for additional assistance or redress on the standard organization issue and including potentially even recommending an amendment to the Act, although I recognize it's fairly new.

Jon.

COMMISSIONER JACOBSON: In the discussion within the subgroup, I believe there was a general feeling that both issues were below the line, that the FTC and DOJ –

CHAIRPERSON GARZA: Can you pull your microphone up?

COMMISSIONER JACOBSON: I'm sorry. That the FTC and DOJ, particularly the FTC, are bringing appropriate cases, commencing the process of common law resolution of these issues in a sensible, organized coherent fashion that is a traditional way antitrust law develops, that they are going about it in the right way and that there's little, candidly, for us to add to the common law processing that respect.

There was very little discussion of the act, although it was an issue that was considered and rejected for review. The Act is a very narrow exemption from the antitrust laws. If we're going to look at standards at all, and I would prefer to see the common law process run its course, then I think we should look more broadly at it. I, for one, don't believe in most antitrust exemptions, and if there is a rule of reason that can be

applied to standards development entities, there is no reason that the same rule shouldn't be applied to its members.

I personally would keep both of these issues below the line, but respect other views. Certainly, when companies as important to the economy as Cisco and Sun and Hewlett-Packard all feel that this is an issue that we should address, you have to respect that.

CHAIRPERSON GARZA: Jon.

VICE CHAIR YAROWSKY: I just want to address the SDO act that was just passed. You know, it may even be far narrower than we've discussed so far. Not only does it just apply to the standard development organizations and not to members, but a very select group of SDOs in the sense that they have to comply with what is called voluntary consensus standard organizations, which are based on certain criteria set out in an OMB circular. That sounds very arcane and I'll move on, but what I'm trying to say is Congress really granulated this, obviously set out – not only set out a rule of reason for what they defined as standard-setting activities, but then also excluded from that definition any of the per se

offenses.

So even if you were conducting standard-setting activities, it could never involve price-fixing. It could never involve market allocation. It could never involve boycotts, and it only applied to SDOs. So, again, not just in complete defense of what Congress just spent three and a half years doing, but at least on that subject, I think it's fairly exhausted and it's fairly narrow.

CHAIRPERSON GARZA: But that would suggest that the issue that Debra raised is a real one because of a carve-out, if you will. It could be attacked as price-fixing or boycotting in some circumstances.

COMMISSIONER VALENTINE: Well, that's a question under what the act seems to exclude, are discussions of prices and costs that aren't reasonably related to the adoption of the standard, but one could argue that ex ante, the discussion of what a reasonable royalty is, in fact, reasonably related to the adoption of the standard and you can't gain the process because you don't even know if your patent is going to be reading on the standard.

But, I mean, this may be getting too small.

VICE CHAIR YAROWSKY: Can I just say one thing?

What you're referring to in terms of description of the excluded activity is really a term of art that derives from the original National Cooperative Research Act of 1984. Remember, the same voluntary notification system was first used for R and D joint ventures. Okay? In '93, Congress amended that act to allow to be extended to production joint ventures.

This is the third chapter of that, and so that phraseology that you have cited really is a term of art that goes back to the original act. That's why it was really used. There is a savings clause, from what I remember in that act, that basically is a standstill so that this act doesn't affect current antitrust law and does not affect intellectual property law in terms of where the law is going.

So, again, this act is to be construed – this is not in the legislative history. It's actually in the plain language of the act. This act is not to be construed to interfere with developing case law either in the antitrust area or the intellectual property area. So what I'm giving you is just my view that I think it's fairly fresh and I'm not inclined to recommend that we go

back into it.

COMMISSIONER KEMPF: Deborah?

CHAIRPERSON GARZA: Don.

COMMISSIONER KEMPF: I would not add it. I read with care and interest the letters suggesting this. They do more than suggest that we study this subject of price-fixing and the standard-setting process. They recommend flat-out that we authorize price-fixing in the standard-setting process, price-fixing by the buyers, not the sellers. And I think what has been suggested would be an abuse of the standard-setting process. So I'm pretty much against it.

It would probably be the first item that the next Antitrust Commission, Antitrust Modernization Commission, Exemptions and Immunities Committees would look at several years from now.

But I do want to comment, secondly, on Jon's observation that seems to suggest all this is working out fine and hunky dory in the courts. I think the reason people are embolden to ask for things like that is because it's not working out well in the courts. We have what I view as wrong-headed decisions that seek to penalize

consumers and protect competitors to get a level playing field and all the like. It's usually the argument of people who are not good competitors, and so – but I'm content to let that process continue, not because I think it's going well, but because I think it will self-correct.

CHAIRPERSON GARZA: All right. Any other comments or questions?

Dennis, is there anything else you wanted to –

COMMISSIONER CARLTON: I don't have anything to add.

CHAIRPERSON GARZA: All right. In that case, then, can I ask the Commissioners by a show of hands whether they concur in the recommendation of the IP Working Group to study issue number one?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. I'd ask by a show of hands whether the Commissioners concur with the recommendation to study issue number two.

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: And I would like for the Commissioners to indicate by a show of hands whether they concur with the recommendation not to study issue number

three.

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. I'd ask by a show of hands whether the Commissioners concur with the recommendation -- I'm going to put it the way it's in the memo, Dennis, for now, but the recommendation as reflected in the memo not to study issue number four.

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. Same question with respect to five, concurrence not to study issue number five.

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Same question with respect to six, concurrence not to study.

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Issue seven, concurrence not to study.

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Issue number eight, concurrence not to study.

COMMISSIONER KEMPF: What would the prize be?

[Laughter.]

COMMISSIONER KEMPF: No. You can go ahead and take a vote on it.

CHAIRPERSON GARZA: Eight?

COMMISSIONER VALENTINE: Not?

CHAIRPERSON GARZA: Not.

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: And nine, consensus not to study.

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Thank you. That was very efficient. Thank you, Dennis.

Vi. Single-Firm Conduct Working Group Recommendations

CHAIRPERSON GARZA: With that, we'll move into the discussion on the Single-Firm Conduct Working Group recommendations, and Jon Jacobson led that group, so I'll turn to you.

COMMISSIONER JACOBSON: Thank you, Deborah.

What I'd like to do is go through each of the recommendations, pro and con, seriatim with a brief discussion of the working group's recommendation and the rationale therefore.

The first issue is basically whether there are

aspects of the new or modern economy that warrant some different treatment. Some would suggest more harsh treatment. Others would suggest more lenient treatment for conduct, vertical or single firm, and that is an issue that is at the core of the rationale for the creation of this Commission. It is one that certainly Congress and Sensenbrenner felt strongly about. The limited legislative history of the statute creating us puts that at the very top of the list. I think there are a number of Commissioners who may be of the view that the answer to this question is not only no, but an emphatic no, but I think it would be disrespectful to the Congress that created us not to evaluate this issue, and that was certainly the unanimous view of the working group.

The second issue is whether the Robinson-Patman Act should be reconsidered. The antitrust cognoscenti have been posing that question for decades. The Justice Department, as I think everyone knows, doesn't enforce the statute, views it as the property of the FTC. The FTC views it as its property, holding its nose.

There are serious concerns about buyer power, about the concerns that led to the creation of the Act.

There are certainly arguments that have been advanced and that we expect will continue to be advanced for retention of the Act, but the issue is of enormous consequence to the United States economy, and there was little controversy in the working group in recommending this issue be considered.

The third issue is at the core of non-merger, non-cartel antitrust, and that is whether the Commission should endeavor to articulate standards for what constitutes exclusionary or anticompetitive conduct, both under Section 1 of the Sherman Act in vertical cases and a similar standard will undoubtedly apply in non-per se horizontal cases as well, as well as to unilateral conduct under Section 2 of the Sherman Act. There was division on the working group as to whether we should undertake this particular task. We'll get into that momentarily, but it was the recommendation of the working group that this issue be considered.

The fourth question is a good deal more narrow. There is at least a perceived gap in antitrust coverage in that Party A who solicits Party B to join in a price-fixing conspiracy, absent unusual circumstances where that

conduct can be characterized as an attempt to monopolize, as in the Bob Crandall American Airlines case, is only subject to prohibition under Section 5 of the FTC Act, the remedy for which is simply a cease and desist order.

There is a sense that conduct, at least if undertaken covertly, can be sufficiently pernicious that more serious Sherman Act-type standards should be considered, and to evaluate that question, the working group without controversy recommended the study of that issue.

The fifth issue was by a divided vote, and that is whether the Commission should undertake a study of monopsony issues and particularly single-firm exercises of buyer power. The majority of the working group believed that particularly since we're considering the Robinson-Patman Act, Section 2(f) of which applies to buyer power at least as exerted in commodity industries, that to consider potential modifications or even repeal of Robinson-Patman without looking into the larger question of buyer power would not be appropriate, and therefore a majority of the Commission recommended study of that issue.

The first issue, in our speak, below the line is market definition, and that is an issue that is below the line again on the basis of a divided vote. There was quite of bit of discussion in the working group over that issue. A lot of views were heard, pro and con. At the end of the day, the majority of the working group concluded that although the market definition process is imperfect and flawed, that, in essence, it asks the right types of questions and that the process of adjudication through the agencies and the courts should be allowed to continue to perfect methods of analyzing market definition and that there was little to that process that this Commission could add.

Item seven was initially above the line, wound up, I believe, unanimously below the line just in the interest of there is only so much the Modernization Commission is going to be able to do. That issue is whether the primary line aspects, the predatory pricing aspects of the Robinson-Patman Act, and the provisions of Section 3 of the Clayton Act should be repealed, not as wrong-headed, but as duplicative of the provisions of Section 2 and Section 1, respectively. The consensus was

that to the extent these statutes are duplicative, as most observers believe they are, they are not causing undue harm and, therefore, the Commission's time can be spent better on other tasks.

Issue three, there was considerable discussion about Section 8 of the Clayton Act. It is a controversial statute. The mere fact of an interlocking directorate does not ipso facto result in a lessening of competition. The consensus of the working group was that the statute does not pose a sufficient problem to the economy to warrant our attention, particularly in light of the unknown circumstances that might prevail were the statute to be repealed. We've had a regime since 1914 prohibiting interlocks among substantial competitors, and were we to repeal that, the consequences are unknown, and given our obligation to do no harm, that issue fell below the line.

Finally, an issue that undoubtedly would have drawn greater attention 15, 20 years ago, resale price maintenance, the working group unanimously concluded that although strong arguments can be made for eliminating the Dr. Miles *per se* rule for resale price maintenance, that given the effect of the Business Electronics against Sharp

decision and given the Congressional support year in, year out for maintenance of the *per se* rule, that this was not an issue that the Commission should spend time on.

Those are the working group's recommendations, and I'll open it up for questions.

CHAIRPERSON GARZA: All right. Does anyone have any questions or comments that they want to make on any specific recommendations?

Sandy.

COMMISSIONER LITVACK: I just had one, I guess, which is did the group feel and, if so, was there evidence before the group that led to its feeling that the issue encompassed in number four was sufficiently, for lack of a better word, widespread, recurrent, serious to warrant the study here; and if so, I guess my question is what evidence, if any, is there evidence that this is a problem?

COMMISSIONER JACOBSON: We did discuss that issue briefly. We did not encounter any empirical evidence that it is a widespread problem. Because it involves covert activity, it's something that I think would be impossible of its nature to develop solid empirical data concerning.

