ANTITRUST MODERNIZATION COMMISSION

PUBLIC MEETING

Tuesday, July 25, 2006

Morgan, Lewis and Bockius, LLP
Main Conference Room
1111 Pennsylvania Avenue, N.W.
Washington, D.C.

Pursuant to notice, the meeting convened at 9:31 a.m.

PRESENT:

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

ALSO PRESENT:

ANDREW HEIMERT, Executive Director and General Counsel
SUSAN DESANTI, Senior Counsel
WILLIAM ADKINSON, Counsel
NADINE JONES, Counsel
MARNI KARLIN, Counsel
KRISTEN GORZELANY, Paralegal
JAMES ABELL, Summer Intern

CONTENTS

Criminal Remedies, Indirect Purchaser Reform, Treble Damages, FTC-DOJ Clearance Issues, State Merger Enforcement, The FTAIA Amendment, and Regulated Industries

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

CHAIRPERSON GARZA: I would like to welcome the Commissioners and staff and the folks in the audience who have come to observe us.

All the Commissioners should have gotten a fairly substantial paper to prepare for today's deliberations, and I just want to mention that the staff put in a tremendous amount of work since we last met, pulling together where we are and what was left and responding to the various questions that we had put to them and asked them to research - I think they did a terrific job and put a lot of work into it. So, I want to thank the staff for their efforts, initially, and express our appreciation for their work.

What the staff did — one of the things they did — was try to go through and identify the issues that we had left over for further debate and resolution, specifically. Those are the ones that are included in the notebook behind Tab A. Tab A, the overall outline, is their effort to compile where they understood the various indications of support from the Commissioners to be. The remainder of the materials relate to the specific issues where we had open deliberations.

So, we are going to go through those. As I

understand it, in addition to the issues that we had left over for further discussion, I think that some of the issues that they have included are ones where there wasn't a consensus position, where there were three-way splits or four-way splits, and it wasn't clear to the staff that we had come to any consensus. The purpose of including it here was to see whether we could move to any kind of consensus. So, those are the two types of issues included for today's deliberations.

The thought is that we can get through this today, and tomorrow we'll go back through the entire collection of tentative recommendations and findings to essentially make sure that we are all on the same page, do some wordsmithing, and talk a little bit about the direction that the staff will take with them as they go off to start to draft sections of the report.

So, that is where we are. We are going to start with criminal remedies. You should have a list of the order in which we are going to go. And what I hope you will do is address yourself to the questions that the staff has indicated in the supplemental criminal remedies discussion outline and indicate what your position is with a very short explanation.

We don't have very much time for this discussion, so I would ask that you would keep it very brief. So, with that, do you want to start, Mr. Heimert?

MR. HEIMERT: Sure. Kristen Gorzelany is going to pass out ones with numbers. I think the ones sent around didn't have numbers, but they are relatively few, so it should be relatively clear.

Commissioner Jacobson, if you could begin.

Criminal Remedies Follow-Up

COMMISSIONER JACOBSON: With regard to the first heading, I vote yes for 2 and 3.

I could be persuaded to vote yes for 4, but I prefer 3. I would be open to further discussion on the subject.

With regard to the second heading, I continue to believe that number 7 would be the choice, but this is an area where the Brandeis maxim, where it may be more important that it be settled than settled right, would apply.

So, I would vote for 6 as a second choice, but my vote now is for 7.

And then, with regard to the third category, I adhere to my vote at number 8.

And no to number 9.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I vote for 1 and number 5.

With regard to 8 and 9, I am not sure that either of them currently address my views.

As I understand it, and having thought about this some more, it seems to me that what the government would need to prove beyond a reasonable doubt to trigger the applicability of Section 3571(d) is that the entire conspiracy is the gain or loss by the entire conspiracy, not by the particular defendant.

At that point, having a jury finding of a number based upon that, the judge could apply the Sentencing Guidelines and reach a sentence to find any number below that, which would mean that the jury would not have to hit the nail precisely. It could believe that the total gain or loss was a billion dollars but render a finding beyond a reasonable doubt that the gain or loss was at least half a billion dollars, and the judge could apply the Sentencing Guidelines without a further jury finding to enter a fine of anything less than $500 million.

On that understanding, I am not sure — I am

inclined toward 8, but I think this Commission could do some service by making a statement, if the other Commissioners agree, by making a statement along the lines that I have just indicated. I think there is some confusion out there about exactly what the jury has to find beyond a reasonable doubt. Is it the total gain or loss by the conspiracy, or is it the 20 percent in the Sentencing Guidelines? I think it is the former.

So that is my position. I am inclined toward 8, but I would like to see further elaboration on it to clarify this area of the law, which I think definitely needs clarification.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: I basically come down exactly where Commissioner Burchfield is.

I would vote 1, recommending no change.

Similarly, on 2, number 5, no change.

And finally, on the question that Commissioner Burchfield raised, I agree with him that it would be useful to clarify. I agree with him as to the applicability. So, I would vote for 8, but suggest that we do comment on how we believe the statute should be interpreted or what the jury must find.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: Well, I am in the same place where Commissioner Burchfield and Commissioner Litvack are.

