ANTITRUST MODERNIZATION COMMISSION

COMMISSION MEETING

Wednesday, June 7, 2006

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

Meeting convened, pursuant to notice, at 9:35 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
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

SUSAN DESANTI, Senior Counsel

WILLIAM F. ADKINSON, JR., Counsel

NADINE JONES, Counsel

MARNI KARLIN, Counsel

ALAN J. MEESE, Senior Advisor

KRISTEN M. GORZELANY, Paralegal

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Discussion of International Antitrust Issues and State Action Doctrine of Immunity

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity. All Commissioner votes and views transcribed herein are subject to change or modification.

P R O C E E D I N G S

MR. HEIMERT: All right. We'll open this Antitrust Modernization Committee Hearing for this morning. There's a quorum of Commissioners. All Commissioners are present or are expected to be. Commissioner Burchfield will be arriving momentarily.

CHAIRPERSON GARZA: I'd like to welcome the Commissioners, staff, and members of the public present in the audience. We will be deliberating in two areas, today. First, International Antitrust Issues, and second, State Action Doctrine of Immunity. We will begin with International Issues, for which we have reserved about two hours of deliberation. We will break and then take up State Action Immunity. Today we plan to end our deliberations before lunch.

So, we'll begin with International.

International Antitrust Issues

I just want to make a short introduction for the record.

International antitrust enforcement may be one of the most significant developments in modern antitrust, and it poses some of the most significant challenges for

law and policy makers in the future. The Commission is undertaking to advise Congress and the President on how they should view and deal with these issues. In particular, the Commission asked for comment and testimony on the following issues: whether the FTAIA should be amended to clarify the circumstances in which U.S. antitrust law applies to conduct outside the U.S., whether additional steps should be taken to facilitate coordination of enforcement among jurisdictions, and whether additional steps should be taken to reduce the possibility of conflict in the international enforcement of antitrust.

We'll proceed in our deliberations like we have in the prior two meetings. The Commissioners were supplied by the staff with several memoranda of issues and the testimony and comments we received and something called a "discussion outline" that sets forth questions and potential recommendations for discussion by the Commissioners. We have a list, a deliberation order that you all should have in front of you.

And I believe, Debra Valentine, you're at the top of that list, if you're ready.

COMMISSIONER VALENTINE: The benefit of this is I get to go last on State Action, I see.

On our International Antitrust Issues, on number 1, should we amend the FTAIA? I think the principled answer would be that we should, and that either the simpler language recommended by Professor Fox, which is captured in that box, bullet 3, and/or there's some alternative language that she proposed in her testimony, captured in executive summary, point 3, which is that plaintiffs must show that what harm has been proximately caused by the illegal action that harmed the U.S. market and is inextricably wound up with the effect of U.S. commerce.

My concern, however, and I guess I would be interested in hearing the views of the other Commissioners, is that virtually no one encouraged us to initiate a process of statutory amendment, and I believe that this is one area where that caution about engaging in Congressional change may be merited, so far as when the first FTAIA came about it was the Act that had something – the counterpart that gave us the Webb-Pomerene and other export-cartel issues. So who knows what sorts

of issues we'll get into when we get into statutory change?

So, shall I say, as a less principled fallback, I would be happy to go with number 2, recommending no statutory change, but encouraging courts to apply the *Empagran* standard.

And in that respect I guess I would note that it was rather striking that neither the FTC nor the DOJ supported statutory change and thought that things would sort themselves out well. So, I guess that's half a vote for 2 and half a vote for 3. On our issue, number 2, Technical Amendments IEEIA, I would recommend no statutory change. I think it's clear that it's a good statute. I think it has good flexibility within it.

Foreign countries that are concerned about our ability to use evidence that they might provide to us for other antitrust purposes is already addressed in the statute by their ability to prohibit such – so, I think we should just leave that alone. Are there technical changes to the budgetary authority of the antitrust agencies that would be useful? Well, there may be many budgetary changes that may be useful, but with respect to

our particular issue, which is provision of technical assistance, I don't think any change is necessary. And there again I would note that neither of the agencies requested change there.

Finally, I guess the one place where we may be able to make some impact is on issue 4, are there multilateral procedures that should be implemented or other actions to enhance international antitrust comity? And there, I would support a number of measures, and although it will probably be just important for us, should we go forward in doing this to work jointly on crafting the best signal that we can send? Certainly making use of existing agreements is a nice thing to say, but I'm not sure. Part of the problem is that the existing agreements are sufficiently vague and ambiguous that they haven't accomplished much. I think, with respect to the bullets under 8, (a) is fine, (b) is fine, (c) is fine, and (d) is fine. I haven't found this simple invocation of comity mechanisms in other areas. Bankruptcy and airline safety are terribly useful unless we put it into an antitrust context. And I can imagine trying to define some of those mechanisms, which is

really more requiring agencies to investigate each other when they are, "investigating each other," by having one agency defer to the decision of the other, and I think we're just going to have to see what language gets drafted and see whether that works.

I do think that, in acting here, we need to be cautious not to be the big gorilla. From what I recall of the submissions, I believe Jim Atwood's formulations for the principles of comity were better than the ABA's. Eleanor Fox makes an interesting point that the U.S. loves comity but has never deferred to another country — And I think when we do this and try to encourage other countries to work together and form alliances with these smaller countries – this is extremely idealistic – but I guess I would recommend that the antitrust agencies push to have a centralized pre-merger notification system. And, yes, I would recommend that the agencies pursue procedural and substantive convergence, to the extent possible, through the ICN and OECD. So, 9 and 10 are fine, as well.

CHAIRPERSON GARZA: Okay, and just for the record, Debra, for 8, it's (a), (c), and (d).

COMMISSIONER VALENTINE: It was (a), (b), (c), and (d). And (e), I think, would have to be substantially modified.

CHAIRPERSON GARZA: All right. Commissioner Delrahim.

COMMISSIONER DELRAHIM: I agree with Commissioner Valentine with respect to the first question. I'm converted in this area. I think it is always best when Congress gives clear direction to the courts and to the parties in this area.

However, I think the FTAIA, like the Sherman Act, is incapable of being amended in any clearer terms than what the courts have done.

Like Tip O'Neill said, don't speak unless you can improve the silence. In this area I think it fits well. I don't think it can be amended without screwing it up. I don't think Congress can do that. We tried, when I was at the Justice Department and this was percolating up through the courts, to see if there was a way to do that. We've probably had folks that have been thinking about this for the last 20 years to come up with different ways and an agreement on what the best solution

was, even back then.

So, I think that recommendation 2, to have Congress look at our report and look at our recommendations and somehow enact a statutory change - I think 3 is much more restrictive, in terms of cost benefit, on the effect of U.S. commerce for it to occur within the territories and the boundaries of the United States.

And I think that it might be terribly restrictive for their purposes, but I think just encouraging, for whatever that's worth, other circuits to find that the *Empagran* standard is something that we should do.

With respect to question 2, technical amendments in the IAEAA, I have to disagree with Commissioner Valentine. I think that number 5 would be my recommendation to this Commission, that the IAEAA clarifies the provision in that it says certain evidence that has been obtained for antitrust investigations that could be used for other crimes has prevented international agreements under this provision to be agreed upon, and probably has hindered investigation of

antitrust cases. So I think an amendment here is appropriate to allow for further development and further cooperation in investigations, particularly in cartel cases.

With respect to question number 3 for the budgetary authority, again I would have to disagree with my colleague. I think that it is worthwhile providing budgetary authority and various budgetary authorities, for the Justice Department and the Federal Trade Commission require great training and assistance; I think we're all in agreement on that. The issue is, is there a more efficient way of doing that than going through USAID to seek — just like private parties and foundations do — to get those funds?

If the United States government thinks that it is valuable for this technical training to bring the standards of analysis, investigative techniques, and other methods and capacities to foreign countries, to give them the proper tools to analyze whether it's single-firm conduct or cartel cases, then we should provide the authority to the agencies who provide this assistance, to be able to spend money, to hire the

appropriate staff.

Right now, there are staff from investigative groups who are sent out on missions for one month, two months, three months - a lot of times for much shorter periods of time than those countries request our assistance for, particularly economists. I think there's a lot of value in sending economists — some of the best are down at the Justice Department as well as the Federal Trade Commission — to send out and train economists — I mentioned before that it's probably the economists who saved antitrust law in the United States, not so much the agencies or Congress, and the courts got the better reasoning of some of the folks in the Senate back in the '80s who started applying the standards, and I think a lot of these new countries who might think too much market share is bad for an economy will benefit from that kind of training.

So, therefore I think budgetary authority, including authorization to these agencies to encourage it, is probably the most useful step we could take through our recommendations

The multilateral procedures - question 4 posed

to us, I do agree that we should recommend that the agencies pursue additional comity agreements — I certainly agree with that - and enforce the statement that inconsistent or conflicting enforcement does impede trade and thus the welfare of the consumer in total. All that is great to include language. I think, to some extent, many of the agreements that have these types of language have them in the preamble, but we should encourage that.

I have not reached any firm conclusion as far as deference to a jurisdiction of the center of gravity. How do we define that? Chairman Pitofsky has written a lot about this. I think he has a lot of great ideas in this field. A number of other folks have written and spoken on this.

I'm not yet convinced that putting that into the trade agreement — I just don't think it's right that we don't have exact knowledge of what the center of gravity is at this time. But it should be pursued, and we should figure out a way — and some of these relate back to this deference issue.

I do agree with (c); I think there should be a

deferral to countries – that is direct, predictable, and foreseeable. We have some knowledge of what that means because of the U.S. domestic antitrust laws that we can refer to as a point of reference in case there is a dispute. At this time, I don't think we're ready for a dispute-settlement mechanism in the international arena for antitrust purposes. I don't think there's the expertise. And I think it could do more harm than good. I would probably prefer negative language in trade agreements, saying that we shall not enforce in certain areas, rather than positive agreement that we shall enforce. I think every country should be encouraged to focus on cartel enforcement and collaboration rather than being encouraged to get into single-firm and some of the more difficult areas until the capacity is raised in each of those enforcement agencies.

With respect to (d), I do not support a mechanism, again, for the same reason I disagreed with (b) at this time. I think it's a good guard to have for our enforcement authorities to allow this, that there is coordination for investigations. I don't know of an affirmative reason for a respondent – but I go back and

forth on that, and I can be persuaded otherwise. I just don't know a lot about how bankruptcies — and I know we've gotten a lot of testimony — securities and compensation have had comity mechanisms. I think we should encourage the two agencies to examine bills and report to Congress. We don't have the time or resources to do it in this Commission. I wish we did, but we don't. But this requires further study by the Congressional committees of jurisdiction, as well as the expert agencies to report back to them. It is an important area to look to and it has worked in other areas of the law, perhaps it can provide guidance for the antitrust arena.

The same goes with question number 9 for me. I don't know if we should recommend that they pursue development but they should do a report of whether or not international centralized pre-merger notification system makes sense. Perhaps it could be started with a bilateral mechanism between the United States and Canada, maybe the United States, Canada, and Mexico to see how that goes and then go on to a multilateral mechanism. But again, I think it's very important that we study and

take a look at this and continue to improve it. I don't know at this time if we can get into that type of a notification system, but to be efficient.

With the last one, I do agree with 100 percent. The agency should continue to pursue a particular procedure, substantive convergence. The substantive, I think, is a little more difficult. It gets into local economies. You have a number of countries where they have moved from the central command and control, particularly in — whether it's telecom or energy. We probably need a little more aggressive antitrust school to be able to break down some of these state-owned monopolies in some of these other countries until we get to a market system.

However, procedurally, there's no excuse to have different procedures for multilateral companies to have to follow. It would probably make a lot of sense, because the procedural convergence will help with coordination of investigations, would help with coordination of analysis of mergers — of analysis that the agencies would engage.

CHAIRPERSON GARZA: Thank you, Commissioner

Delrahim.

COMMISSIONER DELRAHIM: But I would like to be further educated by my colleagues.

CHAIRPERSON GARZA: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I can make this very brief, I think. As to 1, I would support 2. I would be against 3 on the principle of the basis that Congress has enough to do without getting itself into this issue, which it didn't handle well before and that was something that was attempted by a committee and a staff that was friendly to the antitrust laws. So, I would strongly support 2. I would strongly support 4. I wouldn't change that statute at all. I agree with Commissioner Delrahim that putting budget authority into the antitrust enforcement agencies makes sense, so I would support 7.

As to the pod of questions under 4, I favor, obviously, 8, as well as (a), (b), although I question what a voice in the process means, not knowing exactly what it means, I nevertheless would support (b).

I support (c).

I do not support (d), neither do I support (e).

I support 9, whether it's possible or not is another question, but it makes sense if it's possible.

And, of course, I support 10.

CHAIRPERSON GARZA: Thank you. Commissioner Warden.

COMMISSIONER WARDEN: I am inclined to support number 2, under 1.

Although the simplicity of 3 has a lot to recommend it and I would be prepared to support 3, if it were limited to private actions or the recovery of damages. I think the clear rule is very useful in that context, whereas the wording of the present statute is useful for — in ways I'm not sure. But I suspect it is useful to the enforcement authorities.

In 2 and 3, Commissioner Delrahim knows a lot more about this than I do, and therefore I give weight to his views. But my recollection is that the enforcement agencies recommended no change, or at least didn't ask for a change in IAEAA and didn't ask for the budget authority and said they were satisfied with the present situation. It may be that they don't know where their own best interests lie, but I think their views are entitled to weight.

And number 4, yes I favor 8.

I favor (a).

I strongly favor (b), and I think that (b) has to be a two way street. The United States has to be prepared to defer and not insist that our way is the only way when the center of gravity is somewhere else. I would take it that a voice in the process means that the enforcement agency of the center of gravity country would give a hearing to the enforcement agencies of other concerned countries. I don't know that's what it means.

I prefer (c), which I think is sort of a lesser version of (b).

I do not favor (d), I think international agreements generally confer rights or claims, if you will, something less than right on the States, not on private parties. I don't think that the respondent should be able to demand that the governments conduct itself in a certain way.

If I know what the analog in the competition field might be to the mechanisms used in these other areas, I might favor it, but frankly I don't have any idea. Product safety is a completely different kind of thing.

I favor 9 and I favor 10.

COMMISSIONER VALENTINE: I'm sorry. On the IEIA, technical assistance, how did Commissioner Warden vote?

COMMISSIONER WARDEN: Well, I didn't vote.

COMMISSIONER VALENTINE: Oh, okay.

COMMISSIONER WARDEN: I see some merit to Commissioner Delrahim's position and I seem weight to be give to the fact that the DOJ and FTC didn't seem to enthusiastic about either of these.

COMMISSIONER DELRAHIM: Madame Chair, if I could just make a comment. Last night at, oh, about 10:30 – it shows you my boring life – and they're showing the debate of the supplemental appropriations bill for Iraq, Afghanistan, and Katrina relief, and a good debate is rare. We often find one single person speaking to us in a camera. This debate was a heated argument between Senators Murray and Hutchinson from Texas about a provision in there about whether or not the Veteran's Affairs Commission wanted a certain amount of money, $430 million.