That doesn't mean we wouldn't prosecute it if a revised statute were passed precisely for the same reasons, but the feeling was that the issue is sufficiently narrow and probably not that controversial that it could be addressed in short order and resolved by the Commission in short order.

COMMISSIONER LITVACK: Just one last comment, I guess my point is I'm not sure that we're -- it sounds like we may be trying to devise a remedy for a problem that doesn't exist or certainly doesn't exist widespread, and the issue is not where you come out, but is do you really want to spend the time and the energy and the resources trying to consider something that I don't think is a widespread problem. Certainly there hasn't been any history of it. You mentioned the Bob Crandall situation, and that's about the only one I know of. There may be some others, but certainly not widespread.

COMMISSIONER JACOBSON: Well, there have been a number of cases that the FTC has prosecuted under Section 5 over the years. So it's not sui generis, but I don't think anyone can say that there is empirical data to suggest it's a widespread problem.

CHAIRPERSON GARZA: John Warden.

COMMISSIONER WARDEN: I'll stick to four now, but I have comments on three and five as well. I don't see what's pernicious about this. If the solicitation doesn't meet with success, there is no economic harm, and the fact that we may all think this is morally culpable conduct, which I certainly do, doesn't lead me to believe that we need a law to deal with it.

COMMISSIONER SHENEFIELD: But that would lead to repeal of all laws penalizing attempts if it didn't result in a successful act.

COMMISSIONER KEMPF: Yeah. Like attempted murder.

COMMISSIONER SHENEFIELD: I think at least my recollection of the working group was that it is an anomaly to have criminal apply to the completed agreement, but then have something as wishy – that's the wrong way to put it – as far removed from criminal law as possible, like the Federal Trade Commission Act, apply to conduct that is just as hard core bad. It just hasn't happened yet to have reached a successful conclusion. Why would you want that?

COMMISSIONER WARDEN: I didn't say I wanted the conduct, by the way.

COMMISSIONER SHENEFIELD: The anomaly.

COMMISSIONER WARDEN: I said it was morally culpable. I don't think there is an analogy to attempted monopolization, for example, which can cause injury even if it doesn't succeed in monopolizing, and nor is there the remotest analogy to attempted murder, which is a breach of the peace, whether it succeeds or not. That's my only comment on that. I just don't think it's worth the time and sweat.

CHAIRPERSON GARZA: Okay. Did you want to go on to — you said you had something else.

COMMISSIONER WARDEN: Three and five. Three in my view is a black hole. We could have, you know, that as our sole topic of inquiry were we to pursue it, and it also refers to Section 1 which requires more than a single firm. So I'm not sure why that's part of this group, but this is just a review of the standards developed by the courts for administering Sections 1 and 2 of the Sherman Act, and I don't think that's a particularly useful way for us to spend our time or that we're likely to reach a

consensus or do anything that at the end of the day benefits the public. Yeah. It would be great if we could, if we were, you know, endowed with genius and omniscience and come out with a bright line of what is and isn't exclusionary conduct. So I am definitely opposed to that.

Number five, you know, it sounds interesting in an academic sense and I see that there are people who believe it's a problem, but I'm not sure how real the problem is.

CHAIRPERSON GARZA: I ditto John on three, four, and five, but John Shenefield.

COMMISSIONER SHENEFIELD: Just to respond on the three points, first of all, one of the points of criminal law is to deter conduct, and I don't think there is any sensible argument that it would be wise to have in place a law that deters solicitation to commit a felony. So that's as to, I guess, item four.

As to item three, I think the working group was very much influenced, among other things, by the letter from Senators DeWine and Kohl explicitly requesting us: "We recommend you review the current state of

monopolization law in the wake of *Trinko*." Now, the question is what use we can contribute. There are two kinds of commissions, one that recommends a statutory fix, another kind that recommends or states what it perceives to be the better view of the law, as, for instance, the 1955 Attorney General's Commission.

I don't know whether we can agree on not, but I don't think we can just walk away from the problem, because it is one of the central controversies of current antitrust law, and it's very much in the news since *Trinko*, and it's sort of like the horizontal merger issue. It would be far more comfortable if we didn't have to deal with it, but it's there, and if this Commission is going to have any credibility at all, it cannot walk away from major issues like that.

As to five – well, I'll just stop there. Three and four is enough.

CHAIRPERSON GARZA: Okay. Makan.

COMMISSIONER DELRAHIM: As to number three, I agree. I don't think that our limited resources or time is worth spending trying to re-examine *Trinko*. I think the standard is appropriate. There has been some

discussion, but whether or not, you know, Section 2 standards should be revisited or we should be moving towards the positions held in Europe, I think that would be not necessarily the best use of our time; however, 3(e) is an area that I think is vitally important for us to examine. This is the treatment of bundling and discounting prices, and I guess in a similar way in industries where there is a zero marginal cost, that's probably more appropriate in issue number one that deals with what's mostly appropriate in the new economy areas where you have software.

But the bundling discount is a big issue that we visited with the case from the Third Circuit in LePage's. The agencies didn't recommend for cert. to the Supreme Court. So the issue still lingers without appropriate standards for firm and what conduct could be subject to the antitrust laws.

Now, whether we have the wisdom to address that or not, I think it's perfectly appropriate for the Commission and an important one for both enforcers and the business community.

CHAIRPERSON GARZA: Don.

COMMISSIONER KEMPF: I probably would not do one, three, four, or five, but I do want to comment on that, and I probably would do eight.

I would count myself instinctively among those who would say not only is the answer no, it's a resounding no on question number one. I don't believe in much of the new economy jargon. I think there are new products and new methods, different methods of distribution, a shorter time horizon, geographic horizon, all the things that are part of what people sometimes call the new economy, but I see no reason why you would make the standards either more lenient or more harsh. But if we want to spend some time addressing it, I don't have a violent objection to it, but I know where my instincts are.

As for item three, boy, I think that is something that I care an awful lot about, but it's a — did somebody use the phrase "black hole"? Yeah. I'm going to, for example if we study that, say that there is essentially no such thing as predatory pricing and that most lawsuits brought by competitors are brought not to any anticompetitive situations, but to stunt competition; and I don't mind, again, weighing in on that, but that's

an awful lot to chew on. Maybe it's something we should chew on. I certainly have no interest in gravitating toward Europe where abuse of dominant power is just, again, a thing to keep inefficient competitors alive.

But I'm comfortable however the committee goes on that, but everybody should understand that is an awful big thing to bite off.

I had really sort of a question you can come back and answer on four. For example, I don't know why it's limited to covert. Overt stuff, like if some guy gets up at a trade association meeting and says, You know what I think; I think we all ought to raise our prices ten percent next week, so he couldn't be prosecuted for doing anything covertly, and, you know, I would wonder why you wouldn't do something that paralleled what the Section 2 does, have the offense and attempt to commit the offense and let it go at all that. Now, I would be against it and would be against even studying it, because Section 1 is one sentence long, is as vague as a statute probably has ever been written, and, you know, I think it was Mel Brooks once said beauty is in the eye of William Holden, and there's a lot to that. And if you start trying to

have an attempt to do something that's ill-defined to start with, I just think you subject people to a lot of risks improvidently. So I would at the end of the day preserve the asymmetry that we have.

The buyer power, I just think that's as clear as the ass on any animal you name, and I don't think there's any need to clarify it. So I wouldn't spend any time of it.

The Clayton Act, maybe it's because I've had a number of things over the years where directorships have been precluded for idiotic technical coverage of Section 8 and you spend an inordinate amount of time looking at it, and I think that is something that's been around for a very long time, but desperately cries out for modernization.

CHAIRPERSON GARZA: Dennis.

COMMISSIONER CARLTON: I wanted to talk about five and six. Let me first turn to six. I'd be in favor of including six. Let me explain why, not because I want to add more topics to what we study, but because this is a topic, market definition, that is at the heart of all antitrust cases. We've already described in the merger

memo how we're going to talk about and analyze how markets are defined. In the IP discussion we just had, we're going to talk about how markets are defined. In topic one here, if you read the commentary, they're going to talk about how markets are defined.

So I think a sub theme or a short summary of what I just said is we're already discussing how markets are defined.

Now, if you want that say, well, it's only in high-tech industries we're going to study it and only in merger context we're going to study it on this Commission and that's going to narrow things, I don't think that's helpful, and I think a way to summarize what we should do is let's talk about market definition in regular cases, in merger cases, in vertical cases, new economy cases and see if it's different; otherwise, I think you're going to get a very disparate disconnected analysis.

So I actually would recommend that six go above the line, but that we consolidate – maybe after this meeting, the staff consolidate and say we're studying market definition, because that's what I think we are doing.

As far as item number five, as an academic, I don't have any problem studying any topic, and buyer power is as good as any. I would say, though – I was a member of the subcommittee – I would vote against that. It's not my sense that it is an issue over which there is a lot of controversy.

COMMISSIONER KEMPF: Can I ask a question of Dennis?

CHAIRPERSON GARZA: Yes, sure.

COMMISSIONER KEMPF: I suppose if we were to take on six, defining market power, you know, where does it carry you? In other words, that is at the core – I agree that's at the core of a lot of stuff that goes on, as is market definition, but, boy, you know, that's usually a battle of experts and it's slippery stuff. I mean, I essentially try to avoid spending any time at it in any case because for the defendants, it's usually a trick bag. So I would always say to the judge it doesn't matter how you define it as long as you keep the fundamental market realities well in mind, and whether you say we have – I'll take a real case – whether you say we have 98 percent of the inner-city bus market or two percent of the inner-city

travel market, it doesn't make any difference if you look at all the factors involved in that, or energy versus petroleum or energy versus coal or energy versus nuclear power.

There's a million ways you can look at that, and back in the heyday of antitrust enforcement, that was where the defendants always lost on appeal. They always persuaded the judge of a sensible market definition and got it yanked out from under them on appeal, and so I would always say to the judge, I don't care how you define it as long as you get the facts and the forces right, and so what I urge in my findings and will urge you orally is to say I've studied it this way and I've studied it that way and neither way does it make any difference because of the factors are always the same. That way, you don't get caught in it, but if I end up having to define it or defining market power, my gosh, that's an awful heavy thing to take on.

COMMISSIONER CARLTON: Well, I guess I agree in part, having worked with you in some of those cases, Don. I agree with that strategy. I think it's important. I think there are at least two or three things that are

important. One is in some of the cases where marginal cost is very low, I think there is confusion what market power means and what people are talking about, especially innovative industries; but, second, even in cases where that isn't an issue, let's just talk about what you said. I think it is correct to say that market definition is a first step and then let's look at all the other facts. So the question is do we look at what the other facts are and are there tests now that are pretty routinely done that can illuminate whether you have the right definition or the wrong definition, and let's suppose you can do pretty good tests as to what are the consequences if a new firm enters or two new firms enter or one firm exits and you know there is no effect on price. Well, that answers the ultimate issue, and I think it's important to stress that market definition is not something that by itself answers a question.

My sense is that as you move away from the antitrust agencies into courts, into juries, that point gets obscured, and I do think there is confusion in how markets are defined, especially in court cases, and we're already analyzing many of these issues in the other memos.

CHAIRPERSON GARZA: All right. Jon Jacobson.