On I, 1. On II, 5. On III, 8. But, having listened to Commissioner Burchfield, I am persuaded that such a statement as he described would be useful.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I am in favor of number 3, number 7, and number 8. And, with respect with number 8, I associate myself with Commissioner Burchfield's comments.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: Okay. I can do this quickly.

1, 5, and 8.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I also would go with 1.

And I think I voted for 5 before. I think that is probably the right answer.

I noticed in the prior voting that we actually had more recommending that it applies to loss caused by the entire antitrust conspiracy. I think that is probably along with what Commissioner Burchfield was saying, the way it has to come out for the government to be able to proceed.

So, I would be happy to go with 6 as well, if that is where the majority would be, but it looks as if everybody is coming out for 5. I am sorry I am making this complicated.

Put me down for 5, but I think the thoughts in 6 probably ought to be reflected in the way we look at 8.

And I will vote for 8, again with Commissioner Burchfield's fillip.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I vote for item 1.

I favor item 6, but I would happy to go with 5 if we explained that there was a sentiment that the law should be "caused by the entire antitrust conspiracy," that that is what the relevant issue is.

And I agree with Commissioner Burchfield's comment on number 8. So, I would vote for 8 as long as we comment on what we think the proper reasoning is that the court should follow.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Numbers 1, 6, and 8.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I vote for 1, 7, and 9.

And let me make a comment on II, where I voted for

7.

As between 5 and 6, I am infinitely preferable to 5 over 6. In other words, what I am recognizing is that I am one of the few votes for number 7, it would appear.

On number 8, that is a tentative vote subject to more discussion concerning what Commissioner Burchfield raised.

But I am interested in further discussion on this.

MR. HEIMERT: All right. Commissioner Jacobson.

COMMISSIONER JACOBSON: We are in an area of criminal law. I think the first thing we learn in our first year of law school in criminal law is that criminal statutes need to be definite, both as to the offense defined and as to the penalty.

A significant majority of the Commission is voting to support the status quo of a regime where there is absolutely no certainty, where there is absolutely grave doubt about both the number of the fine in corporate cases and the Constitutionality of the entire approach. I believe that is an abdication of our responsibility.

The comments that we received indicate – from the Justice Department, they think things are just fine because they can, as Deputy Assistant Attorney General Hammond

indicated in his remarks, all defendants are catering to this regime, and therefore it must be good. The fact that the government is wielding its considerable power in an unconstitutional manner may result in outcomes such that the defendant always wins, but it is not something that, as Americans in a free society, we should necessarily support.

3571 is unnecessarily vague unless, as the AAI comments astutely pointed out. The fine determination, the gain or loss determination, is so low that a jury can fairly say that it has been found beyond a reasonable doubt. I thought that was a good point that they made.

If the government is going to seek corporate fines in excess of $100 million, that is fine as a policy matter. I actually support that strongly. I think that is important to the enforcement of the criminal statutes, but let's put it on constitutional footing. Let's increase the fines level so that the fines can be administered consistently with the due process clause and with *Blakely, Apprendi,* and *Booker*. To just have the process proceed on the basis where defendants do not have the position to go to trial strikes me as fundamentally wrong.

With regard to the question of whether the gain or loss applies to the defendant or to the whole conspiracy,

again, this is something where, at least defendants ought to know what the law is.

So, leaving it to the courts in the circumstance where all of the commentators noted the obvious fact of life that defendants don't go to court, therefore there are no rulings on the subject, I think is an abdication of our responsibility.

So, if we don't know, let's say so. Let's say we don't have the expertise to address the issue. That would be fine with me. But certainly we ought to choose between the defendant's sales and the sales of the whole conspiracy. As between the two, upon reflection, I am, candidly, indifferent. I will go for the defendant's sales just as a swipe on the government, because I think it is not behaving constitutionally in these respects.

In any event, let's get a determination out there so people know what the penalties are for the conduct involved.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I respect and very often defer to Commissioner Jacobson's views in matters of antitrust. Here, however, I do think we part ways.

I am not as concerned about the constitutional

issues as he is, because I think it is not irresolvable, A. And B, if there is a constitutional problem with 3571(d), it is a constitutional problem that crosses all substantive matters of federal law, RICO, federal fraud investigations and prosecutions, and the healthcare area in other places. So, it is either less of a problem or a much greater problem. I am inclined to think that it is a lesser problem than the commentators have indicated.

I would reiterate that, in terms of proving gain or loss, the jury doesn't have to hit the nail on the head. Certainly in a civil case there is a lower burden of proof, but juries find antitrust damages all the time in civil cases. And while, to use a somewhat irrelevant example, perhaps, I think a jury would be hard pressed to find beyond a reasonable doubt that I could run a six, or seven, or ten-minute mile. I would hope that they could find beyond a reasonable doubt that I could run a six-minute forty-yard dash.

So, I think since the jury doesn't have to be precise on the upper limits of the loss in order to justify application of the Sentencing Guidelines, then I don't think that there is that much of a constitutional problem here.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I would like to press Commissioner Jacobson — and my thinking was somewhat similar to Commissioner Burchfield's. I was saying to myself as I listened to Commissioner Jacobson's remarks, that it is not solely an antitrust issue that is being raised.