The argument was, they didn't ask for it; they

don't want it. Well, the argument was that, at the end of the year, they always come for it.

The agencies don't have a position they can express publicly unless it goes through interagency process to the White House and gets approval and all that and that becomes a very long procedure. For many reasons it doesn't get through. I just want to give caution to my colleagues that, just because the agencies did not ask for some of this does not mean necessarily that internally, or within that division of that agency, that it is good. It just could mean that they don't have authority to speak on this. And I'm saying this as a person who has been on both sides of the aisle, the receiving end, who got those recommendations, who got these - and also from the agency whether or not we had the authority to do things that were right.

And I'm not implying what they think or they don't think, I'm just saying that we should be cautious of giving too much weight to whether or not the agencies have asked for it, partly because, specifically or privately, we don't know what they may think.

COMMISSIONER VALENTINE: Well, if we're going

to talk about the agencies, I'd like —

CHAIRPERSON GARZA: What I'd like to do is do what we've done in the past and just let everyone have an initial opportunity to indicate where they are, and then we will have time to go back and discuss some things.

Commissioner Litvack.

COMMISSIONER LITVACK: On question 1, I would go with 2, on question 2, I would go with 4, on question 3 — mindful of Commissioner Delrahim's comments, which I think would have validity — I still would go with number 6.

On 8, I would favor (a).

I would favor (b) for the reasons that Commissioner Warden articulated, and the same with respect to (c).

I would not favor (d), and, like Commissioner Warden, I don't understand enough about (e) to have a view one way or the other.

As far as 9 goes, I think I agree with Commissioner Delrahim. I would not recommend that. I think studying the issue might be useful and reporting back, but I don't want to recommend now such a system.

And I would support 10.

CHAIRPERSON GARZA: Thank you.

On the question on amending the FTAIA, I actually was inclined to go with 1. On the issue of amending the IAEAA, while I respect the views of Commissioner Delrahim, I think I will go with 4.

On the budget authority issue, I would go with 6. And again, I hear what Makan said. I think it can be useful to have the Justice Department and the Federal Trade Commission continue to work with other jurisdictions around the world, whether they get the money from an internal budgeting process or through other ways, it probably doesn't matter too much and I wouldn't want to — I personally don't feel comfortable interjecting ourselves into what can be a very complex process of figuring out the budget. So, while I would be in favor of encouraging continued work in that regard, at this time I would recommend no change to the budgetary authority.

On 4, or rather on the multilateral procedures, 8(a) — 8(b), I'd have to say I'm not sure what center of gravity and voice mean, and we may have to work on the

language, but I think I agree with others that the principle, the concept, makes sense. There would have to be some instances in which jurisdictions would be encouraged to presumptively defer while making sure they take into account the interests of other jurisdictions.

I would go with (c), (d), but not that private parties would have a right to demand coordination, but would have the right to make that request and that the jurisdictions would allow them to make that request — would consider it seriously. I also would like to add to a few of the suggestions that were made and comments that were submitted on behalf of Bertelsmann, General Electric, Microsoft, Pfizer, World Consumer Electronics and Time-Warner. A few of those things I thought were worthwhile, and one of them was that the jurisdictions should agree to seek to avoid inconsistent remedies in conjunction with the same type of conduct or transaction.

Another recommendation that they made, which I think is worthwhile for us to consider and endorse, potentially, is an agreement to fashion remedies on a joint basis with the jurisdictions that are looking at the same course of conduct on a transaction.

And the third recommendation that had been made on those comments was for what they called benchmarking. That is going back and reviewing instances in which two or more jurisdictions were looking at conduct and acting to see what the effect was – the way that they perceive it and any inconsistent remedies they may have imposed.

So, I'd like to perhaps have some discussion about those additional provisions. On 9, I agree with those people who said that something should be looked at, studied,

And so I think that it's something that should be studied. I thought about it, of course, in preparing for this meeting and can see a lot of complications and perhaps effects that would be undesirable to businesses. So, I think it's something that should be studied to see whether something can be worked out. I like Makan's suggestion that perhaps the starting point would be something with Canada and Mexico and the U.S. to see whether there was a way to get some sort of coordination on pre-merger notification.

And then on 10, I agree particularly with, as Makan said, respect to procedure on substantive

convergence. I think I agree with that as well, as a notion, though - that being that we would work to try to encourage the adoption of policies that are consistent with sound economic principles.

COMMISSIONER WARDEN: Deb, what was the first of your three proposed additions to 8?

CHAIRPERSON GARZA: The first one was that jurisdictions would agree to seek to avoid inconsistent remedies.

COMMISSIONER WARDEN: Oh, Okay. I had joint remedies as the second —

CHAIRPERSON GARZA: And that was the second — agree to fashion remedies on a joint basis.

Commissioner Yarowsky.

COMMISSIONER YAROWSKY: Okay. I'm going to speed it along a little bit. For question 1, number 2. For question 2, I started and remain with 4, recommend no statutory change, but I've heard what Makan said. So, we'll see how this debate goes and I remain open to think about it.

On the budget issue, budgetary authority, I think that Makan rightly captures a very possible dynamic

going on about private versus public face to the world about speaking out about budget issues.

Here's my real concern – well, there are two – one, I don't want the Commission to recommend a change in the way they're appropriating money and allocating budgetary authority and ruffle feathers on that front. Maybe it won't ruffle any feathers. But I want to make sure we don't, because we have other very important substantive recommendations I think we're going to ask Congress. So, I want to think about that.

But two, here's my concern, again, going into the empirical realm that Makan helped bring us into: if we would go for 7, recommend that Congress would shift the budgetary authority, that's fine if we did that to the agencies really at the heart of it. But I would certainly want to then request an earmark for it, because what often happens is, as many of us know, it can become a permissible use, and then it can compete with enforcement resources, which – then what will happen, whereas the USAID has this kind of stable relationship with the agencies, so far, and kind of provides this.

So, again, this is a very empirical situation, but I never would want it to compete with enforcement resources, because if it did, it would never happen, and this is an important activity.

Okay, moving on to 4 — yeah, we'll check 8 — and then the subparts (a), (b), I assume center of gravity would work much like center of gravity works in choice of law, but we should talk about it if it doesn't.

(c) for now, (d) and (e), no.

9, I think the wording we have so far is that the agencies should pursue development. We're not telling them how to do it or what the structure is. So, it's generally acceptable to me in that form, because it may just be, let's start it.

On 10, yes, I feel pretty strongly about it, because so far we've avoided antitrust getting sucked into the WTO process and the trade discussion process. I think the way to insure that this is resolved from the antitrust agencies and forces all around the world is to have them keep working at it. If there's a vacuum perceived, one day soon, antitrust could be on the agenda for some other kind of multilateral discussion, and I

don't think that would be in the best interest of antitrust here or abroad.

CHAIRPERSON GARZA: Thank you.

COMMISSIONER SHENEFIELD: Madame Chairman, would it make sense, as people go forward voting, to get them to take a position on the three sort of additions that you helpfully made?

CHAIRPERSON GARZA: We can if you'd like. We can go back and do it.

COMMISSIONER SHENEFIELD: Go back and do it - exactly.

COMMISSIONER BURCHFIELD: Could you give me the third one again?

COMMISSIONER SHENEFIELD: Perspective review.

CHAIRPERSON GARZA: Yes. What they call benchmarking, which is exactly what Commissioner Shenefield said.

Benchmarking reviews instances where both jurisdictions impose remedies. And if I could just read from what they wrote, in any instance where the U.S. and foreign antitrust agencies are unable to reach agreement on appropriate treatment of a merger or any other

business conduct under investigation, at a minimum, they should agree to conduct ongoing benchmarking reviews of the matter and of the impact of the parties' divergent decrees. The purpose of the reviews would be for the authorities to exchange information and views with an eye toward insuring that future remedies will be consistent across borders.

Do you have a view on any of the three? It was the benchmarking that I just described. The other one was to agree to seek to avoid inconsistent remedies. And the second was, agree to fashion remedies on a joint basis.

COMMISSIONER SHENEFIELD: To seek to fashion or to fashion?

CHAIRPERSON GARZA: Well, let me just – agree to seek to avoid inconsistent remedies, recognizing that particular harm may ensue if companies are subjected to inconsistent or conflicting remedies in different parts of the world. The U.S. could agree with its trading partners that, to the extent consistent with the respective antitrust laws, neither party will impose remedies inconsistent with those imposed by the other.

A variation would be for the U.S. and its partners to agree that when investigating a transaction or conduct previously examined by the other parties' antitrust authority, an antitrust authority should not impose divergent remedies without prior consultation with its counterpart.

And the, agree to fashion remedies on a joint basis, if a competent authority is unwilling to defer completely, based on comity principles, then there still might be an opportunity to formalize an alternative procedure in which antitrust authorities jointly fashion an appropriate remedy.

And the cite is an example of the parallel investigations by the U.S. and EU of General Electric's purchase of Instrumentarium in 2003 as an example of how that worked. And then they go on further to say, for example, decrees could avoid creating inconsistent obligations by using common definitions, drafting complementary common trustee provisions and consulting during the divestiture process.

COMMISSIONER JACOBSON: So what are we doing? Are we going back to the beginning?

COMMISSIONER VALENTINE: Everybody from now on, then they'll come back to us.

CHAIRPERSON GARZA: In the meantime, I'll ask the staff to make copies of these comments.

COMMISSIONER VALENTINE: Actually that was my problem. I looked for those in my volume last night. I think they were sent out relatively late, and I couldn't find them.

CHAIRPERSON GARZA: Well, I think these were — this was not Jim Atwood's testimony.

COMMISSIONER VALENTINE: Oh, no. But I couldn't find it in my volumes. I think I know why, but I would like to see it before I do my final observation.

CHAIRPERSON GARZA: If you care to voice an opinion, if not we can cover it in our discussion in the second round.

COMMISSIONER YAROWSKY: In that vein, I feel pretty comfortable about the benchmarking concept. I'm sympathetic to the two remedy issues, as well. I just want to see the wording.

CHAIRPERSON GARZA: Okay.

Commissioner Cannon.

COMMISSIONER CANNON: Thank you, Madam Chair. On the FTAIA, I think I'm going to hang with the Chairman on this on at this point, and vote for 1. So there are two votes there, Deb.

CHAIRPERSON GARZA: Thank you.

COMMISSIONER CANNON: On 2, no statutory change to the IAEAA.

On the budget authority, I think the only short observation I would make is that there really is no such thing as a technical change to the budget authority, right? I've never really seen one that was. If something is explained that way, you can pretty much bet that it is not a technical change, but I would recommend no change on that.

On 8, I like two of your three, Deb, jurisdictions seeking to avoid inconsistent remedies and benchmarking reviews, and (a), as well, and that is it on those.

And I, like most of the other Commissioners, just don't know enough about the other comity mechanisms and I'll stay open to that.

On 9, I don't think I would support that, at

this point. It kind of gets back to what Commissioner Valentine called the gorilla in the room issue here, in terms of the United States' position on that.

And certainly on 10, but pace will always be an issue on that. It takes a little while, but I would support that.

CHAIRPERSON GARZA: All right.

Commissioner Jacobson.

COMMISSIONER JACOBSON: I'm going to come back to the first set of issues, last.

Quickly, I favor 5 and 7 for the reasons articulated by Commissioner Delrahim. I favor 8(a) and 8(b). I believe 8(b) captures a lot of the General Electric/Microsoft paper that you were discussing earlier. I would support (b) if "demand" were changed to "request," as the Chair suggested.

I support 9. I support 10.

With regard to the first set of inquiries, after a great deal of thought, I'm persuaded that the only solution for Section 6(a) of the Sherman Act is repeal. And to leave the assessment of the jurisdictional reach to the courts through the common law

process that started with the *Banana* case in the teens, *Alcoa* in the 40s and the *Timberlane* case.

We are dealing with a statute that is so confusing that the Supreme Court had to grant certiorari to resolve a conflict over the meaning of the word "a." Now, that is not a good statute. If you have to grant certiorari to decide what the word "a" means, there is a problem with the drafting of that statute.

And then we have a decision that comes out of that that doesn't even resolve the issue, which allows some guidance but basically sends it back for further development. Now, I'm sympathetic to those who support the D.C. Circuit's remand decision in *Empagran* because it seems like an answer, but as someone who has litigated this issue, it is not an answer. The distinction between but-for cause, which the D.C. Circuit held as insufficient, and proximate cause is a very elusive one.

It is one that can be pleaded around. As we go forward, plaintiffs will plead around it. It is also a distinction that, under the D.C. Circuit's decision, a foreign purchaser who acquires his or her goods from a foreign seller can sue under U.S. law in connection with

a vertical restraint that has excluded a U.S. competitor, but cannot sue for an international cartel. That is an unwise distinction that would be perpetuated and will be in the future if the *Empagran*-remand decision is followed.

I think we should leave this to the courts. So, I don't support any of 1, 2, or 3. I support absolute repeal of the statutes and allowing the common law to develop unimpeded by metaphysical interpretations of the word "a."

CHAIRPERSON GARZA: Thank you.

Commissioner Carlton.

COMMISSIONER CARLTON: I favor 3, but recognizing the reservations that some people have mentioned about making a statutory change, I might go with something like 2, but I have reservations. My view is that 3 is simpler. If you look at page nine of the memo that we were sent, I think there is language that is even simpler. It says that the AMC should recommend that, "the United States laws do not apply in the absence of an adverse effect in the United States' territory." I think that's simpler. If we're going to recommend

something because we cannot feel comfortable recommending statutory change, I would go with that wording.

The reason I don't like the wording in 2 is that I had difficulty – and I'm glad to hear that Commissioner Jacobson had some difficulty too – understanding exactly whether what the Supreme Court said, or what the D.C. Circuit said, was clear. And if we recommend something based on 2, I hope it won't be based on courts' reasoning. I think we should state the principle we recommend and not say which court decision we think supports that principle, because my intuition is exactly what Commissioner Jacobson said, that someone is going to come up with arguments to show that their position is consistent with something, and it will be inconsistent with what we're recommending here.

Finally, I want to point out that there is something to the issues on *Empagran* that are closely related to something that we talked about last time and I don't want to lose the link. There was a - in the *Empagran* decision, I'm pretty sure there was a request; it was requested to submit an amicus brief. A bunch of economists were asked to submit an amicus brief. I did

not do that, but the thrust of that amicus brief had to do with the economic issues related to deterrence when foreign cartels are involved. And I think that, from an economic point of view, that's one of the key issues associated with this question under item 1. And that's why last time I said that when there's an international cartel, a multiple of damages – the court should consider whether the multiple of damages should be different.

And that would achieve the deterrent effect that many people are concerned is missing, if you don't allow foreign plaintiffs to sue. Now, who gets that money? That's a separate issue, and we can have decoupling, but I won't go into that right now.

On question number 2, I vote in favor of number 5, subject to listening to what other people have to say.