COMMISSIONER JACOBSON: I want to try to address most of the comments, and let me just start in order of the questions. I was a no-vote on issue three, partially on the black hole theory, which I completely endorse, partially because I think the odds on getting a coherent consensus out of this commission – and I like and enjoy working with everyone here, but getting a consensus on these issues, I think is going to be a struggle, in part because the likelihood that the courts will take a divided opinion by this commission on these issues quite lightly, and, therefore, we will have done no good at the end to have day. All of those considerations add up to me to vote to decline to consider these issues.

These issues to me are the most important and interesting we have. So I'd love to spend time looking at them. I just don't think we're going to accomplish much good by doing so.

I do want to address Makan's point about the bundling issue and LePage's, and I respect that, but at the end of the day, the Division came to largely the same – the Solicitor General came to the same point of view

which I have, which is let the common law process work itself out, let's have further cases, further factual situations so that we can test our instincts to see if they're correct and look at the what the law should be over a longer view.

I do think if we look at bundling, it's difficult not also to look at tying. It's difficult not also to look at leveraging in the attempt to monopolize sense. It's different not also to look at whether the court in *Trinko* got substantive Section 2 rights. So I think it's difficult to look in isolation at the bundling issue, and for that reason, although I find that issue particularly interesting, I would just vote no on the entirety of issue three.

On issue four, I respect the points of view that have been expressed. I come out that we should look at the issue, but it's not something that, you know, if we were to say no on would upset me unduly.

The buyer power, I also believe is a close question. I've long had an academic interest in monopsony issues and perhaps that colors my view. I do think there are unique buyer power issues that are affecting the

economy today in ways that they haven't before. I don't think the economics profession has truly understood monopsony, particularly where accompanied by the economies of scope that we're seeing in some companies in the economy today. I do think a study of those issues could do some good. Again, this is not one that I would jump up and down on if we were to say no, however.

I would jump up and down, though, if we were to say yes on market definition, because I believe that is another true black hole. I don't agree. I think it's true that we're going to address market definition in everything you do, because you can't talk about antitrust subjects without talking about market definition, but that doesn't mean we're going to analyze market definition issues from the ground up, to take the methodology, to take the question that we talked at some length about in the working group, whether there should be market definition at all, which would require at least in some cases a statutory change to Section 2 of the Sherman Act and Section 7 of the Clayton Act. So that is one that I feel if we were going to get into it, it would occupy virtually all of our time, and that's why I'm comfortable

myself with the working group recommendation of no on issue six.

And that's my piece.

CHAIRPERSON GARZA: Any other comments before we test our consensus? Makan.

COMMISSIONER DELRAHIM: Let me just quickly respond on the LePage's issue, and the reason is – to clarify the Solicitor General's position – was not so much that we should let the common law test itself out before there's a rule. It's the Supreme Court is not yet ready to issue a rule, partly because once the court speaks, you know, it requires a constitutional amendment to overturn that thing, and so we didn't have –

COMMISSIONER VALENTINE: No.

COMMISSIONER DELRAHIM: Almost.

COMMISSIONER VALENTINE: No.

COMMISSIONER DELRAHIM: But once there is that pronouncement by the court, it's going to be very difficult to overturn that through legislative process. So it wasn't so much that it was let's allow the academic study on this issue, let's have some of the lower courts have some experience with this. I think we are exactly

one of those bodies that could have an academic review of the issue and add to the body of knowledge in this area, and I think that's exactly what our mission is.

COMMISSIONER KEMPF: And that's item three?

COMMISSIONER DELRAHIM: That's just the subpart of item three. That's only with respect to the bundling.

COMMISSIONER KEMPF: I would actually welcome further input from my fellow Commissioners on three. Oddly enough, I earlier said I was inclined to vote against it, but Jon's response in favor of voting against it has much pushed me the other way.

[Laughter.]

CHAIRPERSON GARZA: Now, now, Don.

COMMISSIONER KEMPF: He talked about the importance of unanimity, and I don't -- I think if we can get unanimity on some things, for example repeal of the Robinson-Patman Act, that would be a swell thing. At the same time, as I look back on the work of prior commissions, some of the most enduring outcomes have been the product of the dissents. If you look back at some of the dissents, and some of those are the ones that at the end of the day, the strength of their intellectual power

prevailed and they have become what is currently prevailing antitrust law.

So I don't mind if we get a thorough discussion of an important issue and we end up with clear articulations of both viewpoints. That doesn't bother me, and as you were arguing, I said, well, gee, maybe that's something we ought to embrace for reasons such as you said on the *LePage's* case which is an area where we may not have unanimity.

So if anybody else wants to weigh in on it, I would welcome that, because I'm sitting on the fence on it.

CHAIRPERSON GARZA: Sandy.

COMMISSIONER LITVACK: I'm going to accept the invitation and weigh in, because I've been on the fence and back and forth on this very question. The best argument against it that I've heard is the one job John Warden articulated and you adopted earlier about the black hole, and the best argument for it, I think is the one John Shenefield articulated in my mind.

When I come out -- I mean, I think where you come down to is, A, I share your view that it's nice if we can

reach unanimity, but it's not essential, because if we were to do that, we would come to the lowest common denominator on everything and just pick those things everyone agrees on. I'm not sure what we would have accomplished.

So I don't think that is the test. I agree with you. I think what you come down to is can we look at this and is it worth doing without ending up in a black hole, and I guess where I come out is, yes, I think we can and if we can, we should. I think the we can is only a matter of self-discipline. Obviously, you can put yourself in a black hole, if we are so inclined, but I think you can intellectually approach it and not let this thing swallow you and yet add something.

So I'm almost thinking as I'm talking, and I think I'm going to vote for it.

CHAIRPERSON GARZA: The other only question I have is since we've been asked to prepare a report to Congress and the President, which you could say and suggest that what we would be doing is recommending enforcement priorities or recommending legislative change, where would we end up on this issue? Would we be just

putting a piece out there that people could reference and cite to support or undermine arguments? Where would it go?

COMMISSIONER SHENEFIELD: May I quote from the letter from Senator DeWine and Kohl, the chairman of the Antitrust Subcommittee and the ranking member?

CHAIRPERSON GARZA: Um-hum.

COMMISSIONER SHENEFIELD: "We recommend you review the current state of the monopolization law in the wake of *Trinko* and consider whether you would recommend any legislative changes. In addition, the business community would benefit from a clear articulation of the principles in this area." Whether we ever get to that objective is something that is unknowable, although one could be skeptical, but if you can, if there is a chance, I don't see how you could walk away from that rather direct request.

CHAIRPERSON GARZA: Steve.

COMMISSIONER CANNON: I agree with Sandy as well. I mean, this question of it may take a lot of time, but what's the corresponding value, and that's where I -- I mean, I'd hate to say let's not do something because it's just too hard to do or we think it will take too much

time. In all of these, you could spend an enormous amount of time on them.

So I'm with Sandy on this one.

CHAIRPERSON GARZA: Jon.

VICE CHAIR YAROWSKY: I agree with Steve, and also Chairman Sensenbrenner also indicated that the *Trinko* decision was important. So I think we have real interest on both sides of Hill, and our job is to define it in a way that we can actually study it and try to come out to a resolution.

CHAIRPERSON GARZA: Okay.

COMMISSIONER VALENTINE: I'm still back with the answer to Deb Garza's question, which is it is true that we could say that the Justice Department or the FTC should file amicus briefs and try to refine the doctrine. It is true that we could say maybe that Ortho is the better way of looking at LePage's issues than LePage's, but what does that mean or what kind of a recommendation is that at the end of the day? I don't understand what we would be doing here either other than the black hole.

CHAIRPERSON GARZA: Sandy.

COMMISSIONER LITVACK: I'm probably just going to

repeat.

COMMISSIONER CANNON: Are you changing your mind again?

COMMISSIONER LITVACK: No, no, no, not yet. I'm with you now, Steve.

For me, at least, John answered the question by reading what he did. I think the answer, at least to me, is twofold. One, it may well be that there are legislative remedies that should be addressed; and, two, even if that is not so or can't be identified, I don't think it is irrelevant or trivial if we serve a benefit to the business community by better defining or proposing or articulating a better approach, and I think often gains momentum.

I don't know how it translates itself at the end of the day, but the prestige, the weight of the Commission, if it have a view, may well lead the way in some different direction, a better direction. So that works for me anyway.

CHAIRPERSON GARZA: Any other comments?

COMMISSIONER KEMPF: I'm going to change my vote to a yes.

CHAIRPERSON GARZA: Let's get to voting. Let's get to voting quickly, because, otherwise, we might have a few changes.

On the issue number one, can I by a show of hands have the Commissioners indicate whether they concur in the recommendation to study issue number one?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. On issue number two, same thing, can I have a show of hands to concur?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: On issue number three, can I have a show of hands of those who concur in studying the issue?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. Issue number four, a showing of hands for those Commissioners who agree with studying the issue.

[Commissioners vote by show of hands.]

MR. HEIMERT: Six.

COMMISSIONER KEMPF: Six means what, Madam Chairman?

CHAIRPERSON GARZA: I was just wondering whether

I'm the tie-breaker. I don't know. We hadn't discussed this.

COMMISSIONER JACOBSON: I'll break the tie and drop my positive vote in the interest of narrowing the issues that we have to look at, the other priorities.

CHAIRPERSON GARZA: So, Jon, are you saying that you're withdrawing your vote to endorse the recommendation?

COMMISSIONER JACOBSON: We have to have some resolution.

CHAIRPERSON GARZA: I think we've been going with the majority rule. I shouldn't have been so silly about it. So I think with six, it wasn't going to succeed anyway.

COMMISSIONER JACOBSON: Okay.

CHAIRPERSON GARZA: Can I have a show of hands on the recommendation to study issue five, please?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. Can I have a show of hands on whether the Commissioners concur in the recommendation not to study section six, issue six?

[Commissioners vote by show of hands.]

COMMISSIONER JACOBSON: What's the count on that?

MR. HEIMERT: Seven nos.

COMMISSIONER JACOBSON: What is a no?

CHAIRPERSON GARZA: Let me restate it to be clear, just to be clear. The question is whether the Commissioners concur in the recommendation not to study section six, issue six.

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: All right. The Commissioners who agree with the recommendation not to study issue seven, raise their hands.

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. Can I have a show of concurrence with the recommendation not to study issue eight?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. And, finally, a show of hands for those who concur with the recommendation not to study issue nine?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: All right.

COMMISSIONER JACOBSON: So does that mean that the issues for consideration are one, two, three?

CHAIRPERSON GARZA: Andrew, would you like to address that?

MR. HEIMERT: That's my tally.

COMMISSIONER VALENTINE: Yeah.

COMMISSIONER KEMPF: That's mine.

CHAIRPERSON GARZA: All right. We're scheduled to take a break now. We can do that, or I know that some people would like to get out earlier. Jon, do you think that --

VICE CHAIR YAROWSKY: Yeah.

CHAIRPERSON GARZA: All right. Why don't we go forward?

VII. Immunities And Exemptions Working Group

Recommendations

VICE CHAIR YAROWSKY: With your indulgence, I think we can do immunities and exemptions very quickly given the nature of the discussions.