And if the recommendation for item 2 were to recommend that 3571(d) be repealed, for example, then I might be more comfortable. And I would like Commissioner Jacobson to address the pros and cons of broadening it. The problem I had with it, as written, is that it reads like a special pleading by antitrust defendants. And I think there is a serious problem, but I don't necessarily think it is an antitrust problem. I am bouncing the ball back, basically, to Commissioner Jacobson.

COMMISSIONER JACOBSON: That is a difficult question. Clearly, if you are talking about bank robbery or embezzlement, there are a number of offenses where double the gain, double the loss, can be calculated beyond a reasonable doubt without a problem. Depending on what the RICO conspiracy is, that may or may not be the case. Depending on what the healthcare fraud and abuse may be, that may or may not be the case.

We do know in antitrust cases that the calculation

of an overcharge is always difficult. And the only way the statute can be applied constitutionally is in the sense recommended by the AAI, i.e., setting the number so low that the jury can fairly find beyond a reasonable doubt that that threshold has been passed.

I think that is wrong as a policy matter, because at the margins, it will lead to fines that are too low and will lead to a calculation that, perhaps, does not pass the $100 million threshold and then, therefore, leaves the statute basically nugatory. That is why I would support a very significant increase in the fine to $500 million.

Now, the argument against that is that we just went back to Congress a couple of years ago and we don't want to go back again. Well, it is not the Justice Department going back this time. This would be the Antitrust Modernization Commission, which was tasked by the Congress to look at this. If we said, "You made a move in the right direction a couple of years ago, but you didn't go far enough," I would like to think that determination would be respected.

With regard with what to do about 3571, generally, that is a very hard question. I personally lack the expertise to answer it. I feel I do have the expertise to

answer that in antitrust cases it is unwise and, in many applications – certainly the way it is being applied by the Justice Department – it is an unconstitutional provision.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Let me make one further comment. The problem I have with 1, which I voted for, is that we have a number of the recommendations, and you see in the memo that Chair Garza referred to, sort of where we stand generally and tentatively on everything, the potential recommendations for review.

There are a number of them that say – let me give you one that I think I am the lone ranger on – merger enforcement is swell. That is, sort of, not an unfair characterization. The problem I have with this one is that it is subject to interpretation the same way. "Recommend no change" sort of sounds like everything is hunky-dory; why would we change it? Whereas I agree with Commissioner Jacobson that the current application of 3571(d) is very problematic, I just don't see two things.

One, a neat division of antitrust from other statutes. And second, I don't like the sort of pleading nature in the way that it is currently framed. So, while I am down as a yes there, it is a reluctant yes in the sense

that I cannot figure anything that is better.

Now, if the report were to be a speaking report that noted the testimony that was given with respect to this matter and registered a general concern, I would be a lot more comfortable than something that might be interpreted as everybody here thinks that everything is hunky-dory as it presently is in the application of 3571(d).

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: It seems to me, just listening to Commissioner Jacobson, that, at least in my parsing of it, there are really two issues, and they are different.

One is the issue with the statute itself. Is it unconstitutional or unwise, to use the term that you used, with respect to antitrust. I guess I come out with Commissioner Burchfield, perhaps a little stronger. I am not sure it is unconstitutional at all, and, if there are constitutional issues, they can be dealt with, I think.

The second question you raise I think is more troublesome, and I think, if true, we should address it by language or by statement rather than here, and that is whether it is being used unfairly, unwisely, or even impermissibly, by the Antitrust Division. If the Commission

believes that is the case, then that should be stated as such, and there should be comments made upon that fact.

It is a different question, it seems to me, than trying to either obliterate the statute, carve antitrust out in the special pleadings that Commissioner Kempf referred to, or some other remedy. I think if the problem is the application of the Antitrust Division, that is the one we should address. I don't think the problem is the statute, as such.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I never cease to be amused by former assistant attorneys who go from the tactics that are well accepted in the attorney's office, using them day to day, into private practice, and then complain immediately about the unfairness about the tactics that they have used.

Criminal investigations are ugly. The government has an array of tools that it can use to force pleas out of corporate defendants and individuals, ranging from debarment from doing business with the government, which is a death knell in the healthcare context or in the defense context, to, as has been suggested, the threat of prosecuting senior executives in the criminal division. And this isn't

something that the Antitrust Division has done requiring as a predicate for pleading guilty, a waiver of all privileges.

And so, to say that what the Justice Department, what the Antitrust Division, is doing with respect to 3571, is unfair, unjust, or unconstitutional, it seems to me is neglectful of what goes on in any large-scale criminal investigation. The people who are being investigated almost always think that they are unfair, but those tactics are pretty well accepted in the American court system for good or ill.

The second thing is that it is true that the Justice Department may extract better or tougher settlements from antitrust defendants than it would get if it took the cases to trial, but a good friend of mine is fond of saying that litigation, and particularly trials, are the sport of kings, and that the courtroom is a dangerous place. That, in my view, is what makes the process so much fun and interesting, but it is true that most corporations are averse to taking their cases in front of juries when there is that much at stake.