On the budgetary authority, my initial feeling was item 6, but in light of what Commissioner Delrahim said, I wanted to state what I think is the central issue. I don't know how to resolve it. I would be interested in people's views on it. The issue is, who should be allocating money for what probably all of us think is an important activity, namely, the dissemination

of international antitrust? The question is, should the Department of Justice have the budgetary authority to decide how to spend its money, or should an international agency be granting money specifically for that purpose? If the Department of Justice has it within its budget, the question is whether it would have discretion - first, how to use that money, internally, the United States, or internationally, that would be important to answer. And then the second question is, do you think they'd get as much money? I don't know the answer to those two questions, but those seem like the two questions that you have to answer, really, to get to distinguishing between 6 and 7. And I had really put weight on the fact that the agencies hadn't asked for extra authority.

If someone thinks that doesn't really reflect their position or that there would be not enough money given under the current system, I'd be interested in their views on that. But, barring that, my initial view is to go with number 6.

On number 8, obviously I'm in favor of number 8. It's hard to be against pursuing comity, I suppose. The question is what that means. I'd be in favor of

8(a).

8(b), I'm not sure if I'm in favor of, simply because I worry what these words mean, center of gravity and voice. I think I'd prefer to say that there'd be convergence of the objective. And what's the objective? The objective should be the maximization of world welfare. That, then, would lead to implementable policies. But, as it's written, I'm nervous of what the words mean.

I'd be in favor of (c).

I'd be in favor of (d) if it were written that the respondent didn't have a right to get this review but could request a review.

I don't know enough about (e) that I feel comfortable voting one way or the other. Regarding 9, I would vote in favor if the word "pursue" was replaced by "study." I though that Commissioner Delrahim's suggestions of trying it with Canada and Mexico sounded reasonable to me.

And finally, I'd be in favor of 10.

In terms of the additions that Commissioner Garza mentioned, they sound reasonable to me. I'd like

to study them in a little more detail, but they sounded reasonable.

CHAIRPERSON GARZA: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I come to this area with less experience and knowledge in these issues than many of the people sitting around the table, but with the recognition that we will probably look back in 5 or 10 years and think that the issues that we consider here on the international front are among the most important that we are considering as a Commission.

So, with that as prelude, I have no firm convictions on most of these, but I will give you my initial inclinations. On the first question, I believe that Commissioner Jacobson, as is always the case, makes some very insightful points about where the statutory situation lies and what the courts have done with it.

My concern about total repeal, and leaving the issue solely to the courts, is that really doesn't recommend a direction for the law to proceed. And while I am interested in hearing about what he might recommend for the Commission to recommend to the courts on that as a test, until I hear further on that I am inclined toward

option number 2.

On the second set of issues, technical amendments, I am inclined toward — let me go back to number 3, under question 1, for a second. I am always skeptical of language that has a double negative in it. I would hope that the language could be drafted better —

COMMISSIONER VALENTINE: That statute has a triple negative.

COMMISSIONER BURCHFIELD: That's even worse. That's 50 percent worse. But I think the language that Commissioner Carlton referred to in the text of the memo might be a better starting point there. But in any event, I'm on recommendation number 2 as my initial position there to answer question 1.

On topic number 2, I am inclined toward number 5, because I can certainly envision a situation in which foreign entities would be concerned about reading the statute, concerned about what it means. And if there's any benefit to making it clear that use of the information for non-antitrust purposes is not a mandatory part of the agreement, then I would be inclined toward that.

On topic 3, I am inclined toward number 6.

On topic 4, I struggle with these somewhat as I read them, because they are merely precatory.

Whatever we would recommend, in terms of statutory or legal changes in the United States would be subject in most instances to cooperative action by other governments. That having been said, it is with a great deal of optimism that I hope not just our government, but governments around the world will look at this report and so our recommendations may carry some weight.

In light of that, I would be inclined to yes on the general question of 8.

Yes on 8(a).

I will listen to the discussion on (b).

My question about (b) is, are we, in the United States with a well developed competition and antitrust regime, willing to defer to a government that has the center of gravity of a potential violation, that has a less well-developed and perhaps even a less - antitrust regime. In other words, are we willing to defer enforcement authority to a regime that is going to enforce in a lax way? And I have some concerns about

that.

On (c), I am inclined toward agreeing with (c).

(d) I would concur with if “demand” is changed to “request.”

On (e), rather than “adoption,” I would change that word to “study.”

On 9, I would change “pursuit” to “study,” and I would agree with 10.

CHAIRPERSON GARZA: Thank you.

As we have in the past, we'll now have general discussion.

MR. HEIMERT: Do we want to separate the issues, or do you want to discuss them all simultaneously?

CHAIRPERSON GARZA: I'd just call on people to see what they want —

MR. HEIMERT: All right. Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Let me start with the budgetary authority issue. It seems to me that the premise that you have to have in mind when you discuss this issue is the same amount of money is available both

ways. That can't be the decisive difference. So the question then is how to preserve the money appropriated for a legitimate and laudable purpose. How to make sure that it's spent on that purpose. And, as I understand the budget process, if it is a separate line item within an agency budget, then it must be spent for that purpose and it can't be reprogrammed across line items. And therefore, that's a technical problem that could be easily taken care of.

It then seems to me that it is far cleaner for an agency, the Justice Department and the FTC, to go to Congress to request an appropriation for a laudable purpose, receive it or not in the amount that it requests or not, and then spend it or not. Going through another agency just adds another layer of bureaucracy, a whole other set of dynamics that are very unpredictable.

USAID may sometimes be supportive of strong and sensible antitrust enforcement; sometimes it may not. It's not its core mission. The Justice Department and FTC always will be, and therefore, it seems to me that the simplest process is the best in this particular area. So, I would urge us to take USAID, which is a foreign aid

agency, out of the business of antitrust enforcement and instruction abroad.

Secondly, on the large FTAIA, the intellectually pure position is that, as Commissioner Jacobson eloquently supports - I just fear that it's just filling a swamp back up again that was, at least partially, drained by the Supreme Court's decision in *Empagran*. Cast your mind back to the absolutely ludicrous situation we had before the FTAIA and the whole reason Peter Rodino set out on this course.

We had decisions that were legitimately worrisome to the business community, inconsistent among themselves and inconsistent with good antitrust thinking. *Empagran* is not perfect, but it's beginning to move in a direction that makes a lot of sense, at least from my point of view.

Courts have begun to gather collectively in support of it. The reasoning seems to be persuasive. Sure, there are anomalies. There always will be. But what you have to compare it to the situation pre-1982, I guess it is. And if you compare those two situations, the direction in which we're now headed, though it's been

messy and chaotic and disruptive, for those of us – and there are several in this group who have litigated in this area – the direction in which we are now headed is comfortable and makes some sense. So it's not a question of perfection. It's a question of the best available alternative. And here, the perfect can be the enemy of the good.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Well, I respect everything that John says, but I respect those remarks particularly. I am deeply troubled by the implications of the *Empagran* decision, which, as I mentioned before and I'll mention again in a minute – I think the point that the pre-1982 situation was chaotic is correct. We have, however, in areas other than antitrust, developed a solid body of foreign relations law, some of which is captured in the restatement third, I guess it is, of the foreign relation law of the United States. That does apply some principles that could be utilized productively in antitrust cases to produce far less chaos than we're going to see, I think, over the next few years as people struggle with the opinions that have followed the DC

Circuit in *Empagran*.

I suggested repeal as opposed to modification largely because of the reasons laid out by Commissioner Delrahim. This is a difficult statute to draft correctly. Certainly the way it's drafted now, I think, everyone agree, is a mess. The one that is in our program, if you will, is equally problematic. Shall not apply to injury not occurring within the United States or United States territory. I'm not really clear what that means. Does that mean only domestic U.S. companies are allowed to sue? That would certainly conflict with the *Pfizer* case.

COMMISSIONER VALENTINE: But that was a foreign purchase in the U.S., so it would apply. - Not a fair question —

COMMISSIONER JACOBSON: That's not how I read it, and the provision at page nine of the memo - the U.S. laws do not apply in the absence of an adverse effect in the United States territory. Well, all global cartels have an adverse impact in the United States territory, so that's not a limiting principle, either. There may be a way to draft this that's clear. I haven't seen it yet.

I therefore think that just resort to the common-law process through an outright repeal of the statute is superior. I think, following the *Empagran* decision — and worse, for this Commission to recommend that the distinction between but-for and proximate be pursued, that that be the law of the land I think would be a terrible mistake.

So, if we're not going to go for repeal, we should just go with 1, let the common law develop with the statute as written. I think suggesting following the *Empagran* decision is a mistake.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I'll try to start with the simpler ones and maybe come back to — on the IAEAA, I do just want to underline that the statute as currently drafted does not require foreign countries to allow their evidence to be used for non-antitrust purposes. It allows us, if we find a tax violation, a securities violation, to ask the other country to use the evidence for that purpose, and they have the ability to say no.

It is only with their consent that we can use it. I do not think in 500 million years that the Justice

Department would agree to a statute which would not allow them to at least ask to use evidence in their hands that's a clear violation of the tax or the security laws. So I don't see why we want to go up against where the agencies are.

The technical changes to the budgetary authority - I actually have come around, I think more for the reasons that John Shenefield articulated than Makan. The issue here really is that going forward now with 100 competition agencies around the world, we will need additional technical assistance, and it's very, very important. I do think that the DOJ and FTC are better dispensers of where that should go than USAID.

The problem, though, is that in fact the very people who are best providers of that technical assistance are the investigators who have done the cases and know how to do it. And simply hiring people, like the PCAOB and throwing them without really understanding how to investigate and prosecute a case, how to think about how to define a market at foreign countries is only going to hurt the foreign countries.

So, I think what we need to be doing is if we

give Justice and the FTC additional budget authority for this we somehow need to insure that will enable them to get the best people over to help. And they're not going to want to send their best staff to go help foreign agencies. On the other hand, there a lot of other things that we can be doing in this area in terms of there are currently conflict statutes that prevent the agencies from hiring foreigners, particularly foreign government officials. I mean, there's lots of stuff that one could do that would help to train foreign agencies that I think might be useful and better targeted than simply hiring people and throwing money at it.

I also would agree on 8(d), that it should be, rather than demand, that a request be seriously considered when multiple agencies are investigating.

And, Deb, I think I agree with all of your additional proposals, 1, 2, and 3. The only one I'm a little concerned about is the wording on 3, which suggest that there should always be consistent outcomes. There are often, in fact, mergers where the remedies required are different in different jurisdictions simply because the markets are different and the harm is different. So,

if consistent means absolutely the same, I wouldn't agree with it. If consistent simply means consistent in principle and objective, in terms of addressing the harm, I don't have so much of a problem there.

And I guess, finally, I fear I am going to go with Commissioner Shenefield, and concede that the perfect may be the enemy of the good. A peer repeal of this statute would throw us back into total chaos – that is, a peer repeal of the FTAIA – and I think we would be behind the eight ball. I concede that it's the worst statute I've ever seen. I concede that much of the case law makes no sense, but I do think we're a step ahead of where we were 20 years ago.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I'll save 1 for the last. I'm still in – on items 2 and 3, that is, the statutory changes to the IAEAA and the budget authority. But I'm happy to abide the consensus of the group, whichever way it goes.

On number 4, 8(b), I find that language pretty clear, but if it can be improved it should be improved and I favor it. And I think this may be a situation

where the perfect is the enemy of the good, as well, in the sense that in similar instances Commissioner Burchfield said we might have to defer under this test to a jurisdiction that has competition policies that we don't necessarily subscribe to or that aren't developed. But I think that's likely to be rare and I'd rather remove the overhead of conflicting investigations.

I'm happy to go now with 8(d) if demand is changed to request. I'm happy to have pursue changed to study in 9, although I thought pursue was perfectly all right as it was. I favor all of the additions to 8 that Chairman Garza mentioned.

I think, really, it's almost one recommendation, that is, avoid inconsistent remedies wherever possible by the development of joint remedies or deferral under principles of comity. And then check where there have been divergent remedies, follow the benchmarking. That's almost a procedural suggestion.

Now, as to 1, I'd like to be corrected if I'm wrong, because like Commissioner Burchfield I don't feel like I've spent my life studying or practicing this particular area of the law. I have some experience. It

seems to me that the problem that the FTIAA was intended to address was private litigation. And if it's a larger problem, I'd like someone to tell me.

So, I would be happy to repeal the Act or leave the Act alone, either one, and supplement it with a provision as I said earlier, that said that there's no private right of action under the antitrust laws for injury not occurring within the United States or U.S. territory. And if, as Commissioner Jacobson says, there's some unclear about not occurring, then I think that can be approved by a reflection at length on what the appropriate language would be. But I think that's an easier test to apply than to the test that was applied in *Empagran*. And I see no reason why the United States should be providing remedies for conduct in foreign countries that the governments in those countries for whatever reason don't seem fit to supply themselves.

And this would be a much simpler way of dealing with the *Empagran* problem than epistemological disputes about cause.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: Thanks. Let me address

question number 4 first. I'm with the change of "demand" to "request" of the support of (d), as well as 9, changing the language to the study and report as we discussed before, and I support all three of the additions by Chairman Garza.

I still have concerns for the same reasons I stated before, with respect to item (b).

Then I'd like to go to question number 2. With respect to the IAEAA, the first point I'd like to make is that the evidence that is provided does not require the consent — I'd like to respectfully just correct Commissioner Valentine — the consent by the foreign country when they provide the evidence. Our use for other essential investigations only requires the consent of our attorney general, not the foreign country providing the evidence.

Because of that, foreign countries, like Canada, have put in to their statutes that they cannot enter into these agreements that Congress said gave authority to the agencies to enter into these agreements, because they presumably thought it was a good idea, to enter in these cooperation agreements. Foreign countries

decree that you cannot, if there's a provision there that says you can use them for other than antitrust purposes. The statute in the United States says when you enter into these agreements you must have a provision that says you can use them for other purposes. What is the language? - essential to a significant law enforcement purpose.

There is a clear statutory conflict between foreign countries. Now, our view is that IAEAA is just not important, it shouldn't be, and our recommendation, I would suggest – and I don't agree with that – our recommendation should be to Congress, repeal it. Why have it in here? If we don't think or the bar doesn't think – or the agencies don't think it's important.

If we think that cooperation is important, than that provision that says you cannot enter into an agreement unless this provision is in there should be removed. And I believe there's nothing more important in our law enforcement than terrorism, and other essential – there are taxes and securities violations. All that is fine and dandy, but if you can find evidence that they fixed prices on explosives someplace - and let's assume the most extreme example, where there's an essential law

enforcement purpose, an investigation is needed, having been one who worked on the Patriot Act and a lot of the terrorisms post 9/11, there's nothing more important to me than that purpose.

But we should look at it as a matter of policy. When there is that provision, we will not enter into the agreement to begin with. The IAEAA was intended to allow statutory authority for the agencies to enter into cooperation agreements to gather, to gain, and exchange evidence that MLATs, mutual law enforcement assistance treaties, do not provide, like 6(e) evidence, like other evidence that requires confidentiality, and they do not have authority to do that because there are statutory protections.

IAEAA said, all right, for the amount of evidence that there're statutory protections, you can enter into these agreements and you have the statutory authority to disclose them that otherwise you would not, under MLATS or other areas. So, when other countries enact these blocking statutes, it's a clear conflict. They cannot enter into these agreements, agreements that presumably the Congress and the United States said are

good.