What I would like to do is make a quick statement, and then I'm going to unilaterally turn my discussion over to Mr. Kempf to talk about one particular

issue. We need to do a couple of housekeeping matters, but they're important in this area.

For anyone who has read the memorandum on this working group, there was an omission. One of the efforts we made in this group was to try to once more dig into the archeology of the exemptions and immunities, and there are quite a few, as you see enumerated. One was left out, glaringly, and that is the Shipping Act. So I'd like to just suggest that was not the intent. We'll add it in, not to put too fine a point on it one way or the other. It's just part of the universe that we want to talk about.

The second housekeeping item is that there's kind of a misnomer in the recommendation number one when we say – and Debra and others have brought this to our attention, and she is quite right. We use the phrase “industry-specific immunities and exemptions,” and if you look at some of the descriptive language and the listing that we have, we're kind of pushing the boundaries of industry specific. So if I can just for communications purposes suggest we just drop that terminology and just say, obviously, what we were looking at were immunities and exemptions, both statutory and case made.

COMMISSIONER KEMPF: So you would just re-articulate that without the industry specific?

VICE CHAIR YAROWSKY: That's right.

COMMISSIONER VALENTINE: Charitable donations, export trading, filed rates, need-based education, resident-matching programs, business acts, and Webb-Pomerene all cover lots of industries.

CHAIRPERSON GARZA: I think take it there may be, then, some immunities and exemptions that – let me ask a question. If you strike industry specific, and then if you look at the listing in the memo, which would include the Shipping Act, are there any other exemptions or immunities that we should cover?

COMMISSIONER JACOBSON: What is the recommendation? That we –

VICE CHAIR YAROWSKY: Yeah. The recommendation, why don't we get to what the recommendation is? The recommendation is that we study – the methodology can come later – we study other exemptions and immunities in the antitrust laws as construed by statutes and case-made law.

COMMISSIONER VALENTINE: Regardless of whether they affect one industry or many.

COMMISSIONER JACOBSON: Do we have a comprehensive listing?

VICE CHAIR YAROWSKY: Well, we've started. I think we made a major step in doing that, Jonathan. They are embedded deeply into the U.S. Code and other places, and so we need to make that our first order of business, but the presumption, at least through the working group dialog, is that that's our goal.

COMMISSIONER JACOBSON: I'm not sure if this is the appropriate time to ask the question or if you want to finish your presentation, but at some point, we need to address how we go about that.

VICE CHAIR YAROWSKY: Yes. Right. As I said, I'm just trying to do the housekeeping now so that we can have that discussion.

Those are the two points. Now I want to go to the recommendations. What we would like to do in terms of studying the individual exemptions and immunities, time may well not permit us to look at every one individually. So, one, we have to develop a methodology so we can discuss these. Two, I think one of the goals in our discussions was to come up with a methodology, if it's

possible, to evaluate and assess current immunities and exemptions so that we can then maybe make some proposals about how future immunities and exemptions should be viewed and weighed as opposed to just have them emanate from many different quarters.

So one is just how do you deal with that in a commission setting? Generically? Do you single out certain exemptions, you know, as examples? But the truth is if there's a commitment to the general applicability of the antitrust laws, if that's the basic commitment and presumption we start with, then immunities and exemptions pose a problem to that, and we need to then decide what our view is on specific exemptions and just in general. That's the first goal.

The second one would be to look at the doctrinal exemptions, and the two that we've identified are the State Action Doctrine and the Noerr-Pennington Doctrine. Now, the FTC most recently has completed its report on state action and we certainly would want to read that carefully and then go from there, and we understand that another report may be forthcoming on the Noerr-Pennington Doctrine.

Generally, what we've observed and many others have observed is that these doctrines are kind of incrementally expanding, and we need to – you know, it's fairly clear to see that. I think we all believe, at least on the working group, that it would make a worthwhile effort for us to analyze how it's expanded and whether some recommendations should come forward about narrowing that expansion or recommending that it be narrowed.

In addition, there is one other proposal not here, but informed our debate, and that is whether a recommendation should be made as to time-limiting exemptions. A few of recent vintage have had a time limitation. There was an exemption in 2001, the need-based education test that was, what, seven or eight years in duration and then it would sunset. Most exemptions, at least statutory, don't just have such sunset provision. One issue that has come up in our interviews with current and former antitrust officials, several have suggested that we should follow the model that the DOJ embraced with consent decrees, saying there is a ten-year sunset unless it's renewed.

Anyway, that's an issue that we hope we will consider. It may have some utility in advising the Congress about our views. Obviously, if we would make such a recommendation, Congress would have to act on that affirmatively, and that's a major proposition there, but I think the idea is at least worth considering as we move forward.

COMMISSIONER KEMPF: With your change, you've eliminated a lengthy, lengthy commentary by me, the thing I cared most about today. So I welcome your removal of industry specific, but let me make a brief comment notwithstanding that.

It is my view that the antitrust laws enjoy neither the respect nor the support among the general population. They should, and while there are many reasons for that - goofy antitrust decisions, ill-considered prosecutions, etc. etc. - probably the single largest one is the presence in the economy of massive price-fixing everywhere sponsored by the Government, either directly or through regulation or through immunities and exemptions, and one that - a proposal that sought to carve out from any scrutiny a few people's pets was ill-considered.

Striking that, they're all on the table now. We may, as you said, choose not to consider one or another for a variety of reasons.

But under the current regime, to pick one, if two people were in the same town in Iowa, and one is a farmer and one is a farm implement seller, and they both fix prices and do a good job at it, one they may hold a big banquet for one and at the end of the year put him on the cover of *Farm Journal*. The other one, they put him on the cover of *Police Gazette* and cart him off the jail.

Disparate treatment like that does not foster healthy respect or support antitrust laws, and it's unfortunate. So I think that all of them ought to be on the table, and I was concerned earlier that we were looking at things like the baseball exemption, an immunity confirmed by Justice Holmes, I guess it was, that has never made any sense, but baseball is so afraid of losing it, they don't follow it, or the Webb-Pomerene Act which impacts ten people in Bulgaria. So my thought was, you know, the stuff that impacts millions of people in the United States and costs billions of dollars, and not to look at those would be foolhardy.

Even if we all come to a conclusion, there is no chance Congress is ever going to be changing these things. They merely set the framework for analyzing all the run-offs, and I thought it was nutty not to look at everything rather than just some.

So I'm very happy with your change, and I don't really need to say anything beyond that except one other thing, and as you say, if not justified by the benefits they provide, what we got in Footnote 59 of Socony was a final thing saying, you know, we've looked at enough price-fixing cases now and we're not going to listen to people justifying stuff anymore, and I'm not sure that any of these things can be justified or, stated differently, I'm not sure they can't all be justified. In other words, that's just an advocacy thing of how you do, and what you're really doing every time you make that decision, you're voting against free and open competition.

So I'm not sure you need that baggage on there, and you might just want to reduce it to should antitrust immunities and exemptions be eliminated, should some or all, something like that.

That's all I had.

CHAIRPERSON GARZA: Jon.

COMMISSIONER JACOBSON: I agree substantively with Don. I say that with some trepidation, because I seem to have a very positive affect on his decision, but I am concerned about the process.

If we want to make a gesture by saying we think immunities and exemptions are bad, I think we can go about that quite easily. It won't be difficult to do. The chances that anything will come of it are zero. If I we want to make a difference, and I think this Commission can make a difference in a number of respects, looking at the Robinson-Patman Act, but particularly here, if we can really put out a persuasive case based on the evidence adduced at hearings and analysis informed by scholars and industry witnesses why particular exemptions should be abandoned, I think we will have accomplished a great good, and I am concerned by putting everything on the table that we inhibit our ability to do that.

CHAIRPERSON GARZA: Jon.

VICE CHAIR YAROWSKY: Yes. I'm just speaking as the interim leader of this group. I mean, the whole Commission will make decisions about how to go to the next

stage of having hearings or how we conduct our deliberations on any of these subjects. Here are just the thoughts about that: I think as Don really eloquently said, this is a generic issue about carve-aways and carve-outs from the antitrust laws. We may actually develop some recommendations, such as a sunset provision, that we would actually get behind for all exemptions and immunities. Whether followed or not, this may actually be something we feel is warranted. We may develop some other methodology that we could subscribe to for all exemptions now, but we may not have deliberations, explicit deliberations, on every single one of the immunities and exemptions. Instead, we may then focus on certain ones. I think that's a decision that I'm not prepared to make today except to say that everything is on the table and we need to take this to the next step.

I think what you're rightly raising is how efficiently to do the study to make a difference, and I think we've reached the next step, but I think our group just didn't want to preclude choosing any one of the exemptions for illustration or in-depth review.

COMMISSIONER JACOBSON: I guess I'm uncomfortable

committing to study this issue without a firm understanding from this group that we're going to prioritize, because, otherwise, I just see it as a gesture accomplishing nothing. I think you can look through your list – and by the way, baseball is left off it.

COMMISSIONER VALENTINE: It's there. It's fourth on page four, major league baseball.

CHAIRPERSON GARZA: It's under "M" instead of "B".

COMMISSIONER JACOBSON: I am appropriately chastised, but if we don't make a commitment to prioritize, I'm reluctant to vote in favor of this issue. I'd like to get a sense of the rest of the Commissioners how they would like to go about this

CHAIRPERSON GARZA: John Shenefield.

COMMISSIONER SHENEFIELD: Let me see if I can help you. What I envision, and I was part of the group as well, is a product that is delivered in three stages. First, an analytical frame work is developed, which is hinted at here, but it has to be far more nuanced and far more complex. A way of filling in – secondly, a way of filling in the unknowns in that framework, mostly through

economics, as Jim Miller did in connection with surface transportation in the late seventies, as Steve Breyer did in connection with airline deregulation in the middle seventies, has to be agreed on and then applying the analytical framework and trying, but probably not being able to succeed entirely, in filling in the unknowns, picking three, five, seven, whatever the right number is of exemptions and immunities that would be possible candidates and recommending to oversight committees in Congress or regulatory agencies or whatever is appropriate that they take the benefit of this commission's work and carry it further.

Now, there seems to be general agreement among a lot of different parties, including the head of the Antitrust Division and our congressional sponsors and the rest, that there are three or four or five as to which they would like our views. Shipping Act is one. Webb-Pomerene is another. Export Trading Companies is another. There may well be others.

COMMISSIONER VALENTINE: Maybe McCarran these days.

COMMISSIONER SHENEFIELD: Maybe McCarran. And

there is no reason not to take that next step. My only caution is that the amount of empirical work that is involved in actually coming to harder conclusions than can be arrived at in a couple years, we probably can't do, but I think we can kick this can down the road pretty far and make a difference.

CHAIRPERSON GARZA: Okay

COMMISSIONER JACOBSON: I'm comfortable proceeding on that basis.

CHAIRPERSON GARZA: Were there any other comments?

COMMISSIONER CANNON: This sounds a little like the debate we may have in the regulated industries presentation, that we talked about this very same thing, which is trying to gather up some basic principles for this analysis we have to do, knowing that there are dozens of specific regulated industries out there that maybe we would look to as being, you know, helpful in that analysis.

So I think we've got to get started somewhere, and John is absolutely right; you can't do this forever. It would take a lot of time, but I think it's a good start

and I'd vote for it.

CHAIRPERSON GARZA: Okay. Bobby.