Antitrust does not present a unique situation here. And I am concerned, as Commissioner Kempf says, that if we try to modify 3571(d) in a way that limits its

applicability to antitrust, it looks as though we are doing special pleading in antitrust cases, whereas the cases in all other areas of criminal law are equal, if not greater.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I don't see how this could be viewed as special pleading for antitrust defendants if it were coupled with a recommendation that the maximum corporate fine be raised to $500 million.

And I agree with Commissioner Jacobson's of why it makes sense not to apply this statute in the antitrust context, and I share his lack of expertise of how to apply it in any other context. Although, in most areas other than RICO it would be a lot easier to apply.

I would like, also, briefly, to say why I favor recommendation 7, and this is a repetition of my comment, I believe, when we first considered this issue, which is that, under the present regime, if the courts interpret this to apply to the entire conspiracies damages, and there are 20 co-conspirators, the government can fine each one of them, or seek to fine each one of them, on the basis of the entire loss or unlawful gain. And the result is basically 20 times what the loss or gain is.

While I agree that we have long accepted ugly

criminal law enforcement, I find it, personally, extremely distasteful. I think that strong penalties but not draconian penalties are what ought to lie behind criminal law enforcement. And that is why I favor 7 and 3.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: Well, some of what I was going to say has already been said. My thinking really had been that it didn't make sense to make a carve-out for antitrust, necessarily, in this area.

But I also wanted to ask Commissioner Jacobson why he believes, and he said it several times, that the way that the Department of Justice is proceeding currently is unconstitutional. I mean, I understand why the Supreme Court had concerns about the constitutionality of the way that 3571(d) was being applied, but what I don't understand, Commissioner Jacobson, is your view that currently, the Justice Department is behaving unconstitutionally.

COMMISSIONER JACOBSON: Let me first say that I don't want to be unduly critical of the Justice Department here. They have been dealt a hand by the regime that exists. Criminal cases are ugly. The people have violated the law. And no one can second guess them for having done their most to take every advantage to which they are

entitled under the law. And no one can possibly question the magnificent results that they have achieved.

So, I want to put that out there, that I think the Justice Department, over the past 15 years in particular, has done a magnificent job in this. The problem that is most troubling to me is the following, and that is that the government is getting fines that are being accepted by defendants only because they are protecting individuals from further prosecution as a result of accepting the fine.

There was some discussion of that at the hearing. It was danced around a bit, but it was made absolutely clear by Deputy Assistant Attorney General Hammond's speech – he says that. The benefit of not litigating gain or loss is that your individuals will get a better deal. You know, he has done a terrific job of enforcing the law in this respect.

But when you are forcing corporations into a position where they are agreeing to a fine that they know, in court, would never hold up, it is not a matter of, there is a one percent chance of failure, so let's take the risk; That is not the calculation. The calculation is the executive vice president for this division will get a pass if I agree to this fine. If I don't, it is full speed ahead

and they will go after all the individuals, and the price is not worth paying.

We are taking a statute that is unconstitutionally vague, that, in its application, in the vast majority of the cases, in the amounts of fines that we are talking about — we are not talking about small fines that clearly pass the beyond-a-reasonable-doubt test as explained by AAI. We are talking about vast fines. People are accepting those fines, notwithstanding that they could not pass muster under the *Booker* case to protect individuals. And I have seen that in action. It is deeply disturbing to me.

I think it is our role to say something about it, and to put the enforcement of criminal law - we are the only ones in a position to do this, in a manner and in a mechanism that is consistent with the due process clause.

CHAIRPERSON GARZA: May I just comment on that, Commissioner Jacobson?

Although we had responses to our requests for comment that suggested that there were additional reasons why corporations would agree to settle on fines and some of them being the traditional ones that cause any company to settle in any litigation, what is not clear to me is why you think that this undue pressure, as you have put it in the

past - trade money for people, why doesn't it exist if you have a Sherman Act fine maximum of $500 million, or $100 million?

Isn't it always going to be the case that no matter what the number is, you are always going to have the same incentive?

COMMISSIONER JACOBSON: Well, Commissioner Burchfield has made the same point to me privately, and it is a fair point.

I do believe there is much less opportunism among both the government and the defendants when the fine regimen is put on a footing where it is more definite, where the rules are known, and where they are consistent with the Constitution.

Part of this is just not wanting an unduly vague statute to be enforced. But the point you are making is not wrong in most cases. It is probably wrong in a few, but not in the majority.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I have one alternative way in thinking about this in order to reach more clarity over the longer term. I would note that we had a tentative majority of Commissioners voting for the comment that the

Sentencing Commission should reevaluate and explain the rationale for the 20-percent proxy that is under the guidelines, including both the assumption of an average overcharge of 10 percent of the amount of commerce affected and the difficulty of proving the actual gain or loss.

I would be happy to add my vote to that recommendation. In light of what one learns from the Sentencing Commission, then one could certainly, because they have not addressed this for a long time. They did not do it at the time of the 2004 amendments to this statute. I do think we have learned a fair amount about how to calculate cartel overcharges, and there is some indication that, in fact, it may not be as difficult to prove actual gain or loss as was initially thought when this was adopted.