Just by way of background, Assistant Attorney General Bingaman was the head of the agency when this was enacted. I believe Commissioner Yarowsky was at the Judiciary Committee on the House side when this was being enacted. The way this was done, the very last day of Congress, where Assistant Attorney General Bingaman called Senator Hatch to say that we strongly want this, the Criminal Division of the Justice Department wanted this provision because they said the only way we would agree to this statute is to have this, because we might want to use the evidence. The last second came. The very last two hours of Congress adjourning, Senator Hatch broke the envelope and Assistant Attorney General Bingaman agreed, yeah, fine, it's better than nothing. And they didn't know what the ultimate practical effect of this provision would be.

Now, it may be true that the Justice Department would never agree to a repeal of this provision, but that doesn't mean that us as the antitrust recommending commission does not recommend to Congress, say, look, we support the mission, perhaps the provision dealing with

this mutual exchange of information for other investigations otherwise. But by putting this in here, we're not getting the evidence in the first place, let alone using it for other purposes.

That's why I care about – otherwise we should just recommend that they repeal the whole darn thing. Why have it on statute? So, that's where the *IAEAA* – now, the IBA, international bar association, recommends or suggests in their testimony that they would support that, and the ABA's international section also recommends repealing that section.

COMMISSIONER VALENTINE: Not the antitrust section.

COMMISSIONER DELRAHIM: What's that?

COMMISSIONER VALENTINE: Not the antitrust section.

COMMISSIONER DELRAHIM: That could be. That is an important provision.

I don't know if the White House would clear that position. But again, that's not our responsibility. We don't need to get OMB or agency clearance to recommend what we think would be good policy. And I have no idea

if I've made an articulate position of why this is needed, as a matter of antitrust enforcement policy, but I'll leave that for my colleagues to think about.

On the budget authority, I thank and commend my colleague, Commissioner Shenefield, for having better articulated the positions here. Part of this is USAID. I mean, it's not just to get USAID out of this business. The USAID's mission is to provide assistance to certain countries. Certain countries that need and qualify for this assistance. The antitrust agencies, for example, cannot provide USAID funded assistance to Egypt. Why? Because USAID - Egypt is a developed economy and cannot qualify for USAID funding. However, Egypt has got a brand new antitrust agency and are the ones who most need the assistance. Those countries who have, unfortunately, all sorts of political turmoil and problems who would qualify for antitrust assistance – it's probably the last aid that they need right now. They need assistance in all sorts of other areas, not antitrust. But yet they qualify for it, and that's great. We could go to Darfur and provide them antitrust assistance because they qualify for USAID, but we can't go to Thailand or – I

don't if Thailand is on the list – but Egypt and some of these countries with advanced economies.

That's why we need this change, and I don't mean budgetary authority that the agency can go out and seek taxes or impose new fees. What I mean is, Congress giving them the authority, the authorization, to use money, whether that money – each year, the agency is fully funded. They don't get a penny of the taxpayer's dollar. They're funded, as is the FTC, by the Hart-Scott-Rodino fees.

Each year, they go into this Rodino-Scott-Rodino trust fund, approximately 30 or 40 million dollars of additional money that's there. The most important thing is giving them authority to use out of their funds as they need. Now, the stronger statement would be, as Commissioner Yarowsky mentioned, use this amount – and you must do this. You must use this. Don't use it for travel. Don't use it to hire 10 more investigators, but – here's 500,000 dollars to use for technical assistance.

It's a strong statement by the government and by this Commission to say that this is important for our

convergence.

The last issue I'd like to quickly comment on is the first question we have on FTAIA. I think it makes a lot of sense for repeal on the whole thing, because Congress, and it really intended to limit authority, limit the reach of FTAIA. Certain creative litigants read into 6(a).2, an expansion of litigating authority. And so, however, as much appeal as that has to clarify the statute, I think, as Commissioner Shenefield said, we're already down this road where we have come a little bit too far. To me, the DC Circuit analysis makes sense. Common law analysis will probably come out to the same view. I think we have corrected the derailed system with the Supreme Court's decision.

I think a better change – and I'd like our colleagues to look at this – an option that is not here, however, was in the Justice Department's brief to the Supreme Court. Part of the issue came, in 6(a).2, such effect gives rise to a claim under the provisions of Section 1 through 7.

One way to address this, I think, more cleanly, is to address this through standing and, rather than

jurisdiction of the Court, the standing of who brings that claim. The litigants viewed this as – the plaintiff – the Court now has jurisdiction because the plaintiff is injured by effect given rise to a claim by somebody other than the plaintiff before the Court. I think one way to change this would be to say by a claim by the plaintiff would be in addition 6(a).2 that could clarify this and limit this more clearly. Another way would be to say, just put a standing statute, like, clearly saying only those – and repeat that – can bring a claim under 6 – under the FTAIA who are actually injured. You cannot bring a claim of somebody else – litigants in Nicaragua or Australia, or where was the *Empagran* plaintiffs' folks.

So, there's several other ways that we can discuss, but standing is something we should think about and perhaps restate the Justice Department's view. The DC Circuit really just overlooked it and said, oh, they're standing here – without any discussion. The Supreme Court just basically said the same thing, without ever going through a proper standing analysis.

This is a perfect candidate, I think, for a

limiting standing of these types of plaintiffs. Thank you.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: First, on the budget point, I'm trying to think what it is exactly we would say. Is it the case that DOJ or the Federal Trade Commission has requested funds for the purpose of providing technical assistance and not gotten them, or that, under their current budgets, they haven't been able to engage in activities that they would have liked to have been able to engage in because of the way that the budget is constructed. What is the ill that we really would be addressing? And what would we be saying to who? Would we be saying to the agencies, you need to request specific budgetary amounts to do this, or we would be saying to Congress, the next time they request it, don't say no? What is it exactly we would be saying?

COMMISSIONER DELRAHIM: The agencies haven't asked Congress for that type of authority, as far as I know. The issue becomes, the agencies cannot request funding for assistance in certain countries that don't qualify for USAID funding, even though, in their

determination, those countries probably need it the most.

So, what would we say to whom? Well, we could say two things. One is to Congress. Give them, Congress – you figure out – I mean there's magical language that the Appropriations Committees as well as the Authorizing Committees have of what that means. Give them the authority and give them a certain amount of funds. Those funds could come from direct appropriations or from the Rodino-Scott-Rodino fees, the surplus money that comes into the agency each year. And we're talking about a half a million – like a million bucks, is all we're talking about. It's not a whole lot. But we should leave the amount and the mechanism by which the agencies go to the Congress of how they do that.

CHAIRPERSON GARZA: But, Makan, right now, is it the case that if the DOJ wanted to respond to request for assistance from some jurisdiction that doesn't qualify – Egypt is the example you've used – so, Egypt comes and says we'd like to have someone come over for a few weeks for someone to come over to help us. Is it the case now that the DOJ is prohibited from using current funding to do that?

COMMISSIONER DELRAHIM: They're not prohibited from using their current funds that they use for other purposes for sending out.

CHAIRPERSON GARZA: Okay.

COMMISSIONER DELRAHIM: But they cannot, for example, get USAID funding. And here's an example, it's not so much having an international organization, there's a program, a great experiment that has continued to live on during the Clinton Administration of commercial law development within the Commerce Department. That they provide rule of law training by taking judges and other experts of law to certain countries. That is for the Commerce Department for dealing with intellectual properties and other areas.

A program similar to that, that says, agencies, you have a certain amount of money, and you have the authority to use for this purpose, and we encourage you to do that.

You don't think about, am I making a decision, am I using people's salaries and investigative staff? If there's a merger wave again, they would be hard pressed to send folks, whereas, if they had a program within the

Justice Department – the foreign commerce section or whatever – that was just dedicated to providing technical assistance training, economists and lawyers – investigators – that is independently funded and authorized.

CHAIRPERSON GARZA: So, Makan, your suggestion is that there would be a line item, and I guess this goes to your earmarked point.

COMMISSIONER DELRAHIM: Yes.

CHAIRPERSON GARZA: I don't understand the budgeting process very well, but your suggestion is that there would be an item in the DOJ budget, for example, that would say, you can use this much for technical assistance, and that is the only thing you could use it for. It would be added to the other funds and if you didn't use it then it would just disappear.

COMMISSIONER DELRAHIM: It just stays – no, if they don't use it. It just stays there until they use it or it goes back or whatever.

CHAIRPERSON GARZA: But your notion is that it would be additive to whatever –

COMMISSIONER DELRAHIM: Sure. It could be

added. It could be at the discretion of the Assistant Attorney General. At the end of the year, if he wants to use it for – my preference would be to keep it there with a strong encouragement that they use it for technical assistance.

CHAIRPERSON GARZA: And why hasn't DOJ or FTC –

COMMISSIONER YAROWSKY: Can I just jump in, Makan?

This really goes back to - as Makan said, there was a sea change; we all forget about it when the agencies were funded independently. At some point there became one of these cyclical crunches. A tremendous movement welled up about increasing Hart-Scott-Rodino fees and then using those as user fees – just another user fee – to fund the enforcement activities. There was a premium then placed on the priorities within every agency. Times were tight.

At that point – and I can't really reconstruct exactly how USAID came into the picture, but probably a sweetheart arrangement evolved. Whereas the agencies probably were delighted that USAID stepped up to the plate to support these type of activities without making

them make a hard decision to budget against pure enforcement activities.

So, I think what we're grappling with, Deb, is 1) whether you call it a line item or an earmark - I agree with Commissioner Shenefield that, the best of all worlds would be if the agencies themselves that have a vested interest in this and had control of the process; and 2) that it was a separable compartmentalized grant, or appropriation, so that it wouldn't be mingled or played off anything else; and then 3) say all that, but don't get so highly specific about amounts or anything more about the appropriation process, other than just saying it should be a line item. Because if we start telling appropriators how to do their business, other than the general suggestion, a line item, I'm not sure how well that would be received and I don't think we have the expertise —

COMMISSIONER DELRAHIM: We don't.

COMMISSIONER YAROWSKY: — To tell them how to do that.

COMMISSIONER SHENEFIELD: A line item, as I understand it, can't be created unless Congress agrees.

There is always a pot of money that is appropriated that is generally available to the agency. That will never be used for this purpose for as long as there is some other pot in some other agency that is subject to their budget, which is available. But it's subject to all of the ills and flaws that Commissioner Delrahim has pointed out.

For instance, the antitrust division is a separate line item in the Justice Department, but none of the other litigating agencies are. That makes a difference.

And so the suggestion, I would say - what should we say and to whom? We should say it to the administration, to the executive branch: technical assistance in antitrust is a good thing. We support it and we encourage you to do more of it. Second, please inaugurate or initiate proceedings to create a line item account for technical assistance that you would then control. And Congress, we applaud your enthusiasm for this and ask you to be responsive of the Justice Department and the Federal Trade Commission when they request such funds.

CHAIRPERSON GARZA: That's helpful. On the

question of the FTAIA, just to explain briefly, my reason for going with 1 is that I do think that it is something that should be further developed by the courts. I have the concern that if you just repeal the FTAIA then you leave it all to a very rough sea and you remove any kind of direction. But yet I don't think it's necessarily right to say and endorse the DC Circuit opinion, because I think it has potential flaws for reasons that you mentioned, John, so I don't see any point in us, personally, endorsing that particular formulation.

I hadn't thought about, but I am interested — I had initially thought that it didn't make sense to try to suggest any sort of statutory language to address the issue. But on the other hand, I am intrigued by the suggestions that have been made by Commissioner Warden and Commissioner Delrahim that to the extent that the concern is whether foreign entities would be able to come into U.S. courts to obtain damages for harm that they suffered outside the U.S., that maybe that is something that potentially could be cured or expressed in some very and simple language. So, I'd be willing to consider that further.

And then AIAEAAE – whatever.

[Laughter.]

CHAIRPERSON GARZA: I'm a little bit confused, because I actually was going on the staff memo and, like Debra, had the impression – the staff has now given us the actual language, but it was my impression that 6.2.1.1.2(e) – two in the hole – provided that an agreement under the IAEAA must include a provision allowing a foreign jurisdiction to use antitrust evidence in non-antitrust cases when that use is essential and the Attorney General of the FTC provides prior written consent, and that, under the reciprocity requirement, it would appear that foreign countries must also agree to lobby the US to use antitrust evidence produced by the foreign jurisdiction, but I assume it would be with the ABA's consent –

COMMISSIONER VALENTINE: It is. If you look at the IAEAA entered into between the United States and Australia, you will see that, in fact, Australia has to allow it's consent for the use of the evidence.

CHAIRPERSON GARZA: Okay.

COMMISSIONER VALENTINE: So I think, if I

understand what Commissioner Delrahim is saying, that even though Canada could, theoretically, enter into this and then, at times, not consent to the use of information, they are refusing to enter into one of these because they don't even want to be in a position, or they claim that they are prohibited from being able to give evidence that might be able to be used for something else. And it would then require them to exercise their political will and take a political hit for saying no.

CHAIRPERSON GARZA: To say no.

COMMISSIONER VALENTINE: And, quite frankly, we're exchanging evidence with Canada under the MLAT, so it doesn't really matter.

CHAIRPERSON GARZA: And if —

COMMISSIONER VALENTINE: And the staff memo is wrong in that accord. There is an MLAT with Canada that works for criminal prosecution.

CHAIRPERSON GARZA: It does work for criminal prosecution. So there's 6(e) —

COMMISSIONER DELRAHIM: MLAT does not allow for exchange of 6(e) information.

CHAIRPERSON GARZA: Which would be the grand

jury, basically —

COMMISSIONER DELRAHIM: Absolutely.

COMMISSIONER SHENEFIELD: But it doesn't prohibit enough trace information that you don't really need to go to that extent.

COMMISSIONER VALENTINE: Yeah. It works.

COMMISSIONER JACOBSON: But then the respective agencies are going to the absolute limit and probably, in some cases, maybe a little bit over in terms of what they properly can exchange with each other. I have no doubt that happens using anonymous names and the like.

What Makan is suggesting is to simply put it under a statutory rubric so it can be done correctly.

I have my flag up on another issue.

COMMISSIONER DELRAHIM: And also, Canada — it's not so much that they don't want to, they don't have the statutory authority to even enter in to these agreements, because of their blocking statute.

COMMISSIONER VALENTINE: Change their statute.

COMMISSIONER DELRAHIM: Before Canada enters into an agreement, the Minister of Justice must be satisfied that the agreement contains the following: that

any record provided by Canada will be used only for the purposes for which it was requested.

So, they do not have the authority to enter into this agreement. Like I said, if we're satisfied that MLATs or other things are there, we should just recommend that they repeal it. There's no need for that.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: Yes. I just quickly want to do this, because I know we're coming up to the time limit to shift here. Just to clarify, because this had happened at the moment I was initially commenting.

Yes, I will support the Garza additions. And the change in language that a number of folks had talked about, 9 and 10, I don't need to belabor that.