COMMISSIONER BURCHFIELD: Each of these exemptions and immunities is tailored to an activity or industry as to which the people in that industry think that they are somewhat special, and they may not be. My inclination is to think in many instances, they're probably not.

My question for you, John, and I'm sure you've thought about this, is to what degree do you entertain those people to come in and either speak to us personally or submit written comments to put on the table their arguments of why they are special? It seems to me that in order for the Commission's recommendation, however we come out on this, to have legitimacy, we do need to provide a forum for those unique interests or allegedly unique interests to be heard quite apart from the empirical work, and in view of that, how do we manage and prioritize our time as to those exemptions that we're going to listen on, because there's a lot here, and the thing that struck me as I read these memos -- and as a late comer to the Commission, I really do applaud the Commission, each of

you, for the work that you've done in putting together these working memos, but the one question that I had about this one in particular is how you reach a point of legitimacy in your analysis, covering so many different exemptions, when every exemption has its defenders and they're going to want to be heard.

COMMISSIONER SHENEFIELD: And they absolutely should be. I don't think there is any way that you would want to avoid hearing the strongest possible arguments in favor of the exemption or immunity and then dealing with them on the merits. I think that was the turning point, for instance, in airline deregulation. When it became perfectly evident that the arguments in favor of CAB regulation were essentially not very good at the end of the day, but having said that, I don't think we may get to that point, because this is a rather long process. If we come out of this commission's life with an intellectually respectable analytical frame work and some sense of how you would go about applying it to individual exemptions and immunities, and then we have five or ten candidates where we would like to apply it and we begin the dialogue, that's very much like the Senate Antitrust

Subcommittee's work on airline deregulation in 19--whatever it was, '75 and '76, I think, which only began the process, and nothing happened for several more years after that.

So I see us as enriching the intellectual debate on the one hand, in effect calling certain exemptions into question, holding them up for public discussion, and leaving the discussion to follow its natural course thereafter.

CHAIRPERSON GARZA: Jon.

VICE CHAIR YAROWSKY: Yeah. This is the kind of enterprise, at least in my experience on the Hill, and we have Makan and we have Steve Cannon and others who deal with the Hill quite a bit. This is not what happens. What happens is there is other very deep consideration of the issues, empirical realities, the economies surrounding certain interests, and those compete rightfully in a political process for attention. There is nothing wrong with that. No one has a Certificate of election because they're an antitrust purist. I mean, that's their job, is to bring together a lot of different factors.

That's not our job. We're charged with a

different mission, and I think it might be well appreciated – I'm just guessing, but I think it would be well appreciated, given that we are insulated now in a different way from those types of pressures, to try to develop an analytical framework that might be of use. If we can't do it, I think we should be honest with ourselves after we make a real wholehearted attempt, but if we can do that, even if we don't succeed in going through ten or 15 examples, I think that frame work might have a life beyond what we do and might then be able to be used, because I think it's just a hard enterprise to do that up there on the spur on the moment when something happens.

COMMISSIONER SHENEFIELD: I will observe that in the letter, again, from the DeWine and Kohl, that is their first enumerated priority. VICE CHAIR YAROWSKY: And now joined by the head of the Antitrust Division and many, many others.

CHAIRPERSON GARZA: Steve.

COMMISSIONER CANNON: I notice the Local Government Antitrust Act did not make your – VICE CHAIR YAROWSKY: Yes. Well, of course it falls from *Parker v. Brown*. Isn't that what the legislative report said? Yes,

we actually omitted the Local Government Antitrust Act that Mr. Cannon spearheaded.

COMMISSIONER CANNON: That's kind of an overstatement.

CHAIRPERSON GARZA: Any other discussion on issue one or two or three before we test a consensus?

No. All right. Then can I ask by a show of hands which Commissioners agree with the recommendation of the working group to study issue one?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. Can I ask for a show of hands which Commissioners agree with the recommendation to study issue two?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. And can I ask for a show of hands of those Commissioners that agree with the recommendation to study issue three?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. Very good. Well, what we're do now is take a ten-minute break until 3:10, and then when we come back, we'll going into regulated industries and then I think at least begin on the general

discussion.

[Recess.]

CHAIRPERSON GARZA: We'll re-begin the meeting, and we have now the Regulated Industries Working Group recommendations to review.

Steve Cannon, you were the head of that group, so can we go ahead?

**VIII. Regulated Industries Working Group
Recommendations**

COMMISSIONER CANNON: Sure. Thanks. In this working group as well, we were, I think, in a very serious black hole avoidance mode, understanding the enormity of this, if we tried to go industry by industry and do some comprehensive analysis. So the idea that we obviously came up with is, as reflected in our recommendations that are here, is to try to – obviously, we had a couple we thought should be key considerations or key issues that Commissioners should study. Obviously, knowing and understanding that, whether there's two or three or five or ten specific examples of regulated industries that would be appropriate to these various issues is how we would go about it.

So, obviously, we can go through these questions pretty quickly, and I think it might be a fairly quick go-through of the issues that are not recommended for study as well.

But the first question, obviously, is a very large question. It impacts a lot of industries out there and not an insignificant amount of the overall economy, about this division of responsibility between enforcement of competition policy or antitrust laws between the antitrust agencies and then the other regulatory agencies; and then there really are two basic models here, either the antitrust agencies have no authority in a situation like at the Surface Transportation Board with railway mergers, etc., or the agencies share authority, whether it's something like telecommunications, banking, and other sorts of issues.

So we thought this was a very important principle, a good question to answer, and obviously presented that to the task force. The bottom line for us in terms of raising this question is whether or not it really is in terms of allocation of resources, etc., more sensible to have antitrust authority in the antitrust

agencies versus somewhere else. I'm sure everyone around the table has had some experience or another where you've thought, gee, this was a good idea to have it somewhere else or it was a bad idea to have it somewhere else.

So that was the idea behind that, behind question one for analysis.

The second question was how should the presence or absence of antitrust savings clauses in regulatory legislation be interpreted. Obviously, it revolves a lot around the *Trinko* decision, you know, and we thought that, obviously, in light of *Trinko*, that it was good to make sure that we could – or contemplate clarifying the appropriate interpretation of savings clauses and then, obviously, kind of the other side of that, which is the scope of the implied immunity doctrine, you know, where there is no savings clause.

I would note, I believe this was an issue of some note and consequence to Chairman Sensenbrenner in his comments to the Commission.

And the third and final issue for study was whether or not Congress and regulatory agencies, should they set specific industry-specific standards for a

particular antitrust violations that may conflict with general standards for the same violations, and I know in the materials and memos that were sent out, there was a specific reference there, in fact, to the time standards, etc., in the banking industry.

So those were the three that we, after culling through a lot of actually very good suggestions, but some of which we heard about how much time, effort it would take versus the value that may be received, we came up with those three.

Do you want me to go to the ones not recommended or any discussion on those?

CHAIRPERSON GARZA: Do you want to invite discussion on those?

Sandy.

COMMISSIONER LITVACK: I have a question, I guess specifically with regard to number two. I guess what occurs to me, and I don't pretend to really know this, but aren't many of the so-called savings clauses worded very differently? Aren't there legislative histories relating to them, and wouldn't this be a very specific - in other words, if you're trying to say what does it mean, the

answer is, Well, tell me what it says, tell me the legislative history, and I'll tell you the answer, at least what I think the answer is.

COMMISSIONER CANNON: Sure.

COMMISSIONER LITVACK: What would we possibly do?

COMMISSIONER CANNON: Well, I think other members – Jon, do you want to chime in on that?

VICE CHAIR YAROWSKY: Sandy, I think the key question that we discussed in this working group was given the tremendous number of waves that have come out of the *Trinko* decision, should we try to at least make a statutory recommendation, not be a presumptuous, but attempt to make a statutory recommendation to Congress that in passing regulatory statutes, that they explicitly consider what their intention is about the antitrust laws, not tell them how to draft it. That's going to be up to them, and the courts, as you say, are going to have to see if they did it or not, if the intent was really actualized, but given all the chaos that has emerged since that decision – and it may be a short consideration, but this may be an area we could succinctly give some direction on.

COMMISSIONER CANNON: If we're going to do it, now would be the time.

COMMISSIONER LITVACK: Not to be flip, but are we saying anything other than, You know, when you do these things, think about it? Isn't that what we're saying; when you write an antitrust savings clause, think about it?

COMMISSIONER CANNON: That would take ten pages to write, Sandy.

COMMISSIONER LITVACK: It would just seem to me that this is so narrow, and if we are not proposing – and I understand Jonathan is saying we are not and we should not – specific savings clause language that we think would clearly guard against any misinterpretation by the courts, then I, for one, would just have a question in my mind as to whether this is worthy of our time.

COMMISSIONER CANNON: I mean, I don't think we would preclude that, but the Commission may actually do exactly that in terms of recommending that. CHAIRPERSON GARZA: The memo indicates that Chairman Sensenbrenner had recommended this for study. Can somebody refresh my memory; exactly how had the chairman put the issue? What was the specific issue that he had requested us to study?

Does someone have that here?

COMMISSIONER CANNON: I don't have it with. Do you, Jon?

COMMISSIONER DELRAHIM: He had a hearing on the *Trinko* case, and he specifically dealt with – he was active in putting in the savings clause in there, and he thought that *Trinko* came out the wrong way, and he had a whole hearing thinking that the savings clause in that statute should have preserved antitrust enforcement and allowed the claim to go forward.

CHAIRPERSON GARZA: Jon Jacobson, do you have the letter there? Can you read it?

COMMISSIONER JACOBSON: Actually, I'm reading from the July 15th transcript where he attempted to articulate this.

CHAIRPERSON GARZA: Okay.

COMMISSIONER JACOBSON: He said:

"Fifth, the continued application of the antitrust laws and regulated industries is a fertile for the Commission's inquiry. Over the last several years, the courts have sometimes ignored explicit antitrust savings clauses in legislation enacted by Congress,

principally the Telecom Act of 1996. The antitrust laws provide an appropriate competitive bulwark across a range of regulated and non-regulated industries, and their dilution or circumvention by judicial fiat is a troubling development.

In a similar vein, competition advocacy by the Antitrust Division and the FTC during regulatory proceedings undertaken by other Federal agencies such as the FCC is a productive area of inquiry."

CHAIRPERSON GARZA: Okay.

COMMISSIONER JACOBSON: So if I could comment, I understood the intent of this to go well beyond the presence or absence of savings clauses and to go to the heart of implied immunity doctrine generally, and you and I had a conversation this morning where it was my take-away from that was the intent of the recommendation, and I'd be reluctant for the reasons that Sandy -- first of all, I'm reluctant to talk at all, because I dissuade Don all the time, but I think Sandy's concern about this being too narrow is precisely mine, but I'm very comfortable looking at implied immunity generally, more than comfortable. I think we have to, and one aspect of that,

candidly a minor aspect of it, is going to be the interpretation of savings clauses.

VICE CHAIR YAROWSKY: I think that's right. I think this is a narrow formulation, but it takes you into implied immunity. At least in this working group and in the context of regulated industries, we have complex schemes, regulatory schemes, created by Congress. Those regulatory schemes often come out of committees that don't have jurisdiction over the antitrust laws. There is never a thought about the antitrust laws. The question is are the antitrust laws a constant if someone doesn't invoke them.