It is also highly likely that in many cases the average overcharge is greater than 10 percent, and in some it may be less than 10 percent. Once one has the benefit of that learning, then presumably that could be applied with respect to number 8 to enlighten and help elucidate how to, in fact, calculate a 3571(d) fine.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: I think we parsed the issues, and I just want to make a couple of comments.

One reason – and I think, Commissioner Jacobson, you are right, I mean, definiteness is a hallmark attribute of criminal drafting and the criminal code, as best as one can. But usually there is a sense when there is criminal drafting going on in Congress and the Judiciary Committees that they do want, if they can, general applicability. That is why I feel very strongly. That is my background, other than just antitrust, having seen some of that.

That is why I do think it is important that antitrust not be partitioned off. I think we have heard other expressions of that for other reasons, but I view it also as an important principle. I mean, we don't want to specialize antitrust in court. No one is suggesting that in the new Article 1 court.

These courts that hear the antitrust cases, that are subject to these statutes, are courts of general jurisdiction. They are Article 3 courts. And so that is I would have great difficulty to partition it off.

Obviously that is also because the criminal area implicates so many constitutional protections, and there is a desire to keep a uniform treatment when those treatments are involved. Civil cases also have certain protections implicated but not quite in the same degree.

What I am interested in, and I am not sure we have the time or, perhaps, facility to do it is whether there are some empirical suggestions. I mean, no one wants to tie the hands of the enforcers. On the other hand, if someone can be definite — I mean, if this was a discussion of grand jury practices, Commissioner Jacobson, we would hear some of these same comments. It is just an area of enforcement law that doesn't necessarily comport with the kind of due process protections that you see in a courtroom, but there are reasons for that, because that is live jeopardy.

Because I know of your experience in the criminal area now, Commissioner Burchfield and Commissioner Warden and others — are there some definable practices that we really could separate out and look at. I mean that is a reach for some of us, but are there some definable practices that we should think about to the point of commenting if they are so egregious in application. That is what would be helpful for me to consider.

Can I project that toward you, Commissioner Jacobson?

COMMISSIONER JACOBSON: Practices by the Government, or —

COMMISSIONER YAROWSKY: By the Government. That

is how we get to the point where –

COMMISSIONER JACOBSON: No one can talk about – everyone is going to have stories, pro and con, on that, and no one can talk about any of them. So, that is a difficulty. I pass on that.

Let me say this. I haven't heard a lot of comfort by anyone with 3571(d). I have heard a significant majority of us say that we are uncomfortable pulling antitrust out by itself. Can we at least not suggest to the Congress that they revisit the issue of 3571, whether a better course might be to approach fines for particular offenses seriatim and individually, and give some further consideration, in light of the *Booker* decision that 3571(d) is a good policy going across the board?

It seems to me; at least, we should do that, because clearly there are problems with them and the statute. I think everyone here is saying that there are equal problems outside of antitrust. Well, that is not a good thing about the statute. That is a bad thing. So why don't we say something about that in our report?

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Four quick things.

I would like to get Commissioner Cannon's vote on

these things, when appropriate.

Second, Commissioner Warden's reasons for why he voted for number 7, I would like to echo those and add one more. And that is that, with the specter of all of the things that he said, people are reluctant to have their day in court. So, to me, it is always, when you have the specter of, "Gee, if we lose this, we could be subject to 20-30 times what damage we caused." People will say, "I don't want to take that risk. I would rather plead guilty." So, you have people pleading guilty to crimes they didn't commit, sort of on an insurance policy-type recommendation. I find that troubling.

But that same point also carries me to not want to increase the maximum fine to $500 million, especially for small firms. That raises that same kind of specter. So, some of the arguments about the problems with this also cut me to be opposed to recommendation 3, I guess it would be.

And finally, Commissioner Jacobson's proposal that we at least say something like, "Congress or the Sentencing Commission or somebody should take a fresh look at this" is one that I would support, subject to articulation of the language.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I think Commissioner Kempf made a valid point with respect to the increase to $500 million. But I find that, sort of, specific dollar number less troubling than this gain or loss concept, which we saw applied, not in the antitrust area, but to these two officers from Dynegy, or however it is pronounced, who got sentenced to 25 years in prison because the judge said, the gain or loss is this, and that is what the Guidelines say, and so forth. So that, I share your hesitation, but I don't think it applies as strongly there.

With respect to Commissioner Yarowsky's question about practices, the one thing that Commissioner Jacobson has identified is this concept of individuals being traded. It may be possible to amend the practice, there. I mean, for example, in cases where defendants agree to certain relief to the plaintiff's class and to pay the class's counsel fees themselves, it has always been the practice, considered dictated by ethics, that you first agree on the relief and only after that do you discuss counsel fees.