I think Makan has submitted a very compelling case by taking you back to the origin, really, of what happened with the IAEAA. When the first draft came up, and yes, I was up there handling that, and so was George Slover, who's in the audience.

It really was an antitrust only focus. This is what Assistant Attorney General Bingaman came up to do, and she worked very effectively with both sides of the

aisle of both Houses to see if she could try and get this done. By the time, at the end of the day, and I say this with admiration, because the Justice Department always proves to be such a worthy advocate and lobbyist, as we saw with the Standard Development Organization Act, as they came in at the last minute and got some very important things. They came in and had this other issue about non-antitrust uses on the agenda. The Deputy Attorney General had to make some accommodations and then there had to be political accommodations if you were going to get them before Congress went home.

So that's what happened. It doesn't make it good or bad as far as policy, but now what we have - we have a few years to look at what's happened. And my feeling is that the kind of language being suggested in 5 - though, as you know, I originally started out with 4 - It says it does not require, so it creates the flexibility so there aren't any roadblocks. Given that there was not a tremendous discussion of the non-antitrust uses ever in the deliberation over this legislation, I don't feel particular ownership over keeping it as it is, if there are some impediments.

And so I think, based on our discussion today, I'm leaning more towards 5, if that will help the state of affairs. I think we've talked about the budget authority. Commissioner Jacobson, I think you had the most brilliant characterization of the state of affairs, in terms of *Empagran*. But I also believe with some that there will be another 20 year arc if we absolutely repeal it. That's my only concern, and we're going to talk about some of those possibilities in the State Action section, I think, as well.

So, I am very open to try and consider the standing ideas or other ideas. I think if we're going to do that, we may want to put that out for comments or deliberate a little more about it. But that might be one approach we could use there. So, I think that wraps up my comments.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I want to talk about two issues, one is the budget authority. I thought what Makan said was persuasive with the Egypt/Darfur example. So therefore, what I'm understanding of the recommendation to be is that that money that would have

otherwise gone to, say, the Department of Justice or FTC through USAID. Instead, they get that money directly and then internally make a decision whether to use it for a developing or non-developing country. That seems to be perfectly reasonable.

What I'm less clear about in this discussion is the line item. As I'm sure many people do, I think international antitrust is very important. I think we can have an influence on how it develops. I think how it develops in the rest of the world will have an impact domestically on the United States because of increasing globalization.

What I'm unclear about is, are we saying that we want a line item for the agencies on technical assistance because we don't trust the agencies if they got additional money in the general budget to allocate it between enforcement and technical international assistance? That seems like what we're saying, and I just want to clarify. In general, it seems to me, I'd like the Justice Department to make the decision how best to protect antitrust in the United States. And that might involve influencing antitrust throughout the world.

I'd rather have them make that decision than some third party agency. And that, I thought, was the point Makan made, and I thought he made it effectively. What I was less clear about was what John was saying about the line item. You can read, our recommendation 7 as either requiring a line item or not requiring a line item. It's simply asking the FTC or DOJ to get the extra money. And it seems to me there's a subtlety here that's above and beyond what's in 7, and I would like some clarification.

I didn't get the same feeling about the line item as you did, John, but I think —

COMMISSIONER SHENEFIELD: Can I respond to that?

COMMISSIONER CARLTON: Yes.

COMMISSIONER SHENEFIELD: I don't think we ought to get into the question of line items or not line items. If we just say we believe in technical assistance and we ask the Justice Department and FTC to request it, and we think Congress ought to grant it for that purpose, that's all we need to do.

COMMISSIONER CARLTON: Okay. I'd be happy with

that.

COMMISSIONER DELRAHIM: I agree.

COMMISSIONER CARLTON: I think I found the arguments you two have made persuasive, and I was getting nervous about whether it had to be a line item.

COMMISSIONER WARDEN: I'd be happy to go along with that.

COMMISSIONER CARLTON: I want to go back to 1, *Empagran*. Since I'm not a lawyer — I don't know if that puts me at a disadvantage or an advantage —

[Laughter.]

COMMISSIONER CARLTON: My reading is that, for me to decide the difference between proximate cause and but-for cause makes me nervous. I thought the underlying issue was some person, say, in Europe, who buys Vitamin C, there was a Vitamin C cartel — can that person sue in the U.S. courts? And it seemed to me that one answer is no. And if that's the answer we like, it seems to me we can write some simple sentence to capture that. And I think that's a standing issue, but I'll defer to people who are better at drafting.

I will say that I'm averse to endorsing a

decision, because the logic of that *Empagran* decision to me, as an economist – I'll say lacks clarity. And, again, I just want to emphasize that if we're worried about deterrence, we should deal with that with a multiple. And if we're worried about giving too great a multiple when you're in a foreign cartel to a plaintiff, we can deal with that by decoupling.

I just think those issues have to be kept separate. But I would be very averse to supporting anything that refers to a decision out of the logic in the decision, because I don't understand the logic so clearly. And I think we should just state what it is we want to accomplish, and that's what we should either recommend or recommend that there be a statutory change.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Briefly. I am persuaded that we should not go back to pre-1982. I am completely persuaded that we cannot endorse the text of the *Empagran* decision and I would urge those who are urging that today to reread the decision with the issues that we've put together in mind.

I am going to suggest also – well, let me make

one other point – I think the injury occurring within the United States language that the staff drafted is interesting, but what about an agreement among two U.S. companies to exclude a French entrant from competing into the United States. Are we advertently saying that that French plaintiff should not be able to sue? Does the French plaintiff incur injury inside or outside the United States?

For all of those reasons, because I think it's easy to think about a clear statute, I think it's difficult to draft one that doesn't have one leak or another associated with it. I am persuaded by the Chair's suggestion that we should go with number 1, and encourage common law development and draft, without endorsing *Empagran*, but draft a report that articulates what we believe to be the most significant principles that I think we all, at the end of the day, can reach a strong consensus on. We don't want the Vitamin purchaser in Belgium who purchased from a seller in Britain being able to sue for triple damages in the U.S. courts.

I think we all agree with that. The problem with the Act as written is that it led people to think a

claim like that could be maintained. So, I would strongly urge that we coalesce around item 1, and that we work closely with the staff to articulate in the report the principles on which I think, at the end of the day, we all agree.

COMMISSIONER VALENTINE: If you think we all agree, I'm game.

Go ahead, Mr. Warden.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I think that the French company example is a red herring. If the French company has sought to make sales in the United States and been precluded from doing so, that's injury suffered within the United States.

COMMISSIONER VALENTINE: Yes. I agree.

COMMISSIONER WARDEN: I would go with the standing injury test and that addresses the problem.

COMMISSIONER JACOBSON: But I think we can do that in the context I was just suggesting, articulating principles in a report. I don't think those propositions are inconsistent with each other.

COMMISSIONER WARDEN: They aren't, but a simple

statute has a lot to recommend it.

COMMISSIONER SHENEFIELD: The problem with what you suggest, John, is that you're then back to the second Circuit and have a Kruman Rule, and the D.C. Circuit having an *Empagran* rule and the fifth Circuit having a whatever the name of that case was – a different rule.

The virtue of where we are now is that things have – all the imperfections built in – things have begun to coalesce in a generally healthy direction.

COMMISSIONER WARDEN: I don't agree, but –

COMMISSIONER SHENEFIELD: That's fine.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: No, I don't have a comment. I was just going to ask Commissioner Warden which of the three proposals, or alternative to the three proposals, are you at right now? I find your remarks persuasive, but I don't know which of those you are on.

COMMISSIONER WARDEN: Well, I'm at a revised version of number 3, which would preclude private actions under the antitrust laws for injury not occurring within the United States.

CHAIRPERSON GARZA: And actually, I think

Andrew was about to go — it would be useful, I think —

COMMISSIONER WARDEN: There may be some better language.

I'm sorry.

CHAIRPERSON GARZA: I think we ought to go around, since there may have been some movement, I'd like to go around and just check where everybody is on the FTAIA issue.

MR. HEIMERT: So, why don't we go around. And we'll add the fourth option, we can call it option zero, or whatever you want to call it, which is just outright repeal. Leave it to common law —

COMMISSIONER JACOBSON: I'm going to withdraw that one. I don't think anyone is supporting that.

COMMISSIONER DELRAHIM: What about the option of examining the standing issue.

CHAIRPERSON GARZA: I think that would be a variation on 3.

MR. HEIMERT: 3 we sort of modified, and we'll work out a proposal to capture —

COMMISSIONER DELRAHIM: Exactly.

CHAIRPERSON GARZA: If you could be clear on

where you are when we go around. And if we have a substantial number of Commissioners who are interested in it, then we can ask the study group and staff to potentially come up with some alternative language, which we could either consider as a statutory recommendation or alternatively, as John has described, include it in as a recommendation in the report.

So, if we could go around again.

MR. HEIMERT: I'll read off names. Just specify 1,2, or 3 — and 3, any clarifications as to where you're leaning.

Commissioner Burchfield on FTAIA. I'm sorry, 1, 2, or 3.

COMMISSIONER BURCHFIELD: I am with a modified version of 3.

MR. HEIMERT: Commissioner Cannon has stepped out.

Commissioner Carlton.

COMMISSIONER CARLTON: I'd go with a modification of 3, depending on the particular modification.

MR. HEIMERT: Of course.

Commissioner Delrahim.

COMMISSIONER DELRAHIM: A modification of 3, depending on — if we don't agree to that, it would be 2, even though it would be presumptive that we're somehow more important than the D.C. Circuit and more persuasive to the second Circuit than citing the D.C. Circuit and say, D.C. Circuit and the Antitrust Modernization Commission. But I think if you are a litigant, it could help.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: I am interested in seeing a standing proposal under 3. My backup is still one.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Ditto.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: I'm with the Chair and Commissioner Jacobson. Depending on the language, I'm just very uncertain about what kind of language and where we would go with that. I was very attracted by Commissioner Jacobson's suggestion that we stay with 1 and basically try to articulate the things that I think we do all agree to.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I'm with 2.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: The merging consensus on 3, assuming we reach consensus, but my backup would be 2.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I agree with Commissioner Valentine.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: I agree also.

MR. HEIMERT: With Commissioner Valentine and Warden?

COMMISSIONER YAROWSKY: My backup is 2, but let's try to see what we can do with standing.

MR. HEIMERT: All right. Should we move on to the IAEAA and just go around on that.

CHAIRPERSON GARZA: And just, to be clear, we will get Commissioner Cannon's views and then somebody will —

MR. HEIMERT: And Commissioner Kempf, as well.

CHAIRPERSON GARZA: Yes. Commissioner Kempf.

MR. HEIMERT: All right, IAEAA, 4 or 5.

Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I'm going to pass on that. Come back to me at the end.

MR. HEIMERT: Okay.

COMMISSIONER BURCHFIELD: I'm mulling it over.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: 5.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: 5.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: I'm going to do Burchfield on this one.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: 5.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: Let me pass for now.

[Laughter.]

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: 4.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: 4.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I've been persuaded to go for 5.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: 5.

MR. HEIMERT: Can we return to you, Commissioner Burchfield?

COMMISSIONER BURCHFIELD: I am persuaded by Commissioner Delrahim that at least in the instance of Canada, there is an issue, and so I would go with 5.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: Yes. I'm —

COMMISSIONER SHENEFIELD: 4 and a half.

CHAIRPERSON GARZA: Yes. Makan, I'll throw in with you and do 5.

CHAIRPERSON GARZA: And then Commissioner Litvack.

COMMISSIONER LITVACK: I'm where Commissioner Garza is, a 4 and a half. I'll go with 5.

MR. HEIMERT: Okay. We'll get the views of Commissioners Cannon and Kempf subsequently.

On the budget authority, which on our scorecard we labeled technical changes, but let's call it budget

authority, which would give the authority to the Department of Justice, Antitrust Division, to have funding whether it's a line item or not — and the FTC.

COMMISSIONER WARDEN: Do we need two agencies involved in international assistance?

COMMISSIONER DELRAHIM: Certainly, when you have one Executive Branch agency.

MR. HEIMERT: Why don't we just try to decide the bigger picture issue, and then we can come back on that if we have to.

COMMISSIONER JACOBSON: That is the bigger picture.

MR. HEIMERT: The specific issue in front of us right now.

All right. Commissioner Burchfield on 6 or 7.

COMMISSIONER BURCHFIELD: Leaning towards 7.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: 7.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: 7.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: I'm also leaning towards 7,

along the lines of what Commissioner Shenefield articulated.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Still on 7.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: 7.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: 7.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: 7.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: 7.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: 7.

CHAIRPERSON GARZA: All right. Maybe if you could just – no, I think we ought to have people just say on comity, just ask them 8(a), (b), (c), (d).

MR. HEIMERT: Why don't we label, Chairman Garza, the three principles on remedies. For convenience, we can label them (f), (g), (h).

(f) is seek to avoid inconsistent remedies.

(g) is try to create joint remedies, or create

remedies jointly.

(h) is having post hoc benchmarking reviews where those, (f) and (g), didn't result in consistent remedies.

COMMISSIONER JACOBSON: Just a clarification. These are all sort of exhortations rather than requirements.

CHAIRPERSON GARZA: I think that's right. Yes.

MR. HEIMERT: So we'll just go through everybody and if you can just – 8, and then which of those sub-options you like, 9 and 10. And 9, we've modified to study as opposed to pursue. If you understood pursue to be something more than study –

COMMISSIONER WARDEN: And 8(d) has been modified.

MR. HEIMERT: 8(d) has been modified, as well.

CHAIRPERSON GARZA: To request.

MR. HEIMERT: To request. All right. So, everybody's just as clear as we can be for now?

Commissioner Burchfield.

COMMISSIONER BURCHFIELD: 8, yes, (a), yes, (b), not at this time.

(c), yes.

(d), yes, as modified, change demand to request.

(e), if adoption is changed to study, yes. 9, if pursue is changed to study, yes, and 10, yes.

MR. HEIMERT: And did you have (f), (g), and (h), the remedies, proposals —

COMMISSIONER BURCHFIELD: I find it a little difficult to disagree with those, so yes on all them. And I'm also in favor of apple pie.

COMMISSIONER WARDEN: Is 8(e) adoption changed to study?

MR. HEIMERT: Was there — and I think that's a fair change. Was there someone who would object to changing on 8(e) that it was study rather than adopt?

COMMISSIONER JACOBSON: I'll vote for it with study.

MR. HEIMERT: All right, we'll put it into study, and with that understanding, we'll keep going.

COMMISSIONER VALENTINE: No. Actually, on the second bullet in the Atwood submission that was just passed around sort of accomplishes the same thing,

drawing upon the examples of comity in other areas, reviewing them, developing best practices that would work in the antitrust area. It's all the same thing.

COMMISSIONER BURCHFIELD: Madame Chairman, it seems to me that since this Commission has been delegated authority to do consideration and study that I would like to see our report look at those issues in more depth, certainly, than I've looked at them before. And just, maybe in the text of the report, talk about what is done in these other areas of law and examine the pros and cons on how that could be extended to the antitrust realm.