Now, the small question, though it's not monumentally important in terms of the application of the antitrust laws, is how do you make sure that that happens, and that's a drafting issue. I think Sandy is right; there is only a limited amount we can say about drafting, but I think the intent of this is to take us into the realm of implied immunity, but through the context of regulated industries where this comes up all the time.

CHAIRPERSON GARZA: So would the concept be that we would do something like what John Shenefield had

outlined in respect to the immunities and exemptions proposal; is that how you would be approaching it?

VICE CHAIR YAROWSKY: Yes. I think we would develop a framework. First, we'd have to look at implied immunities, generally the state of the law, and then some of that is done in the immunity and exemptions sections or some interchange, but then the question is, I mean that we need to pose, is are the antitrust laws a constant that can only be taken away explicitly. You know, are they present unless explicitly taken away or molded into a new scheme? And then I think there are pros and cons about that proposition.

COMMISSIONER JACOBSON: From Georgia Pacific Railroad in 1940 through January of 2004, I think it was the universal understanding that the antitrust laws would be – an implied immunity would be created only on the basis of a plain repugnancy between the antitrust laws and the regulatory regime. I believe that *Trinko* decision has cast some confusion into that area of the law. Implied immunity is not briefed as such in the *Trinko* case. The briefing focused on the text of the telecom act, the interpretation of the savings clause, standing in light of

that. I believe the Supreme Court may, and there are a number of interpretations of the decision, have veered inadvertently in a direction that at least some people are going to argue repeal 64 years worth of good law.

Because it's the Supreme Court and because the only fix for the Supreme Court is legislative or at least a recommendation from a commission to the Supreme Court to rethink what you've done, I think among the most important things we could do is address the potential harm that *Trinko* may have done to this well-established and extremely important doctrine of antitrust law.

CHAIRPERSON GARZA: Sandy.

COMMISSIONER LITVACK: I think you run the risk of overreacting to one Supreme Court decision. Apart from legislation, another way the Supreme Court reams itself in is in further decisions. *Trinko*, and you're going to have – if you haven't already – I'm sure you have – lots of people writing on *Trinko*, what was wrong with *Trinko*, what they didn't consider, what they should have considered, etc.

When we render a report, if we do, three years from now, I'm not sure what – at least I don't have any

confidence right now that there is going to be any particular value to what we may have done with respect to a single case. This isn't *Parker v. Brown* which has been around for a long time and now you're trying to say how has it evolved and where are we. This is a one-year old decision.

I'm leery given all the rest we have – I mean, I'm perfectly happy to hear more, but I'm just expressing a view which says I am leery of really devoting a lot of energy to this at this juncture given the other issues that we are and the need, which everyone recognizes, to prioritize these things.

CHAIRPERSON GARZA: John Warden.

COMMISSIONER WARDEN: I have a question for Sandy, which is how do you feel about the broader statement of this issue, that as an examination of implied immunity doctrine and case law in general?

COMMISSIONER SHENEFIELD: Including the savings clause?

COMMISSIONER WARDEN: Well, sure, but that may be the tail rather than the dog.

COMMISSIONER LITVACK: Well, when I heard it, I

guess to answer your question, John, which a witness never does, I'll answer it with a question, which is state the issue for me more, what is the issue. In other words, I read this is and I have the concerns that I've articulated. I hear Jon Jacobson frame it slightly – put it as a broad question, which sounds – John Warden says it sounds right, but I guess I'd come back and say what is it we're studying, what is the question.

COMMISSIONER SHENEFIELD: Let me try, may I?

CHAIRPERSON GARZA: Um-hum.

COMMISSIONER SHENEFIELD: Given the existence of *Trinko* and whatever progeny have been decided by the time we actually get to this and given the existence of the history of the implied immunity doctrine and particularly cases that have, in fact, been criticized, such as Gordon and NASD and the like, what is the appropriate way to look at the doctrine of implied immunity or how best to apply the doctrine of implied immunity, including the savings clause jurisprudence in the current context or something of that sort.

COMMISSIONER JACOBSON: I think that's well articulated and extremely important.

COMMISSIONER SHENEFIELD: It's a hugely important subject matter. There's no doubt about that.

COMMISSIONER CANNON: Can you say it again, John, is the question.

COMMISSIONER SHENEFIELD: Given all the things that I mentioned -

CHAIRPERSON GARZA: We have a court reporter. If you're interested, we can read it back.

COMMISSIONER LITVACK: John, I think I understood everything up to the last part. How, in your view as a generic matter, not specific, how does the savings clause fit into that, because as I said when I started this, savings clauses are worded differently. They come in all sizes and varieties. They have different legislative history behind them. So how would that, in your view look as you look at it, tie into the general question?

COMMISSIONER SHENEFIELD: I can't give you an encyclopedic answer, because as you say, there are many different kinds of savings clauses with different legislative histories, but it seems probable to me, just thinking about it a priori, that there are kinds of savings clauses - they don't make it up every time they

start on a new savings clause. So they go back and look, Congress goes back and looks, at prior examples.

My guess is there are kinds of savings clauses designed to address specific kinds of problems and specific kinds of industries. It may well be that some are better than others. Some of are ineffective. It may well be that *Trinko* only deals with a certain kind and not others. So I'm not sure, but it's got to be part of that problem or that examination, I would think.

COMMISSIONER JACOBSON: I understand the request of Congressman Sensenbrenner to perhaps have been pushed by the Telecom Act and its treatment in *Trinko*, but the question that he posed was the broad one that you articulated, and I gave Steve some language earlier that might be substituted here to capture what I think is the intent of the discussion.

CHAIRPERSON GARZA: I guess from my perspective, I might be more inclined to approach it the broader way, which is sort of on the question of implied immunities than to do something which I think that Congress can do. If they decide they don't like the Supreme Court's decision, they can always clarify what they meant by

savings clause. So if it were only the savings clause question, I think I would be inclined to vote against recommending the issue. It's more difficult for me and you're pretty persuasive on the issue of the implied immunity.

COMMISSIONER VALENTINE: So is the issue that we're voting on how should the doctrine of implied immunity be applied to best further the goals of the antitrust laws?

CHAIRPERSON GARZA: I think the issue is the tension between the desire to implied immunity in certain regulated industries versus the general good of having antitrust law applied across the board, I think is what the issue is.

COMMISSIONER JACOBSON: Can I read in an effort at an articulation, which I think should not be controversial?

"What is the appropriate standard for determining the extent to which the antitrust laws apply to regulated industry where the regulatory structure contains no specific antitrust exemption and/or contains a specific antitrust savings clause?"

COMMISSIONER WARDEN: That's fine.

CHAIRPERSON GARZA: Okay. Where is that? What are you reading from?

COMMISSIONER JACOBSON: I wrote it this morning.

CHAIRPERSON GARZA: Oh. You wrote it. Okay.

COMMISSIONER VALENTINE: That sound good.

CHAIRPERSON GARZA: Does the working group believe that accurately –

COMMISSIONERS IN UNISON: Yes.

CHAIRPERSON GARZA: Okay. Any other discussion people wanted to have on any of the other issues?

COMMISSIONER DELRAHIM: Yeah.

COMMISSIONER JACOBSON: I don't think – I'm sorry, Makan.

COMMISSIONER DELRAHIM: No. I'm sorry.

COMMISSIONER JACOBSON: I don't understand issue three? Could you elaborate a little more on it? I'm just not sure I understand what we're getting at.

COMMISSIONER CANNON: Jon.

VICE CHAIR YAROWSKY: I think I can jump in and give an example. Regulatory bodies create their own regulations. They have their own terms of art.

Occasionally, regulatory bodies start creating, quote-unquote, antitrust violations in the context of the industry they supervise. Sometimes those regulations and those violations are not – there's not a concordance between what they have defined as price-fixing, tying things like that to be, with what is generally applicable to all other industries.

This has come up, as Steve I think alluded to, in the banking area where I think the Federal Reserve in recent years, three or four years ago, created an illegal tying test that is much different than – even though the law of tying is sometimes challenging – different than the law of tying as we know it in antitrust law.

COMMISSIONER JACOBSON: Okay. Thank you.

VICE CHAIR YAROWSKY: Again, I don't think this is going to be a monumental effort, but to identify those areas and then to maybe come up with some recommendation.

COMMISSIONER CANNON: I think there are more than a few examples of that.

CHAIRPERSON GARZA: I was going to ask that. Are there other examples?

COMMISSIONER CANNON: I think there are.

CHAIRPERSON GARZA: Any that you can identify?

COMMISSIONER VALENTINE: What if they called it something else?

COMMISSIONER JACOBSON: I think bank mergers might be one. That involves the Justice Department also, but I know they always used to, at least technically, double the HHI delta in analyzing in bank mergers and local mergers.

COMMISSIONER VALENTINE: They used to do it for firms even when others were doing it.

CHAIRPERSON GARZA: But is that different from issue number one, which is the question of whether or not we should have of antitrust agencies looking at mergers?

COMMISSIONER CANNON: Number one is obviously division of authority or oversight of persons, the substance we're talking about, which is issue three.

CHAIRPERSON GARZA: Any other questions or comments on this? Makan?

COMMISSIONER DELRAHIM: The only comment on the implied immunity is the area on banking. The Second Circuit has gone much broader than the repugnancy test that we talked about, and *Trinko* doesn't bother more

necessarily as such; however, it does touch on that. But in the area of securities, they have practically taken antitrust completely out.

Now, if Congress intends to do that, it should explicitly say so; however, the language in the case law on the derivatives and the IPO cases have completely taken antitrust out, and I don't know if that's Congress's intent. As we study this issue, I don't think we should lose sight of some of those other areas outside of the telecom area.

CHAIRPERSON GARZA: Anything else? Anyone else?

All right. Then let's move to testing our consensus.

On issue number one, can I have a show of hands as to those Commissioners who agree with the recommendation to study the issue?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Issue number two, referring to what Hiram passed out, which is the re-articulation of that issue by Jon Jacobson, can I have a show of hands for support for that recommendation?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Okay. Issue number three, can I have a show of hands for those who support that recommendation?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Issue number four, by show of hands, Commissioners who endorse the recommendation not to study the issue.

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Same question with respect to issue number 5, endorse the recommendation not to study the issue.

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: Recommendation six, raise your hand if you endorse the recommendation not to study the issue.

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: And, finally, with respect to issue seven, can I have a show of hands of those who agree with the recommendation not to study?

[Commissioners vote by show of hands.]

CHAIRPERSON GARZA: The staff is going to print out for Commissioners basically a schedule so we can see

what it was that we formed our consensus on so that we can have that for our discussion this afternoon. So I would like to take -- how much time do you need?

MR. HEIMERT: Why don't we say 15 minutes?

CHAIRPERSON GARZA: Only 15?

MR. HEIMERT: Yes.

CHAIRPERSON GARZA: All right. A 15-minute break. So we'll come back at five to four.

COMMISSIONER KEMPF: Madam Chairman?

CHAIRPERSON GARZA: Yes.

COMMISSIONER KEMPF: I have, as I mentioned to you earlier, a conflicting meeting that's supposed to start at four o'clock at the Securities and Exchange Commission.

CHAIRPERSON GARZA: Okay.

COMMISSIONER KEMPF: And I'm wondering in light of that, whether before we take a break, if I could make a couple comments.