And perhaps we could recommend a practice where the Antitrust Division first agrees to pleas and fines with corporate defendants, and only then discusses indictment or length of sentence for individuals. Since I strongly

believe that prison is the deterrent for hardcore antitrust violations, I would favor that.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: I want to try to clarify something about option 7 and the premises. Maybe I am confused, but – so, 3571(d) doesn't set the fine for the individual, organizational entity. It just basically says, I think, in a situation where the conspiracy is so large that the amount of commerce affected and the damages exceed $100 million, then if you can prove beyond a reasonable that double-the-loss or double-the-gain is higher, then the ceiling goes up. It doesn't necessarily mean that Entity A, who is relatively small and can't - for some smaller proportion of the commerce, gets fined an enormous amount. Their fine is still set individually and could still be small, right?

COMMISSIONER WARDEN: I understand that.

CHAIRPERSON GARZA: Okay. Because it seems to me that if you change 3571(d) to say that it applies to loss caused by the particular antitrust defendant, you are really not achieving what 3571(d) was meant to achieve, which was basically to give some flexibility and say, in general, the fine is going to be $100 million, but there may be the

extraordinary case where you have got a conspiracy that is so large that the impact is so large that a $100 million fine is not going to allow us to do what we should do with it.

If you go down to the individual company level, then you really aren't achieving what 3571(d) was intended to achieve at all. So, at that point, it seems to me that you are better off saying, get rid of 3571(d) rather than change it in that way.

COMMISSIONER WARDEN: That is fine with me, also.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: It seems to me - again, as a non-lawyer, I can't speak to any real issues about constitutionality, but it seems to me that the relevant question here is what you think the optimal penalties are to deter activities that the Justice Department goes after with these criminal remedies, in addition to recognizing that there are civil damages.

Several people, and this probably sounds reasonable to me, have expressed that the threat of going to jail is something that has a powerful deterrent effect, and that may well be. It is not obvious to me why I would object to a corporation paying to remedy the — and paying a

large amount of money — to get rid of that possibility when they are under a criminal indictment.

So, putting aside, again, constitutionality issues, it does seem to me that if criminal penalties are a great deterrent, that the fact that some people have to pay a lot of money to bail out some of their top executives doesn't sound like such a bad thing to me, especially if you think that it is hardcore cartel activity that is being deterred.

I also worry that, if you didn't allow that, that something worse could happen, and that is that some lower person might take the blame, and that the real instigators might get off scot-free. This way, at least the whole corporation is forced to pay for the criminal action.

As I see it, the real question here is whether you want to have the discretion in the Justice Department to really hit hard at what I think this is used for, which is hardcore cartel activity. Which is why, if it is, number 6 made sense to me, that it is a harm from the entire conspiracy that you really want to look at, and if it is really bad, you want to give the Justice Department powerful tools to punish.

Really, the point on number 8, which Commissioner

Burchfield raised, is something – again, I'm not sure I fully understand all the legal issues, but it does seem to me to be a concern that the standard, as I understand it, is one that a jury would have had to find beyond a reasonable doubt. And I thought that could be dealt with - the concerns in the *Booker* case could be dealt with in the context of our report, if we have those. So, those are my views.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: I was going to make the same point that Commissioner Carlton just made. I just want to give it a slightly different twist to say that I am not offended by the notion that the government makes these deals, because it may legitimately be in both parties' interests. From the standpoint of the corporation, the time, risk, and energy to its executives is such that is to be agreeable to paying a fine and pleading.

From the standpoint of the government, similarly, on a perfectly legitimate basis, it could well be that the fact that the government can conclude – and should be free to conclude – that exacting a large fine from a corporation is sufficient penalty and not putting the whole case at risk by going to trial.

There is no certainty that the government is going to win its case by any means. So forget bluffing, forget talking, and forget negotiating. In the back of the government's mind is, I'm making the deal here. What is the best I can get, and what are the risks?

It is not unreasonable, in my judgment, for the government to conclude that the best thing it can do is get the maximum fine and not try to take the case to trial. In those circumstances, they should be free to do that.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: Let me, if I can, Mr. Heimert, vote first.

1, 5, and 8 is how I would come down.

I am wondering, though, in 1 - should we make it clear to Commissioner Kempf's point a minute ago, say, "Recommend no statutory change"? Because the rest of the options are in the context of changing the statute as opposed to interpretation, or something of that nature. I think that might be clarifying.

You know, the problem that we have got here, this morning, when it comes to 3571, its application - Commissioner Jacobson could be right, Commissioner Litvack could be right, Commissioner Carlton could be right, and I

think Commissioner Burchfield is always right, in the sense that –

COMMISSIONER VALENTINE: Take that to the bank.

[Laughter.]

COMMISSIONER CANNON: – in the sense that, all we have to look at is the conclusion. We see the outcome of something, and we don't really know what went in to formulating outcome. It may be the scenario Commissioner Jacobson is talking about, in terms of someone going to jail versus the company paying a large fine. It could be the Justice Department's concern over whether or not they will prevail. So, I just think that, given all of that, all we have to struggle with here is the outcome, and that is really all we can control at this point.

So I am, at this point, in favor of leaving things as they are and would be for 1, 5, and 8.

CHAIRPERSON GARZA: So you may come to rue the day in the courtroom, sometime, when Commissioner Burchfield pulls out a piece of paper and quotes you.