CHAIRPERSON GARZA: And, in fairness to staff, the discussion memo that they circulated did attempt to identify those aspects of bankruptcy, FDA, aviation, that people seem to be referring to. I think there wasn't a lot there. I mean, it's conceivable that the staff could go back to the people who testified and suggest that we look at that, but if I recall, we asked them and, when they were testifying, they kind of threw up their hands, too.

MR. HEIMERT: That's my recollection, as well. We put in the memo, at least, pretty much as much as we

got in the way of comments and testimony. And my recollection is that it may have been Commissioner Delrahim who asked one of the witnesses specifically to elaborate and he didn't have much elaboration to offer.

CHAIRPERSON GARZA: Well, let me ask the staff. Is there more that you could do in that area, in respect to these –

MR. HEIMERT: I'm sure there's more we can do. There's always more we can do on these. The question is how much and how much expertise we'd need to develop.

CHAIRPERSON GARZA: Go ahead.

COMMISSIONER VALENTINE: My sense was that we consistently got from all the witnesses the same statutes the staff has included in the memo, the bankruptcy, the Open Sky agreement, the FDA stuff. And quite frankly, looking at other statutes that require recognition of testing in the biotech area – doesn't really help that much.

CHAIRPERSON GARZA: We don't have much, no.

COMMISSIONER VALENTINE: So, I think that it would be sort of unfairly spinning wheels. And I think the concepts of deference or agreeing and reaching

consensus are better if we specify them in the antitrust area.

CHAIRPERSON GARZA: Well, I have to agree. I did look and pay attention to what the staff said about those other areas of law and just found them also not to be all that helpful.

So, that's why I say to the staff, was there a matter of time or was there anything more that you felt you could have developed in those areas?

MR. HEIMERT: We didn't go out and look at those areas carefully. We were attempting to summarize what witnesses told us rather than conduct more extensive independent research. We could obviously look at it and see if there was something to be mined from it, if the Commission feels that would be valuable.

CHAIRPERSON GARZA: I'm not sure that it would be.

COMMISSIONER BURCHFIELD: If our recommendation is to study something, that seems to me like we are abrogating our responsibility rather than to study it ourselves.

CHAIRPERSON GARZA: That's not my

recommendation.

COMMISSIONER BURCHFIELD: I had proposed that recommendation from adopt to study and that, upon reflection, seems to me that abandons what we are supposed to be doing.

I see on page 22, and I did read the synopsis of what the witnesses have said and what those statutory schemes, the bankruptcy-abuse prevention model, the Open Skies agreement, and the FDA statutes try to do, but it seems to me that's not especially analytical. And if we're going to recommend that this be studied, than it seems to me that's something that we can do.

So, my recommendation would be for us to look at that — for us to have the staff look at that.

COMMISSIONER WARDEN: Maybe you ought to reword (e) just to say study of comity mechanisms used in other areas and strike these particular examples.

COMMISSIONER DELRAHIM: One suggestion would be, and I agree with Commissioner Burchfield, but my motivation for suggesting a study by the two expert agencies, is one, the resources that they would have. And it's for them to study what kind of mechanisms might

be possible in the antitrust field. You know, mutual recognition agreement of testing for medical devices is partly because antitrust is so geographically limited it's different. You can't fully adopt that, however, it could be mechanisms.

I think the testimony that we got was from antitrust experts who referred to other areas. It would be helpful for the Justice Department and, if we had more resources, would be for securities experts, or banking experts, or tax experts to tell us, how does that mechanism fit. And then for the antitrust folks to say, okay, does this make sense in our field.

So, I hope that maybe the recommendation is we encourage adoption of comity mechanisms where possible, similar to those used in areas of bankruptcy, airline regulation and product safety, but we would like the Justice Department to study if such a mechanism is even possible and then report to Congress. That might be one way to encourage these types of mechanisms, but then have them study the feasibility of them.

CHAIRPERSON GARZA: I do know that we are running a bit late. But just to go back. I think,

Bobby, in terms of my tally, you were the only one who had expressed an interest the first go around in (e). Before we have the staff do more work on developing that recommendation, I'd like to see if there are any other Commissioners.

Makan, are you suggesting that you affirmatively want to pursue that?

COMMISSIONER DELRAHIM: No. What I would like would just be an encouragement and then request to the agencies to study this.

CHAIRPERSON GARZA: Are there any other Commissioners that did not previously endorse doing anything with (e) that now desire to do something with (e)?

Okay. I'm not seeing any indication. Why don't we see how —

MR. HEIMERT: We'll figure it out. It may be that we can talk about them without more extended study. We'll just have to see.

COMMISSIONER VALENTINE: Let's see how the votes go.

MR. HEIMERT: Why don't we get the rest of the

votes in, if you will.

Commissioner Carlton, on the comity, 8, 9, 10, and the subparts of 8.

COMMISSIONER CARLTON: Yes on 8(a).

8(b), I am uncertain because of the definition of the terms.

Yes on 8(c).

Yes on 8(d), with the change.

Yes on 9, and yes on 10.

And yes on (f), (g), and (h). Especially as an academic, I'm always in favor of studying things, but, just to follow up on what Commissioner Burchfield said, I think my own view is that item 10 is so broad and general. What we're saying in response to item 4 is to sort of think about these things – continue if we want – you could easily – one way to deal with 8(e) is to just have comity as one of those things that we are recommending the antitrust agencies continue to pursue.

I think I'd be more comfortable phrasing something like that rather than saying study this particular thing, because, based on what we've seen, it's not obvious to me that other comity mechanisms is a high

priority. But it might be. I don't want to preclude someone from looking at that.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: Yes to all, as modified and added, except for (b).

MR. HEIMERT: And (e) as you described.

COMMISSIONER DELRAHIM: As I described.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: (a), (c), (d), (f), (g), (h), 9, and 10, as Commissioner Carlton indicated, including comity with the procedural and substantive convergence.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: All of 8 other than (c), plus 9, plus 10, on the basis of mom and apple pie, articulated by Commissioner Burchfield.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: All of 8, except (e), and 9 and 10, as well. And (f), (g), (h). How could I forget.

MR. HEIMERT: Yes. If you say all of 8, I'll presume (f), (g), and (h) are included.

Commissioner Shenefield.

COMMISSIONER SHENEFIELD: 8(a), 8(b), 8(c), 8(d), if it's modified for request.

I oppose 8(e), I am persuaded there are no such other mechanisms, and we've studied it enough.

9, I do not acquiesce in study. I would want more than study. I would want this Commission to take a position that it makes sense for them to go ahead and do it and they can try and figure it out, but it isn't a neutral study.

And 10.

MR. HEIMERT: And (f), (g), and (h)?

COMMISSIONER SHENEFIELD: And (f), (g), and (h).

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: (a), (b), (c), (d), with request. I likewise think that (e) is unnecessary. The agencies are probably all very aware of those procedures and have either decided that they do or don't work in the antitrust context. If we ended up doing it, I would strongly recommend using the language in the Atwood submission about drawing upon application of

comity and having the agencies review other examples to develop best practices and tools. That, with the cooperation of counterpart authorities in other countries might be adopted for antitrust policy, but I think it's probably unnecessary.

9, yes, 10, yes, (f), (g), and (h), yes. And on 9, I likewise think it should it not be just study. This is something that is a huge problem and it should be pursued.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I favor everything except 8(e). And I, too, would be happy to have a — I would prefer that it would be pursue rather than study, but it should be adopted in one form or another.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: I'm with Commissioner Warden. 8(a), (b), (c), (d), (f), (g), (h), 9, with the word pursue, and 10.

MR. HEIMERT: All right. Why don't we take a relatively short break? Well resume at 5 until 12 with State Action Doctrine.

[Brief recess.]

The State Action Doctrine of Immunity

MR. HEIMERT: All right. We'll resume with State Action Doctrine.

Commissioner Garza.

CHAIRPERSON GARZA: If I could begin with a little bit of background. The Commission agreed to study the subject of immunities and exemptions from antitrust laws. Under this tradition they created State Action Doctrine, which shields states from federal antitrust enforcement.

The Commission is not writing on a blank slate here, certainly, as the FTC staff have issued a report and recommend several ways in which the Court should apply the Doctrine.

The Commission requested comment and testimony. Those recommendations are on the appropriate approach to a variety of issues, including the requirement that the states fully articulate an intent to displace competition, the degree of active government supervision and reaction that should be required to invoke immunity, the significance of interstate spillover effects, application of the State Action Doctrine to

quasi-governmental entities and political subdivision in the State, and whether the Local Government Antitrust Act of 1984 should be repealed.

We will begin to deliberate on those issues, we are actually going to honor the agenda, which put a hard break at 1:00, because some people have an expectation of that. There are some other things that they have to attend to.

We'll begin deliberations with the understanding that we may need to continue them on over to our next meeting.

MR. HEIMERT: All right. Commissioner Yarowsky.

COMMISSIONER YAROWSKY: Okay. Number 1, I do think the recommendation to clarify where we are in that swamp called "clear articulation" needs to be done. So, I don't support no change, status quo, here. I think the FTC report really did an excellent job, particularly in this area.

I really do want to commend the Federal Trade Commission. We've all read the report. But this is the kind of work that when you see it, you realize that the

FTC really provides a tremendous benefit in these kinds of areas.

So, I'll generally just start out this discussion, I think 2, is where I'm coming from in this sub-area. The sovereign-compulsion test is a completely different area. I mean, we could, I guess, superficially say, well, states, federal government, those are sovereigns, and now we're talking about foreign sovereigns. Sovereign compulsion really comes from a different direction, and I think trying to impose that test would not be wise, and we can talk about it, perhaps, later.

The McCarran-Ferguson – that is hardly a test if you want to use the word "regulation" in state law in the same phrase. So, no, I don't support that.

Moving to active supervision, which I think is a much more nuanced area. I do recommend change, but I'm really starting out in between – there's certain aspects of what the FTC report suggested that I thought had merit. Others, I think would be too empirically difficult to implement – and for other reasons – state sovereignty reasons, and I mean that sincerely. I think

there's some areas of the tiered approach that we might then cobble together with one or two suggestions of the FTC report.

Generally, on 7(a) — I think that is the state of the law, so it's very hard - if we're talking about a state legislator or a state court, it's very hard to start imposing state active supervision if you believe in Federalism at some basic level.

On (b), I do think that active supervision should apply to some hybrid situation where private actors are involved with an entity of the State, but we need to talk about that further. It's complicated, I think.

7(c), I think it's a good idea, but it's very hard to implement. I think that using the word majority is just very arbitrary. And I also think about regular reauthorization, suggesting that States have to regularly reauthorize conduct. I like the idea. I think that's good government. Would that happen in real life? I don't think so — all the time, consistently. I think we have to be also realistic about how our government works. We tried to do that in the previous panel about how the

appropriation process works, and I think we also need to try to do the best we can to put ourselves in the role of a state legislator and whether that would happen. But that doesn't mean we just give up the battle to try and get more control.

7(d), no, I don't think outside ombudsman would ever occur in most jurisdictions that we know of.

7(e), I'm very sympathetic to, about a rigorous case-by-case analysis about the conduct. It's difficult to carry out, but if there's a way we could structure it, I think I would support it.

Good faith, for me, is always a problem. We see it in a number of other statutory areas – civil rights and other areas. It does show up. The real problem is, it's a messy determination, but, I start from the assumption after the hearing, that there're some real compelling reasons. When private actors get signals from governments, whether it's about how to pay their tickets or how to renew their driver's licenses, people tend to respond to that. If they are given certain signals that a reasonable person would say were signals of behavior and what they're supposed to follow and then, at the end

of the day, after a nuanced factual determination, they find out that there wasn't sufficient active supervision, to me, that's not necessarily a good result.

But what we may want to look at is – if we do want to have a good faith exception – maybe upping the evidentiary burden to "clear and convincing," because I've seen other good-faith statutes and it becomes so murky with "preponderance," and so murky with the test of good faith that, at that point, it's very hard to decide.

COMMISSIONER VALENTINE: So what are you proposing, again?

COMMISSIONER YAROWSKY: I'm saying that I'm seriously for a good faith exception for private actors, but I would like to raise the evidentiary burden so that they would have to show to "clear and convincing" from the usual "preponderance."

Number 3, should courts create a market-participation exception to the State Action Doctrine? I think they should, so I don't agree with 9.

Number 10, I start with that assumption, 10, we may want to decide if we should limit it to certain areas, but I do start with it.

11, I really want to hear more discussion. There are truly 11th-Amendment considerations here, and we need to really think about that. And obviously the federal government could bring these cases, but whether private litigants do is, I think, a real issue, given what the 11th Amendment may prohibit.

Interstate spillover, as much as I started, facially liking that, having heard the testimony, the more I think about it, I'm not sure this is workable. And that's why I'm really anxious to hear what other folks think. Here's why: it may be that someone can develop a test or methodology — Dennis Carlton — to see if we could gauge that in some quantitative way that you would feel secure about, but even if one could do that, and the courts could implement it, it would really be a post hoc look back at behavior. And it's a look back that the state legislators didn't have.

So, it's very hard to hold people to a standard where the states might not have been able to foresee this or project the same analysis. It's not necessarily how they legislate, anyway, thinking about interstate spillover. And then throw everything into motion and

then later on have a case that - four years later, they look back and say, guess what, there're interstate effects.

So, I'm anxious to hear about it, but I guess, as I thought – particularly last night – about it, I couldn't see how to do it.

Should the federal State Action be codified? And then 6 is about the Local Government Act, and the reason I kind of joined them together – let me perhaps take the Local Government Act first if I could.

I think we should be open to some possible change to it. We may want to add the concept of active supervision. But, as Commissioner Cannon will tell you, that was thoroughly debated. I mean, it was purposefully not done, and the word "directed" chosen because of the angst that most legislators had about trying to codify the State Action Doctrine, or part of it, with all the existing case law. I mean, this is an area – I don't think there's any area of antitrust that has more Supreme Court decisions.

Okay. I'll defer to Commissioner Jacobson.

COMMISSIONER JACOBSON: Section 1.

COMMISSIONER YAROWSKY: Maybe Section 1. Okay, Jonathan, come on — But I think there is a problem with it, possibly the word "directed," as it has been looked at. I'm not sure where, historically, at that point, there's a terrible problem with it, but, Steve, we'll see what you say. I feel like it's a legitimate inquiry. But on the other hand, what would you do? Would you put the phrase in, "active supervision"?

That brings me back to number 5, should we codify the State Action Doctrine. I think absolutely not. This is really a case where just developing case law, as nuanced and confusing as it sometimes can be - I think it's a testament to antitrust, having developing case law over time. And so I do not recommend it. But if I take that position, and then we would recommend doing some clarification to the Local Government Act, which, in a sense, might be an exercise in codifying part of it, that would be an inconsistent position. But I do feel strongly about 5, that we should not codify it.

I think that is it.

COMMISSIONER VALENTINE: Where are you on 17, 18, and 19? LGAA 6.

COMMISSIONER YAROWSKY: LGAA, at this point, I look at whether there's a way to import a stronger active-supervision element to the Local Government Act.

CHAIRPERSON GARZA: That's 18.

COMMISSIONER YAROWSKY: That's 18.

17, though, I do recommend that there be a change at this moment, because I'm considering 18.