CHAIRPERSON GARZA: Sure. Please do.

COMMISSIONER KEMPF: And then I'll look forward to reading the transcript of the other discussions later.

We have done, I think, a thorough and thoughtful

job of examining the work of the various working groups and, for those of us who were on some of the working groups, re-examining our own work, and have decided what we decided today. We also have a group of letters, many from interested people, others from enforcers and the like, academia, industry, and as I looked at those, I think we've addressed most all of them during the course of our discussions, but not all of them, and there were some things in Assistant Attorney General Pate's letter that we didn't cover or, for example, in one of them, we covered it narrower. I agreed with the observation that his first comment, while it encompasses the effectiveness of merger law, is broader and asks us to consider antitrust impacts more broadly. I think that's a healthy suggestion. I thoroughly endorse it and hope we will add it to our agenda.

I would take his other comments and would adopt them to the extent they marginally go beyond what we have adopted, although most of them were picked up by us today. And the other comment, there was one person who had said you didn't even mention six of my seven comments or something like that. I've looked at those again carefully

and would not adopt any of those.

CHAIRPERSON GARZA: John, what was it that you – what would you adopt?

COMMISSIONER KEMPF: I would not adopt recommendations – Lundgren, I think is the name.

COMMISSIONER VALENTINE: Lundgren.

CHAIRPERSON GARZA: Okay.

COMMISSIONER KEMPF: I've looked at that. There was content in various of those that I'm sure we'll get into, in fact, in maybe much of that we will specifically get into, but in terms of adding the items to the agenda in the way he suggests them, I would not add any of those.

Finally, we received a thoughtful piece and a book by – it's a colleague of Michael Porter's from Ohio. I don't remember his name.

COMMISSIONER VALENTINE: Charles Weller.

COMMISSIONER KEMPF: Yes, Mr. Weller. Again, I would not add anything to our agenda from that, although there is much substance that I would want to consider. I disagree with most of the thoughts he has in there, but I haven't had a chance to really digest them well and to think about them, and I would want an opportunity to do

that; but in terms of adding anything to agenda, I would not pick up on that.

So where I think I really come down is if there is a vote of any of those, you can count me as a vote no, but if there is a vote on anything from Assistant Attorney General Pate, you should count me as a yes, and specifically I would enthusiastically embrace his first suggestion. By that, I don't mean that we as a committee would necessarily undertake the kind of review he has. We may fund it, we may seek to have others do it, or it may be something that comes out of this commission's work as something that would go on beyond our life. As he himself says, this could take several years. But I think it's something that I would echo with the comments Dennis made earlier, that it's something that I think is decidedly worthwhile. How we should go about doing certain things when they may not be worth doing at all, however we do that them, is sort of something that may have the cart before the horse. So I would endorse specifically that proposal.

And that's all I have to say, and I appreciate your accommodating me so I can go to this other meeting.

CHAIRPERSON GARZA: Thank you. So we'll break for now, then, and try to be back here about five to four. Thank you.

[Recess.]

X. General Discussion Of Issues

CHAIRPERSON GARZA: All right. I propose for the rest of the afternoon we follow the following procedure: First, we'll have Andrew explain what it is he's passed out, what the staff has passed out. The Commissioners should have two documents. The aim of this is to sort of consolidate our achievements today, basically review where we are after today's discussions, and Andrew will explain how these documents are set up and in what format.

I'd also like in that context to have a brief discussion and I have a proposal to make in respect to the recommendation in Hew Pate's letter that we've discussed earlier today.

Then, finally, we'd like to discuss, basically, the next phase of our work, where we go with this tentative consensus list of issues.

So with that, I will first ask Andrew to basically help us recap where we are and explain these

documents to us.

MR. HEIMERT: Thanks. There are two documents that we've prepared. We filled them in as we went along. One document, which has two pages to it, lists each of the issues in the alphabetical order by group and then issue by issue number with what the consensus resolution was, whether to study, yes, no, or defer. There are some notes for a few of the issues. There were clarifications. We couldn't fit them, obviously, in this box, but we, obviously, have the court reporter and our own notes as to how they were clarified or modified if it's not clear here.

The second document, which is three pages, has sorted the issues into the yes, defer, and no categories. I think that's relatively self-explanatory. There are 25 issues in the yes category of which two of were really, through discussions combined, which I think it was Mergers number three and seven, if I'm correct - excuse me - Civil Procedures three and seven. I stand corrected. And I think it would be useful -

COMMISSIONER VALENTINE: Don't you think you've also combined mergers, six and seven, and in seven, if I

recall correctly, there were recommendations also about doing vertical and conglomerate guidelines, and I don't believe anybody voted for that.

MR. HEIMERT: That's part of the purpose of what we'll do now, which is to go through and make sure that this is, in fact, what we agreed to do, and if there is a clarification such as Debra's and any others that people would like to make, we can take those steps now.

CHAIRPERSON GARZA: Well, why don't you read that.

MR. HEIMERT: Okay. The first clarification Commissioner Valentine noted, that Merger issue number seven is broader than simply looking at the — I'll have to pull out the issue. Excuse me. We're on the Mergers Group.

COMMISSIONER VALENTINE: It says, "Do horizontal merger guidelines accurately reflect how the Federal agencies analyze mergers?" And I believe when we were talking about issue number six, there were certain members among us who wanted to include that in six. It also includes within it should the agencies provide guidance in regard to how they analyzed non-horizontal, that is

vertical and conglomerate mergers. I was not aware that anyone voted for doing vertical and conglomerate issues.

CHAIRPERSON GARZA: It's really mergers seven, part A.

MR. HEIMERT: I think that's correct. It's really Merger six, and then in the process of doing six, part A of question seven likely would be addressed at least in passing. That is my understanding.

COMMISSIONER VALENTINE: That is my understanding of the vote as well, yes.

MR. HEIMERT: Do any other Commissioners have a different understanding or recollection? Seven itself is a no consensus as an issue standing alone.

COMMISSIONER VALENTINE: Right.

CHAIRPERSON GARZA: Then you have, on the second page, the deferred.

MR. HEIMERT: Before we go to the deferred, were there any other issues on the yes issues as to ones that people thought were, in fact, yeses or otherwise? Okay. Let's go to the deferred page, which has, as you see, only four issues. On the Civil Procedure issue six, and Criminal Procedure issue seven, both of those were – the

idea was to gather more information by going to the heads of the FTC and the Department of Justice Antitrust Division to gather further information about what might, if anything, be done and then at that point make a decision what more this Commission might do.

On Criminal Procedure, issue two, which is the sentencing guidelines, the question is deferred for now to see what other responses from Congress or the Sentencing Commission or the courts might arise, and then this Commission could take additional steps to provide information on antitrust sentencing.

COMMISSIONER JACOBSON: I thought we had a — I had a clear understanding — let me put it this way — that this was in a different category in that we were not deferring a decision whether to consider it. We were making a decision to consider it. We were deferring the actual consideration of it until the end of our process to take into account these additional new learning's.

With regard to these other issues, I think we were making a decision to defer whether to address it at all in our report.

COMMISSIONER SHENEFIELD: In either case, they're

being deferred. For whatever reason, they're not being done first.

COMMISSIONER JACOBSON: I just think it's in a different category.

COMMISSIONER SHENEFIELD: Well, they are action items, if I can. For example, the wonderful emissaries of Litvack and Shenefield are going to gather information. As they gather information, and bring it back, we may want to decide to do more, or that may be sufficient because we'll have information. So they are action items, Jonathan.

COMMISSIONER VALENTINE: That's one and three, but he's talking about the second one, which I thought there was a commitment to study it at the appropriate time.

CHAIRPERSON GARZA: Unless, obviously, the facts developed as such that it didn't make any sense to study.

COMMISSIONER VALENTINE: Okay. Okay.

CHAIRPERSON GARZA: Here is one thing I think -- let me just jump ahead a little bit, because after this, I was going to discuss sort of the next stage, and part of what we were going to discuss is having working groups, as

presently constituted or changed, actually take the tentative list of issues and basically work on it and focus on it and formulate a working plan, if you will, and information that would help us at a subsequent meeting, say in March, is what I was going to discuss with people so that we could try to prioritize the issues as appropriate and have a general understanding on kind of a work plan for dealing with them.

Now, I think probably, just in looking at this, the sentencing guidelines question, I don't think it would be our intent to have a work plan or anything at this point in time, but I think everybody understands that it's not off the table, it's going to be there, and we're going to continue monitor developments over the course of time to decide when and what want to do.

Is that fair?

COMMISSIONER VALENTINE: That's fair.

MR. HEIMERT: So the final issue that's being deferred for now is Mergers number eight, which is the harmonization of multi-jurisdictional merger review, and, again, that is being deferred so that we can gather further information about how we can most be helpful to

Congress and to the enforcement agencies in that regard, and that will involve further fact findings and discussions with those —

VICE CHAIR YAROWSKY: And contact.

MR. HEIMERT: And contact with the relevant committees. Exactly. So that will involve further fact finding and then a determination of how the Commission will proceed after that has taken place.

COMMISSIONER VALENTINE: And were we going to limit that to procedure or are we going to leave that to Congress's discretion in terms of what they want?

CHAIRPERSON GARZA: I think the assumption is that what we were talking about looking at was procedural.

COMMISSIONER VALENTINE: How the question was originally phrased, okay.

COMMISSIONER WARDEN: If it is procedural, it was discussed in other contexts besides mergers.

CHAIRPERSON GARZA: Exactly.

COMMISSIONER WARDEN: So it should be large.

CHAIRPERSON GARZA: It's a larger comity convergence issue, and we want to, like I said, get a little bit better understanding about what would be

helpful and what we could do in that area. The ad hoc groups we're putting together would then basically report back to the Commission for us to make a decision.

COMMISSIONER VALENTINE: Okay.

CHAIRPERSON GARZA: Makan? Okay. Unless there are other questions on this -

MR. HEIMERT: I was going to finalize those as well. You see the list of no issues. I wanted to confirm with all Commissioners that none of these should be in the yes column.

CHAIRPERSON GARZA: Why do some of them say -

MR. HEIMERT: Some of them say yes in the recommended for study column because that was the original recommendation.

CHAIRPERSON GARZA: I see. I see.

MR. HEIMERT: But the far left column is the relevant one at this point. And the same, Debra, on mergers number seven, the inclusion of mergers number six is with the same understanding that you expressed earlier.

COMMISSIONER VALENTINE: Okay.

CHAIRPERSON GARZA: That's a no?

MR. HEIMERT: Antidumping is a no. It's the far

left column, Jon. It was originally recommended as a yes by the International Working Group.

COMMISSIONER VALENTINE: Okay. So it's seven, part A, included in six, okay.

CHAIRPERSON GARZA: Now, the other thing we wanted to address, because it was brought up earlier, was the first proposal in Assistant Attorney General Hew Pate's letter which came to us after the working group had already prepared their memos and also didn't fit neatly into any particular working group. I would like to propose that before we vote on that one, we have the opportunity to think a bit more about what it entails, and so I'd like to propose that we have an ad hoc task force of Commissioners to take care of doing that and then reporting back to the Commission with their recommendations.

Is this all right? Do I have any volunteers? If you don't want to volunteer now, we can deal with it.

COMMISSIONER CARLTON: I'd volunteer.