COMMISSIONER CANNON: That wouldn't surprise me at all. But let me say this. One thing that Commissioner Burchfield did mention, and I think –

COMMISSIONER BURCHFIELD: That would be considered

clear and convincing evidence.

[Laughter.]

COMMISSIONER CANNON: Indeed. If you can find that in the transcript, I will give you a buck.

But I will say this, if I can add one thing that Commissioner Burchfield raised, that I have been involved with the American Bar Association and some other groups — which is this whole question of waiver of attorney/client privilege through related issues on the *KPMG* case, the *Stein* case that just came down a couple weeks ago with Judge Kaplan.

In my personal opinion, I think these are very, very serious issues. I think it is something that has occurred in the last two or three or four years around post-Enron — it is really a serious matter, and I am hopeful that we will be able to address some of that, actually, in the Commission report, when it comes out.

COMMISSIONER WARDEN: Here, here.

COMMISSIONER BURCHFIELD: Although, if I may, the Antitrust Division, as I understand it, explicitly does not ask for the waiver —

COMMISSIONER CANNON: Well, yes. I'm talking about the amnesty program, which is Commissioner

Shenefield's great creation. Don't take that as a condemnation of the Division's practice, which it certainly is not. I know the amnesty program works differently. I actually talked to Tom Barnett about that when he came, and that is clear.

But I am just saying that, overall, in law enforcement today and prosecutorial decisions, I think it is troubling, and I am concerned about it.

COMMISSIONER JACOBSON: But in that regard, the Commission is to be commended for taking an independent tack and acting in a constitutional matter in this respect.

CHAIRPERSON GARZA: We are almost at the end of our time and I did want to go back.

Commissioner Kempf, by my count for number 5, we now have six and a half, I guess. I have six, with you in brackets. You were 7, with a, sort of, qualified maybe on 5. For 5, I have Commissioners Burchfield, Cannon, Carlton, Garza, Litvack, Valentine, and I have Kempf in brackets.

COMMISSIONER KEMPF: And Commissioner Yarowsky.

COMMISSIONER SHENEFIELD: And I am glad to put myself in that column.

COMMISSIONER CARLTON: And that is with the notion that we will tell the court about number 6.

CHAIRPERSON GARZA: Right. Transferring the sentiment of 6 to 8.

MR. HEIMERT: Okay. So, it is the sentiment of 8 that Commissioner Burchfield articulated, those people voting for 8 are willing to go along with that sentiment.

CHAIRPERSON GARZA: I think that what Andrew is asking is, is there anyone who said they favored 8 who does not agree with, in the report, speaking to the issue that Commissioner Burchfield raised?

COMMISSIONER VALENTINE: That would also cover those of us who think 6 is as important as 5.

CHAIRPERSON GARZA: Right.

COMMISSIONER JACOBSON: Can we at least get a consensus on the other issue, whether we should at least say something if the majority is going to support 1, about the problems in the administration of 3571(d), and the suggestion that, perhaps, if there is scrutiny across the board?

COMMISSIONER SHENEFIELD: For me, it all depends on how it is phrased.

CHAIRPERSON GARZA: Yes. I think that the report will have to lay out the issues, why we were looking at 3571(d). So, certainly that will be there.

COMMISSIONER KEMPF: My flag is up for a different reason, which is exactly what Commissioner Jacobson just said. I think we ought to have a specific, agreed upon language in that regard, and not say, well, there will be something in the report – fuzzy - I think we ought to have a recommendation that may be just that this is a serious problem and should be looked at.

But I – like Commissioner Shenefield, my support for that would depend precisely on what it says. My question is, could we ask either Commissioner Jacobson or the staff to draft something?

Let me make one other comment. Commissioner Jacobson, earlier, when asked about examples, said, nobody can or should discuss because of attorney/client and other related issues. That reminds me of the episode where we had this one witness who was bold enough to say, this is what is going on, and there was this outrage on the part of the enforcement officials. And then, as soon as we were off the record and there was sidebars, it went to sort of a unanimous view that this was occurring. The contrast was such that I said, we are never going to get a fulsome record to reflect what is actually going on. So, I think his point on that is well taken.

I think that we need to have something more than, we ought to have something vague on it to report. At least speaking for myself, I would like to see something drafted that we could take a look at. I am not talking about a five-page document. I am talking about one or two sentences.

CHAIRPERSON GARZA: It is consistent with our plan for tomorrow. Commissioner Jacobson, will you be here tomorrow at all?

COMMISSIONER JACOBSON: Tomorrow morning, early.

CHAIRPERSON GARZA: If you could draft something for when we take up tomorrow's discussions, we could deliberate on your language then.

COMMISSIONER JACOBSON: In my spare time.

CHAIRPERSON GARZA: That is your homework for tonight.

COMMISSIONER JACOBSON: I will be happy to.

CHAIRPERSON GARZA: Unless you can convince Commissioner Kempf to do it for you.

COMMISSIONER JACOBSON: I would love to, but I will write it up.

CHAIRPERSON GARZA: All right. Let's take a five-minute break.