And 19, I don't believe we should add single damages. The whole purpose of this Act was - the city and municipality treasuries at least were potentially at stake. So, only subjecting them to one-third exposure as opposed to full exposure goes against the whole purpose of the Act. And if that were the case, I think we ought to just repeal the Act.

CHAIRPERSON GARZA: And where were you on 5, 6, 7, and 8? Were you on any of those?

COMMISSIONER YAROWSKY: 5, 6, 7, 8, I do recommend — 2, 5, I recommend change. So I don't support no change. 6 is a hybrid. Yes, in part, if not all of the FTC recommendations for active supervision.

7, in part, but not all the tiered suggestions.

Clear and convincing.

CHAIRPERSON GARZA: Okay. Thank you.

Commissioner Burchfield.

COMMISSIONER BURCHFIELD: Tentatively, I am in support of number 2 and 7(b) and (e).

I'm inclined toward 9, but am persuadable on that. 13, 15, and 18.

But I'm intrigued by the discussion.

CHAIRPERSON GARZA: Okay. Commissioner Carlton.

COMMISSIONER CARLTON: Let's see. My current vies are, I'm in favor of item 2.

Item 7. Under item 7, I'd be in favor of (a),(b), and (c). I'd like to hear what people think about (d), and I'd be in favor of (e).

I'm currently in favor of 10 and 11.

I'm in favor of 13.

I would consider 14 if I could get some clarity, with reference to what Commissioner Yarowsky said about how you measure these spillovers. What primarily and what overwhelming interstate spillovers mean.

I might be inclined to vote for 14 if it were

incorporated with some suggestion that if at least x percent of a good were sold outside of the State, then that, by itself, would mean that there's significant spillover. I'm in favor of 15, 18, and 19.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: My preferred course would be sovereign compulsion, which would answer all the questions in 1 and 2, and would eliminate the need to worry about the niceties in the second topic. If the Commission is not going to favor sovereign compulsion as the standard, I would opt for 2, 6, plus 7(b), those in combination, 10, 11, 13, 15, 18, and 19. I would also consider repeal of the Local Government Act.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: Right now, subject to debate, I am more on 2, on clear articulation and adopting the FTC report, which I thought was pretty well-done. For 2, at this point, some combination of 7 - I'm just not positive about that, yet. But I really like the idea of the tiered approach. So, I'll hold on the subparts on that.

On 3, I would say 9 at this point. 12, on no

recommendation on the spillover exception, I just agree with Commissioner Yarowsky. I just think that has difficulty written all over it. I would not favor codification, so I would go for 15, and I would leave the Local Government Antitrust Act as it is at this point, and would look forward to that debate, which I am sure we're going to have.

[Laughter.]

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: Recognizing, as Commissioner Yarowsky said, that number 3, sovereign compulsion comes from a different direction, I still favor it, and I would permit it only where a state compelled the action and its effects were primarily intrastate. I don't have any trouble with the word "primarily." I agree with Commissioner Jacobson that if we do 3, it moots 5, 6, and 7.

I favor 8; I'm happy to have the defense prove by clear and convincing evidence. I favor 11, with the exception, which I think is implicit in here, as to statutory local monopolies for water or whatever. And the 11th-Amendment problem is there, but the government

can sue. I must say I find it interesting that, at the international level, relations between states are at a higher hierarchical level than — because they're between equals — whereas between federal government and the states, it's not between equals, and you're able to sue a foreign sovereign in our courts when it's a market participant, but you can't sue a state. I'm not suggesting we propose a revision of the 11th Amendment, but I do suggest that that's an anomaly.

I definitely favor 14(a).

I favor 15, except I would adopt by statute the sovereign-compulsion standard. Only if that's not to be done would I favor 15.

I favor 19, and I guess I should say that if the group doesn't coalesce around 3, my second choice would be 2.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: I would favor number 2, the standard as proposed in the FTC report.

I would favor number 6 and 7(b).

I favor 10, 11, 13, 15, and I'm totally up in the air about 17, 18, and 19. Since I am, I'll say 17,

which is, since I don't know what to do, do nothing.

[Laughter.]

COMMISSIONER WARDEN: May I ask a question? I assumed that 10 was a lesser-included part of 11. If it's not, I record myself as favoring 10 as well as 11.

COMMISSIONER LITVACK: I took them to be separate.

COMMISSIONER WARDEN: I understood that from your comments.

COMMISSIONER JACOBSON: Me, too.

COMMISSIONER CARLTON: Could I just add that I neglected to vote yes on 8, and I intended to.

MR. HEIMERT: All right. Commissioner Garza.

CHAIRPERSON GARZA: 2 and, although I thought about the compulsion requirement, my main — and then I'm going to skip to the spillover question, because I'm interested in talking about this more, but, to me, the biggest issue is spillover. Essentially, if there were an activity that were purely intrastate, then I think the states should be able to do, politically, whatever they can do, and that's the instance in which concerns about sovereignty and federalism apply. But on the other hand,

if it's going to have spillover effects, as did the California raisin arrangement, then I think the states shouldn't be able to act. And I would do away with a nice parsing of clear articulation and active supervision in that case. I would just basically say, if the states can't vulcanize the markets – and whether significant spillover, however we decide to word it - they can't, basically, do things that contravene the federal antitrust policy.

So, I tend to go with 14, recommending statutory exception to the State Action Doctrine when there are interstate spillovers. I'm not sure whether (a) or (b) would necessarily be the best way to articulate that. I was thinking something along the lines that, unless there was a showing that an anticompetitive effect is intended to be borne – and is overwhelmingly borne – by the citizens of the state, and there is no material spillover into interstate commerce – we could probably talk about what the best way to do that is.

And then on 5, which is, should the federal State Action Doctrine be codified, I guess I would have

said no, except for that I don't know whether that's a necessary corollary to creating the statutory exception where there's spillover. So, I would say 15, unless it was essential to do what I regard to be an important issue with spillover; then I would say 16. And I would also say 17, no recommended change to the Local Government Antitrust Act.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I come to this having served as a Chairman for nine years of a state regulatory commission, so I have a different view, I fear —

COMMISSIONER WARDEN: More particulars, please.

COMMISSIONER SHENEFIELD: Virginia Racing Commission. Horse racing. And this is an area in which the elegant solution is just not realistic, I guarantee you.

So, with that prelude, I'm inclined to support 1. I'm inclined to support 7, and I would like to think about which, but, at this point, 7(a) and 7(b); no on (c) and (d). I'd like to think about (e).

I'm inclined to support 8. I would think of a possible variation of that, as opposed to changing the

burden of proof, maybe changing or detrebling the damages. In other words, they could be found liable, but only for single damages, the theory being that they've hurt somebody and should recompense them.

I'm inclined, at this point, to be in support of 9.

I'm inclined to support 14, though I share the Chairman's uncertainty as to how best to go forward.

I support 15, and I think my ultimate position will be 17, but I'd like to listen to the debate on 19.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: Okay. I was going to go with 2, but I am very intrigued by 3 and the sovereign-compulsion concept. And I guess if I could get comfortable with that being, in fact, constitutional and consistent with *Parker*, I'd be pretty interested in that.

Assuming that I stick with 2, and I need to move on the next set of issues on active supervision, then I am at 7, with (a), (b), and whether, in part, in (b) should be in major part or large part, I think it's worth discussing.

7(c), I think the hybrid public/private should

be also subject to active supervision if the majority of the decision-making entities are private. So, I would favor a combination of (e) and (c) and eliminating the last clause in (c) on the regular reauthorization, which will never happen.

I'm in favor of (d), and I'm in favor of (e), which I actually take to be pretty consistent with 6(c).

On 8, even though it is superficially appealing, I don't think I agree with that. If, let's say, the parties had, in fact, worked to draft the statute that was going to protect them, and then they were complying in good faith — although I don't know if I think they should get out scot free — I would consider a detrebling alternative, but I'm largely not on 8, I think.

I would go for 10 in the market participation, which I construe to mean that they would have to be actively supervised if they are participating as market participants. I would also consider 11. One might also do what I think is the FTC staff-report's alternative on that, which would be 11 in horizontal situations where the state is potentially colluding with private parties,

or is operating at the same level with private parties.

In the next set on interstate spillover, I'm with 13, at least, and I think I would go with 14, as well, as a stronger version. And, like the Chairman, I don't see that much of a difference between (a) and (b). So, I'll look forward to the discussion on that. On the codification, I don't think we have to codify it. And in response to the Chairman, I think we could not codify, but recommend that Congress state that the State Action Doctrine should not apply in situations where there are spillover effects; I think there are ways of doing that. I don't think that you need to codify State Action only to then create exceptions to it.

And then on the LGAA, I am on 18 and 19.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: *Parker v. Brown* was decided in 1943. Since then, the economy has become a good deal more interstate and international. You would think, in those circumstances, that the trend for the State Action Doctrine would be to narrow it, but the precise opposite has been the case. The Doctrine has expanded to immunize all sorts of conduct that has

effects on what, I think, everyone would view as interstate commerce. And I think the time has come to recommend that the doctrine to be reined in. The FTC report is a very elegant way of doing that within the existing structure. I would support it wholeheartedly if I thought that it would survive without leakage and further expansion as we go forward. I despair of that. I think the trend inexorably is going to be to expand the scope of the Doctrine.

I think a sovereign-compulsion articulation to the rule is more faithful to the origins of the Doctrine, is a good deal narrower, has a much greater pro-competitive impact, is relatively simple to understand, and would represent a clear rule for businesses to be governed by going forward.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I agree with the statements just made about sovereign compulsion. I'm happy to have 8 become detrebling rather than proof of a defense by clear and convincing evidence. I'm happy to have the Chairman's language of “no material effects outside the relevant jurisdiction” in 14 rather than (a)

or (b). And I will add what Commissioner Jacobson said about sovereign compulsion — only this in response to Commissioner Valentine's question. I think it clearly would be constitutional to cut this back, and I think you could abolish it entirely, and sovereign compulsion is at least some nod.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: This question is directed primarily to Commissioner Jacobson. The way you think about it, then, you'd have the compulsion requirement, and you'd have the Court consider the existence of spillover, but you would be willing to have a situation in which, if the state compelled it, but there was substantial spillover, it would still be protected? Even putting aside, for the time being, the issue of treble damage actions, but just thinking about it in terms of injunctive relief, or federal enforcement actions.

COMMISSIONER JACOBSON: No. If the spillover is sufficiently great, I would not have compulsion as a defense. I would find the state law to be preempted in those circumstances by the Dormant Commerce Clause.

COMMISSIONER WARDEN: I agree.

CHAIRPERSON GARZA: This was part of the difficulty, but we had – who was it who testified – submitted an article or testimony about the Dormant Commerce Clause? Well, it would cover –

COMMISSIONER JACOBSON: Well, it came up in Carlton Varner's –

CHAIRPERSON GARZA: Yes. That's who I was thinking of.

COMMISSIONER WARDEN: Well, even if it wouldn't, we could have the spillover statute.

CHAIRPERSON GARZA: Well, I know, but John was not proposing a statute. I think you were looking at 13. That's why I was asking the question.

COMMISSIONER JACOBSON: Well, our list of recommendations is to propose this as something that would be judicially accomplished. This is one where I would support properly drafted legislation, as well.

COMMISSIONER BURCHFIELD: Point of clarification. Commissioner Jacobson, there could be situations in which you have sovereign compulsion that is trumped, as I understand it, by an interstate spillover and therefore the antitrust immunity would not attach to

the private actor acting under state compulsion.

COMMISSIONER JACOBSON: The state statute that purported to compel the behavior would be deemed preempted, either by specific federal legislation, if applicable, or by the Commerce Clause.

Now, I do realize that would give rise to some inequities, and I think item 8 in our list would be a good fix in that situation, because you don't want a company that really has complied in good faith, but the state law is later found to be unconstitutionally broad in terms of its interstate scope, and then it's subject to any liability, whether it be single or treble damages. So, I would support that.

One thing about sovereign compulsion - we see less of them today, but rate-bureau conduct would be subject to a sovereign compulsion defense, and that's because the statute provides you cannot charge a rate other than that which is set by your tariff. And if the tariff shall be set by the rate bureau, the state is compelling price fixing in those circumstances.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: What would be

extraordinary is under what you think is the most narrowing test, and I don't disagree with you. In some instances, sovereign compulsion — you could end up with McCarran-type regulation. You could have a situation where the state sets up a regime. Private actors file. Nothing happens for 30 days, and then suddenly a list emanates out of that agency with tariffs or rates or whatever and that's it. There's no supervision of that. You could say they were directed because the statute directed them, but there'd be absolutely no review.

My problem is - here is what I think we have to decide, because there's a major conceptual choice here, because I think we're mingling different analyses. I do it all the time, and I'm disappointed in myself. So, that's why I'm going to try to discipline myself today.

State Action, for the most part, conceptually, has been looking at the behavior of states and how they — what they did and their behavior after they authorize something to occur.

When you get to things like spillover, you're really looking at an outcome situation and then looking back. Let me give you an example. A small little winery

in California starts producing wine, and it's basically only consumed in a county, and it's certainly only consumed within the state borders of California. There're some regulations that go on that the state has put out, and they're complying with them and they're following them.

Suddenly, word has gone out about this little winery, and people start coming and eventually it spreads all over California. It eventually spreads into Arizona. Not much, but it does.

COMMISSIONER JACOBSON: They take the bottles from California?

COMMISSIONER YAROWSKY: No. But then someone comes in, and there's a distribution agreement to one little place in Arizona. But then it catches fire and becomes a regional and then a national brand, but over a number of years. What is the obligation —

COMMISSIONER VALENTINE: What's the State action?

COMMISSIONER YAROWSKY: Well, let's say there're some state regulations that govern wine making, and they are following that, and at some point it really

does have more effects on citizens outside of California, or at least equal effects. Is the state legislature charged with reviewing the situation every 6 months or every 12 months to see if they've reached that critical mass of having had effects ripple beyond the borders of California? How do they know? When they pass these regulations, or the agencies under their supervision pass the regulations, they're just looking at what's in front of them under the assumption that they're regulating something within the state.

If you can show, Commissioner Jacobson, that they did this with full knowledge, that it was going to be interstate in nature, I would understand that. But that's not what most regulation is about.

COMMISSIONER JACOBSON: I'm going to play the expert witness for a second and say that you need more facts, because if the state law - and this is what I think Commissioner Valentine was getting at - says, thou shall charge no less than $20 a bottle, that's pretty clear. That would be a sovereign-compulsion defense. The courts would figure out a way in the real world that the State Action Doctrine applies to whether it was

supervised or not. They would still immunize it in some manner. And so the question would be, is the sale to the Arizona distributor one that occurs in California, and probably the courts would say yes.

If we're talking about some other types of regulations, thou shall not produce more than 20 bottles a year, then we're dealing with different sorts of impacts. It really does depend on the nature of the state statute. You can't just have one size fits all.

COMMISSIONER YAROWSKY: That goes back to crafting the interstate-spillover test. How do we craft that to be sensitive to these different effect situations? If you could, I would embrace it. I just don't know how that would happen.