CHAIRPERSON GARZA: You'd like to do that?

COMMISSIONER CARLTON: I'd also like to just add that I have a related issue I wanted to bring up, and

maybe we should defer that too to the same group, which is the Assistant Attorney General's letter – which I think is right on point in suggesting these studies, not necessarily that we do them, but that someone do them – there is a related point, and that is we're going to be issuing a report for the state of antitrust, but I don't know if there is anything we've talked about that will be prepared that will explain how many merger cases have been brought. Maybe it's covered in one of the merger topics, but how many cartel cases, how many vertical cases, whether they're brought by government agencies, private individuals, how many private cases settle and of each type. It seems to me that background information would be consistent with what the Assistant Attorney General is asking. So I would just ask that whatever committee is formed also think about that too.

CHAIRPERSON GARZA: All right. That sounds good. Anyone who wants to join Dennis on that can just get in contact with Andrew or myself and we'll get that going.

Now, before we talk about the next step, is there anything else that anyone wanted to raise in terms of issues that haven't been considered or anything else?

Okay. What I'd like to propose that we do now is plan to – in order to keep the ball rolling, plan to have working groups, and we'll decide whether it makes sense to use the groups as currently constituted or to re-jigger them based on the work that we've done today, but to have those groups now do the real hard work, which is to figure out how it is that they would recommend to the Commission we go about attacking these issues that we have identified for ourselves with the idea being that to the extent they can suggest to us any kind of sense of priority they think should be attached to it, what we would like to do is try to schedule – and Andrew will work with Commissioners to try to do this – something in March, toward the end of March, to have another meeting like this, if it's possible, in which we will consider written proposals from the working groups in that regard, and that would be – what we could come with at that meeting or shortly thereafter should be the basis for the next number of months going forward.

Yes, Jon.

COMMISSIONER JACOBSON: How would you propose that we deal with the issues that plainly overlap working

groups?

CHAIRPERSON GARZA: Well, I think what the staff will do after today, will massage a bit, take the issues that we've identified, do a kind of organization, make sense of proposed, you know, allocations to working groups. So I think it makes best sense to have the staff take a look at this and propose a workable way of tackling it for us, which we'll deal with.

COMMISSIONER VALENTINE: Do you have an ultimate time frame in terms of when the final date is that the report can be finalized, backing up from that when you have to get it to the printers, how much advance notice do you need on that?

CHAIRPERSON GARZA: We have been thinking about nine months, didn't we? Nine months backing, at least nine months. Having said that, it's conceivable, I suppose, that some people may want to issue something -- we'll have to discuss this. It may be that there are some issues that we want to issue something before one final report. I know that several Commissioners have suggested that. We'll have to deal with it, but if you're thinking about a single report, I think we were hoping to lead nine months.

COMMISSIONER DELRAHIM: Nine months from today?

CHAIRPERSON GARZA: No. Nine months from the time that our Commission expires, which would be, April-March of 2007. So where does that take us then?

MR. HEIMERT: The summer of 2006. What we had contemplated was a first, a solid full draft of the report, in the summer of 2006 that the Commission would then have the opportunity to discuss further refinements to during the remainder of the summer and the fall for finalizing in the fall, and if there are other statements that Commissioners would make with different views, that those would be at the same time put into that at that point.

CHAIRPERSON GARZA: You know, we have to talk about this more, but you can imagine that the first thing the Commissioners would want to see would be largely a staff document which would basically summarize the results of hearings and the fact collection and everything else and in a sort of non-judgmental way. It would simply say here is what we have as a basis for the Commissioners then to basically deliberate, and then the next part of it would be to really kind of, I think, express the views and

recommendations of the Commissioners based on the information.

So there is a first step, I think, which is to understand what we learned from our efforts, the second step being saying what do we then derive from that, what do we think should be recommended, and I think that would be a process that will take some time and thoughtfulness, and there would probably be a second part that will have to be written.

COMMISSIONER SHENEFIELD: Just as Andrew and I discussed yesterday, there are three stages that one of which you can begin immediately. There is the sort of basic groundwork stage. If you know, for instance, that you're going to address issue X, you can begin to put in place a document that has to do with the history of X and the legislation and all that. Then there is sort of a second stage, which is what is it that we're about to learn. That couldn't be done yet, but it could be done before the Commission debates. So with all the excess staff time I know we have, you can sort of begin that process, and I would also suggest that there are organizations represented in the audience that would be

more than happy to be subcontracted if you will. Whether that makes sense or not, I don't know, but I think it's an option.

CHAIRPERSON GARZA: I think to some extent the staff started that effort of background research for the purposes of enabling us to deal with these issues. So I think that we can assume that they will continue to do that work.

COMMISSIONER JACOBSON: Can we have the timetable from now through April '07? We've gotten chunks of it, but I'm really at the loss to figure who is doing what.

COMMISSIONER VALENTINE: Yeah. I'd like to see that.

CHAIRPERSON GARZA: Right now, the staff is currently -- in fact Andrew, and I and he's been talking to the staff have been essentially thinking about of that. I think that's maybe why Andrew was talking to John. They're doing a little more legwork than they've done before. They're talking to folks like John and actually the folks at ICPAC and folks at the FTC who have done studies on discrete issues, other commissions, like the 9-11 Commission, to get as much intelligence as he can about

what works and doesn't and to inform their thinking so they can recommend to us a time line that's going to make sense.

So right now, the staff is trying to learn from the experiences of other people to inform their recommendation to us on the appropriate timing.

COMMISSIONER JACOBSON: What is expected in the working group memos that will be prepared in advance of the March meeting?

CHAIRPERSON GARZA: We'll let you know. I mean, we'll give guidance. Whether it was sufficient or not, everybody got guidance on what these memos should look like. So similar guidance will be provided to the working groups as to what we think is a reasonable expectation, again staff coming up with ideas and talking to individual Commissioners for what would be most helpful to assist further deliberation in March to solidify work plans, etc., and I think the staff will be important to work on that, because, you know, work plans are going to tell them what they're going to be going out and doing for the next period, and so they'll work with, for now, the working groups as constituted and talk to various Commissioners

and come up with a proposal for that.

COMMISSIONER JACOBSON: That makes perfect sense. The one part of your recitation that gave me a little bit of pause was the concept of the staff drafting anything, really, before the views of the Commissioners had been heard.

CHAIRPERSON GARZA: Well, the first thing that they would draft would be, frankly, for the Commissioners and wouldn't -- it would be the basis for the Commissioners' views. In other words, I assume that we will have hearings, testimony, information collected, etc. So it will be -- there needs to be some way to compile that and to summarize it and to present it to the Commissioners and to the public, much the way, for example, you might -- I don't know -- the FTC staff might do for hearings and stuff before the Commissioners and the FTC would decide what they want to do.

So the first part of that, I think is the necessary collection of what we've learned. It's not biased. It's not recommending anything. But it is the basis for which the Commissioners can then deliberate and maybe their recommendations. So it's, you know --

VICE CHAIR YAROWSKY: My sense is that it's a kind of factual predicate.

CHAIRPERSON GARZA: Right.

VICE CHAIR YAROWSKY: It's a background. It's a history, some relevant statutes or cases.

CHAIRPERSON GARZA: It's more than that. It's more than that. If we hold hearings and get information, it's that, but it's also, I think, packaging, conveying, communicating in a way that's manageable what we've learned, because I think as a practical matter, we all have daytime jobs, and while everybody has been really terrific about rolling up their sleeves and doing a lot of hard work, it's not going to be feasible, except for Jon Jacobson, perhaps, for all of us to read everything that comes in on all of these issues. It's not going to be possible for me, I know, and so that's where the work of our staff comes in, to assist us in that.

COMMISSIONER SHENEFIELD: One of the things, though, that I thought the 9-11 Commission did badly was to have staff studies reported out before the Commission had its final debates and then hearings in which the staff testified about what their views were. And it created, I

thought, a lot of confusion.

CHAIRPERSON GARZA: Yes.

COMMISSIONER SHENEFIELD: So I would suggest stay away from that model entirely.

CHAIRPERSON GARZA: And I don't think that's what I was suggesting.

COMMISSIONER SHENEFIELD: No you weren't.

CHAIRPERSON GARZA: Okay.

COMMISSIONER SHENEFIELD: I'm agreeing with you.

CHAIRPERSON GARZA: Okay.

COMMISSIONER DELRAHIM: Deb, are we going to be — now that we know the issues that the Commission is going to be studying, will we be, for the interest of the public, issuing a Federal Register notice or immediately or soon as soon as possible putting out a request both for public views on these issues with a certain kind of time line or deadline that we have those prior to the hearings as well as requests for people who are willing to testify? I think this is particularly important in the immunities and exemptions areas because there are so many industries and so many areas that affected that we don't know to reach out to, but I think for the purposes of transparency

and completeness, the sooner we do that, the more complete record we'll have, the better we'll be before the hearings.

CHAIRPERSON GARZA: Let me just say I think, first of all, the first part of your question, I think everything, of course, that we do as a Commission is certainly posted to our web site. Whether or not we do a Federal Register or not, we'll have to defer the Andrew's recommendation on that, but certainly one of the first things the staff is going to do is, as I indicated, do something that's more formal than this, basically says and explains here is what we have tentatively concluded, this is how we're going to proceed from here and lay out the time line is similar to what we were just talking about. That would be in the public realm where they'll have that. That's a short term. That's something that will be done quickly.

The other thing, and we can discuss this, I think rather than go out now with a Federal Register notice, I was asking for people to comment on our issues and volunteer to testify. I could be wrong, but I've been thinking that the way to do it is to -- this is the idea of

the work plans, and we don't have to have an extended period of time to do these work plans, and as soon as we can meet – if we can meet in February, that's fine – but the idea would be for the work plans to essentially be that, for this issue, this is what we are going to do, you know, however it is best to attack it, which may very well include another notice requesting comments, staffing to go out and do leg work to identify people who we want to hear from and people in particular, whatever it is. I'm not as imaginative myself to come up with the best ways to do it, but I would hope that that's what the staff will then turn to and deal with the Commissioners on to get their input and then propose back to the Commission to just approve, if you will, as a plan going forward. And at that meeting is when we would also essentially vote and decide our timeline, our deadlines for getting certain things done, and all of that.

So Andrew will have to work with you all to figure out when. We're hard to get together on one day. We've been very lucky doing it today. So we don't want to wait too long. We want to keep the ball rolling, and yet we want to give enough time to get the work done. So

whether it's the end of February, beginning of March, whenever we can get that done, that's what we would hope to do.

Is that comfortable?

COMMISSIONERS IN UNISON: Yes.

CHAIRPERSON GARZA: Are there any other things that we wanted to discuss before we send the staff back to the office, lock the door, and make them move us along?

COMMISSIONER SHENEFIELD: I think it's probably worth saying publicly what most of us have said to the staff privately, that their role in putting together this massive amount of work was commendable, and they did it not just with efficiency, but with a grace which I personally appreciate and I'm sure we all do.

CHAIRPERSON GARZA: To use the word of the day, ditto. That doesn't quite express it well enough, but yes, we do appreciate the work, the strong work the staff has given us and we look forward to what's to come.

Thank you, Commissioners, the meeting is concluded, adjourned. Thank you.

[Whereupon, at 4:40 p.m., the meeting was adjourned.]