COMMISSIONER JACOBSON: I agree with John, use the word "primarily;" I think primarily is a good test.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: If you were talking about your regulation, like you can't call your wine Cabernet Sauvignon unless 80 percent of the grapes are of that variety or something, that's not an anticompetitive regulation. If you're talking about not charging less

than $20 a bottle, then the winemaker, not the California legislature has to figure that out. And if I were the judge, I'd construe the California statute to apply only to sales in California, that being the limit of that state's legislative jurisdiction. I don't think they can follow people all over the country and say that you can't charge less than $20.

I think that we use sovereign compulsion in the international field. That seems to work perfectly all right and it would really tighten up what's a mess, in my opinion.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: John, I'm taking, from the way that you're articulating it, that your concern may be about the equities and predictability. But if the situation were such that, say there's some kind of evolution — and I take the points which I share about — it's difficult to address it in the abstract, and could depend on the nature of the regulation, but if you limit private-party liability, based on some notion of good faith or some detrebling and all that basically happens is the court says at some point in time, look, the

California legislation happens to be having an impact on competition in interstate commerce; therefore, either the statute is construed only so that it impacts sales in California, or the statute is preempted. What would be the harm in that? You're not having, necessarily — there's no particular inequity to private parties. They have the cost of defending the lawsuit, but as long as they were acting in good faith, and if there were detrebling, that would be the limit of it.

And, in terms of federalism concerns, basically you're saying, at some point, yes, if your regulation is impeding interstate commerce and is inconsistent with a federal policy of free and open competition, then no, you can't do it. Is that really unfair, even if it happens over time?

COMMISSIONER YAROWSKY: No, it's not unfair. I would love to build this into the doctrine. I think, often with interstate-commerce cases, as soon as you can kind of nudge beyond the boundaries of a state where modern jurisprudence is - assume there's interstate commerce. So, the threshold is easy to arrive at. If you use a different test, “primarily”, or some other test

other than you just break through the threshold, I think that's a harder test to implement. That's why I would like, if I'm not imposing upon you, Professor Carlton - just help me see a test that a judge could actually implement and give guidance to people, other than just a threshold test, that once you push beyond the borders a little bit, that's fine. You're caught in interstate commerce. I understand that kind of test, that's easy. But coming up with something where you draw a line somewhere else seems a little more difficult.

COMMISSIONER CARLTON: Well, that's a hard question, and there is no easy answer, but let me give you my reaction, and that is this: if you believe that a state should be allowed to do whatever it wants to its own citizens, because of doctrines of federalism, then what matters is not a balancing of where the costs are borne primarily. It really becomes an issue, it seems to me, of whether the harm that you impose on the rest of the states, the anticompetitive harm, is material.

So, the way I think about it is, if there were a cartel within the state, but maybe the state legislature forces – what are my views on that? My views

are, if it's just people within the state who are purchasing, I don't like it, but there's no problem. That's the political process. But when you start asking, are there a significant number of sales outside the state, once that is occurring, those citizens who are buying the product are being harmed by an anticompetitive cartel. And it seems to me that they're entitled to not be harmed. And that's why I think that the impact outside of the state — the anticompetitive impact outside of the state - is material. We can talk about what we mean by material.

Then I would go after it. I'm not sure I would balance the net harm or gain in the state. Think of a state legislature controlled by producers. The citizens of that state may get harmed, and the producers may benefit. The harm to the consumers may be much worse than the gain to producers, but the producers have more political power. So, I'm a little worried about balancing gains and losses.

I think that you have to view the whole, that the political process within the state has produced some outcome that we're going to live with because that's

democracy. But what I would not allow to happen is any harm imposed outside of the state that's material.

COMMISSIONER YAROWSKY: I agree with that principle.

COMMISSIONER CARLTON: Now, the other thing that's a little unclear – maybe I only need clarification of this, but there are a lot of acts that states undertake to, for example, protect labor or protect the environment, that will have consequences on output. And I always try to think of it to separate out those types of considerations from considerations that are of a pure anticompetitive nature.

In other words, if someone wants to regulate the environment within his or her state, that's a tricky question, it seems to me. I don't think we're debating that. I think we're only debating whether state legislative action, whose goal is primarily anticompetitive – whether that action should be prevented if there's a material effect outside the state. That's my sense of what I'm thinking about, and in my sense, it should be yes. And it should be "material outside the state."

COMMISSIONER YAROWSKY: And so you would look at factors like commerce and indices of commerce?

COMMISSIONER CARLTON: Yes. I mean, there's a well-defined notion of harm to consumers, and you could actually, if you wanted to, calculate it. I'm not suggesting we put that in our recommendation, but you can calculate — if the state raised the price by 10 percent, how many consumers are buying? What's the deadweight loss as a result of that action? You could absolutely do that. That's not typically how the government necessarily decides when to sue and when not to sue, what mergers to attack, what not to attack. Maybe they should be using that criteria, but there's a well-articulated criteria that, if you had the data, you could use. Or, if you don't have the data, you could roughly estimate.

So, use some — I think you use de minimis at the end of the — to take care of your few bottles of wine going to Arizona.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Let me address the sovereign-compulsion issue by asking Jon a question. Because my worry is that we're in danger of becoming

unmoored from reality here, and rather than sort of go down a quixotic path of purity, I'd like to figure out what it really means in the real world.

What would the foreign sovereign-compulsion defense say? That is to say, who would have to compel what, and what does "compel" mean? Or, to put it another way, I take it what you're advocating is overruling the *Southern Motor Carriers* case.

COMMISSIONER JACOBSON: That would be a consequence, yes. Absolutely.

COMMISSIONER SHENEFIELD: Okay. So, is it a matter of the legislature compelling — requiring certain conduct? If that's what you're focusing on, what about the 95 percent of state regulation as to which legislatures don't say anything at all like that but actually have substantial force. And what about things that aren't required or compelled, but are filed pursuant to things — what is it that sovereign compulsion, in your formulation means?

COMMISSIONER JACOBSON: Well, it has the same meaning to me - state sovereign compulsion would have the same meaning to me as foreign sovereign compulsion. You

don't see it that often, but there is a defense — I can't cite you a case, but I'm confident the courts would recognize it — of federal-government compulsion. It's well established that authorization of conduct by the federal government is not a defense. All sorts of cases like that, one of which is *Socony-Vacuum Oil* - It's well established that authorization of foreign conduct by the foreign sovereign, as in the *Continental Ore* case, is not a defense that conduct needs to be upheld.

What I'm suggesting, which I understood to be the office of item 3 on our list, would be to import the jurisprudence from most of the cases that involve foreign sovereigns into the state arena.

Now, who would authorize it? Anyone who is authorized to compel conduct by a private individual —

COMMISSIONER SHENEFIELD: You used the word "authorized." Did you authorize or compel?

COMMISSIONER WARDEN: "Authorized to compel," he said.

COMMISSIONER JACOBSON: Authorized to compel. I think it would be subject to the defense. If a duly authorized state regulatory agency says to the private

party, you must do this –

COMMISSIONER VALENTINE: State but not municipality.

COMMISSIONER JACOBSON: – then that is sovereign compulsion. I think that's a defense today.

COMMISSIONER SHENEFIELD: Well, yes, but the defense reaches well beyond that today. That's the question.

COMMISSIONER VALENTINE: There's an interesting quote in our memo from the staff which actually says the compulsion test would recognize the origins of the Doctrine, both in *Parker* and more recently in *Goldfarb*, which held that, for the immunity to apply, "anticompetitive activities must be compelled by direction of the state acting as sovereign."

COMMISSIONER WARDEN: That's just building a lot on one word, I think.

COMMISSIONER JACOBSON: Yes. I don't think that was essential to the holding of the *Goldfarb* case.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: Yes. Jon, my question is really – I have a couple questions on compulsion – but

one thing I wasn't clear on, and it sounds like you may be conversant with a lot more of the case law than I am - If the test were "compulsion," would the courts basically examine the question of whether or not there was compulsion by looking at issues of clear articulation and active supervision and everything else? How would it be different? We talked about *Southern Motor Carriers*, but what kind of state schemes that, right now, are okay would become not okay if we changed the standard to sovereign compulsion?

COMMISSIONER JACOBSON: I can't answer that comprehensively. I do think, as I indicated before, and I saw Susan Desanti agreeing with me on this one narrow point, although I think she would prefer the FTC report as our holy grail here - If a state creates a rate-bureau regime, pursuant to which the companies have to file tariffs — this is not uncommon. It's becoming less common as the economy matures, but if you have to file a tariff, and if you can't deviate from that tariff — if deviation from the tariff would be illegal, that, to me, is sovereign compulsion. It's not an executive order from the President saying, you must raise your price by

20 percent, but it's the equivalent of that.

And I would think today the same analysis would apply. There would be other bases upon which to find a state action defense in that context, as well. I can't state it any more comprehensively than that it would just take the Doctrine that's well established from cases like *Continental Ore* forward and pour it into State Action.

CHAIRPERSON GARZA: How would you respond to the argument that the staff - it starts at page 12 - that such a standard could limit the ability of the states to regulate commerce by requiring that legislation specifically compelled discrete forms of conduct, and that it could result in more, rather than less, anticompetitive conduct by precluding private parties from acting in a less anticompetitive manner?

COMMISSIONER WARDEN: That only makes sense if the states decide that they want to go out and pass all these compelling statutes. I think that's an atmospheric argument, or what's the psychological reaction going to be argument.

CHAIRPERSON GARZA: I thought what the argument was is, if the states could only act – and bring the

spillover issue aside — but if the states could only act by compelling specific conduct, that would potentially result in more anticompetitive conduct than less. Because otherwise, they could set up a regime and not dictate particular things. What you might end up getting is conduct that is less anticompetitive, right?

COMMISSIONER JACOBSON: I think John answered that pretty eloquently. The only thing I would add is that you're not going to see very many of those statutes. If you're a private party, it's going to be a lot harder to go to your state legislature and get that kind of statute passed than it is under the regime today where all sorts of nighttime lobbying for anticompetitive legislation is the order of the day.

Sorry.

What I said was really good, but I can't repeat it.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I think that, inherent in compulsion, as has been said, if you don't do this you're acting unlawfully, and you're subject to punishment. That's what it means in the foreign sovereign-compulsion

context. And that's what it would mean here. It's not something that says you may do this, or you're authorized to set up this, that, or the other thing. It's, you must conduct yourself this way. And to use the rate-filing example, that would be accepted today, but even today, you wouldn't allow California to say, if you're doing business here, you can't charge rates in Arizona unless you don't file them here. Nobody would suggest that's permitted under any version.

CHAIRPERSON GARZA: Just to clarify again, what if the states want the industry to self regulate. There's some issue. We want you to get together and establish some sort of standards. And somebody comes along later and says, well, that's hurt diversity in product offerings. That's hurt certain types of producers. That's basically had an anticompetitive effect.

So, in that scenario, could the state tell the industry participants to get together and come up with some sort of industry standards to deal with some sort of problem?

Well, to dictate the standards or say you had

to follow that, is not compulsion —

COMMISSIONER WARDEN: Well, if they don't it's not compulsion. If it's just an invitation to address a problem it's not compulsion. On the other hand, as Dennis said long ago, we're not talking about environmental problems or minimum wages and their indirect impact. If they say, we think there — if the legislature or the governor says, we think there's a public problem posed by x, and the problem arises from the conduct of a particular business, and we'd like recommendations from the people in that business as to how to resolve that problem, I think that's immunized to react to that, but it's different than if they say we think it would be fine, but we're not making you form a cartel. I think those are distinguishable cases.

CHAIRPERSON GARZA: The reason I'm asking, as I indicated, I somewhat favor the idea of compulsion. But I think it's important to understand what the effect would be, because, whatever we say, various state legislatures are going to be concerned about what is this going to change for us and what we do. And, of course, the people who are subject to regulation in those are

going to be saying the same thing. And so I want to be clear about what would be different under compulsion standards.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: Well, yes. I think I'll pick up from it. I'm concerned that, and let's take the standard-setting example. Through the 70s and 80s, the federal government actually directed standard setting. During the Reagan revolution about privatizing, there was a goal to get the government out of that activity and just encourage private actors to get together to do a lot of that, safety, many different standard-setting activities.

They certainly authorized it in many statutes and regulations. I think the private sector felt comfortable getting together to do that activity, because they had been, in a sense, authorized to do it and they came up with standards.

COMMISSIONER JACOBSON: But it wasn't exempt, because it was authorized by the federal government.

COMMISSIONER YAROWSKY: Well, it was authorized.

COMMISSIONER JACOBSON: Authorization is not a defense.

COMMISSIONER YAROWSKY: I'm saying this happened at the state level, as well.

COMMISSIONER WARDEN: Just remember Chicago Board of Trade. Combinations to promote commerce are not prohibited by the antitrust laws. And if Congress, or the President, or Governor So-and-so, or some state legislature asks an industry to deal with a safety problem, or probably even a standard-setting problem, I think you can strongly argue that those are combinations to promote commerce, whatever the text of the State-Action defense.

COMMISSIONER JACOBSON: I agree.

COMMISSIONER YAROWSKY: Well, you can argue it, but I think most of the precedents that we have don't have this narrower bent of “compelling.” And it may create a review of a tremendous number of laws and regulations. That may be a very good thing, but practically speaking, and I'll ask Commissioner Shenefield this, would that happen? You saw a narrow sector; would that happen? And what would happen at the

state level, in terms of the actual reality of that?

COMMISSIONER SHENEFIELD: This would be entirely fantastic to state regulation, and the notion –

COMMISSIONER JACOBSON: In a bad way.

COMMISSIONER SHENEFIELD: I'm sorry. Let me just finish. The notion that anyone will take it seriously is seriously flawed. This just sweeps away a whole bunch of state regulation, which we can talk about when we have more time.

CHAIRPERSON GARZA: Well, we're going to adjourn the meeting, and we'll resume with our deliberations on this subject when we meet next.

I have a proposal to staff, which if I could just get their response - It would be helpful for me, at least – and I don't know how readily available this information is, but just to take a state and find – I'd like to have a sense of the practical consequences, just so I understand – to get a sampling of the kind of state activities that exist today that might be impacted by what we said and we did. And you can let me know whether that's an impossible task to accomplish or whether that's –

COMMISSIONER JACOBSON: Perhaps Commissioner Shenefield could aid in that issue. I'm very worried about that issue. We don't want to do something that's not going to be taken seriously. So, I think it's a very good suggestion to get some real-world reality checks.

COMMISSIONER WARDEN: And it would be interesting to know what kind of state regulation would be swept away —

CHAIRPERSON GARZA: If any.

COMMISSIONER WARDEN: If any. But John says a lot.

CHAIRPERSON GARZA: So then we'll ask the staff to do that. Andrew, when is the next meeting?

MR. HEIMERT: June 16th.

CHAIRPERSON GARZA: And what are the times? Is it a full day?

MR. HEIMERT: Yes, it is.

CHAIRPERSON GARZA: Is it here?

MR. HEIMERT: Yes, it is.

CHAIRPERSON GARZA: Okay. Thank you.

[Whereupon, at 1:00 p.m., the meeting on the State Action Doctrine was convened.]