Disgorgement And Restitution In FTC And DOJ Civil Matters

CHAIRPERSON GARZA: Okay. The next topic is government civil remedies. We have scheduled 20 minutes for us to go through this, so I will ask Commissioners to try to keep their comments brief so that we can stick as close in that 20-minute boundary as possible.

MR. HEIMERT: Commissioner Warden, could you begin, please?

COMMISSIONER WARDEN: I favor 1, as I did before.

I favor 2. As an alternative to 2, I would vote 3.

MR. HEIMERT: All right. Commissioner Valentine.

COMMISSIONER VALENTINE: I am one of the two Commissioners who did not favor 1. I believe that they ought to have greater authority to impose civil fines, although, to some degree, their ability to fine based on daily violations give them a fair amount of leverage. I don't think, at this point, I have any reason for altering my vote.

And on number 2, I favor 3 very strongly. I thought the staff memo and the attached actual FTC statement as to how it enforces under 13(b) was very convincing, very measured, very balanced, temperate, focused, and I think

that we should endorse their current policy for how they intend to seek relief for 13(b).

I also found it interesting that the Justice Department admitted that it stated that it agreed that it also believes that it has authority to seek monetary, equitable remedies.

So, to the extent that there are many among us who think the DOJ and the FTC should act similarly and behave similarly, I actually would add that I think the DOJ should think about seeking monetary relief under the same circumstances that the FTC does.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Yes on 1, yes on 2.

And if 2 were not to carry, then I would be yes on 3 and 4, as fallbacks.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Yes on 1, which is a change, and a vote for 3.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: Yes on 1. Yes on 3.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: Yes on 1. Yes on 3.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: Yes on 1. Yes on 3.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: Yes on 1, and I think it is yes on 3. My view is that the FTC and the DOJ should be the same, which the memo seems to indicate is the case. I also think the government agencies should seek relief only where private actions would fail. I don't know if that is contained in the proposal. By fail, I don't mean fail in court. I mean fail to arise.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: 1 and 3.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: 1 and 3.

I would add that it is my impression, and it is not a strong impression, that, in light of the Justice Department's statement that it is not interested in having additional civil fine authority because, to some degree, I take it, that would water down their criminal enforcement authority, I view that as the explanation for why they have not sought disgorgement in situations where they might think that they have the authority to do so but elect to pursue other remedies.

But, in light of that, I am at 1 and 3.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: I am going to do something uncharacteristic, and that is agree with everyone else.

1 and 3.

MR. HEIMERT: Is there anyone who wants to discuss further? Commissioner Valentine had a proposal.

COMMISSIONER VALENTINE: If you want a consensus on 1, I will go with 1, because neither DOJ nor FTC actually asked for additional authority, which I found strange.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: On 3, the only thing that gave me pause was the point that Commissioner Carlton raised, which is the role of private actions. The only thing that I was concerned about was that there was a certainty to eliminate the possibility of duplication.

Now, I understand that the FTC will exercise its discretion in a way, to the extent that it can, that avoids duplication. The availability of adequate private relief is a major factor.

What I am not as sure about is whether or not they have the ability, or the courts have the ability to make sure that after the FTC has taken such action they can prevent sort of a feasting after that that will result in

duplicative recovery. That I am not sure about. I don't know whether other people have a view on how that will likely work out.

The only thing that makes me more comfortable with the idea of 3 goes to the sentiment that I think was behind Commissioner Warden's proposal that we will discuss later on, which is there some sort of efficiency to having a government agency get disgorgement in cases. If you could be sure that you then wouldn't have a lot of duplicative private litigation and you eliminate the attorneys' fees, you eliminate live inefficiency, you eliminate multiple fora.

So, that is one of the reasons that I thought to endorse option 3.

COMMISSIONER VALENTINE: In brief response to that, I think it will obviously somewhat depend on the circumstances, the extent to which you can insure against duplicative recovery. Certainly, the FTC policy makes very clear that it does everything possible to prevent that and will not seek to recover losses if people have already recovered in private actions.

You often have them all consolidated in one forum, which is what happened in *Mylan*. And I believe there may

even be times when the FTC will submit positions to courts where private plaintiffs are seeking remedies that are similar to ones that the FTC believes it has already obtained and let the court know that neither attorneys' fees nor particularly huge amounts should be available.

CHAIRPERSON GARZA: *Mylan* was one of the cases, though, that I was curious about. That clearly was a case in which you had other litigants. You had private litigants —

COMMISSIONER VALENTINE: All in front of Judge Hogan.

CHAIRPERSON GARZA: Right.

But that would seem to go against the factor that says, if there is an adequate private remedy out there, we generally won't act.

Do you have an insight as to why the FTC —

COMMISSIONER VALENTINE: They followed on the FTC action.

CHAIRPERSON GARZA: Right.

But it would seem to suggest, though, that if the FTC had made a judgment that private actions wouldn't follow on, that they erred.

And so the question is whether —

COMMISSIONER VALENTINE: No. The Federal Trade Commission's disgorgement and restitution was subtracted from what the plaintiffs got, and much of the FTC restitution, in any case, went to state entities, state hospitals that bought the medications, which were not represented, obviously, by the private plaintiffs.

CHAIRPERSON GARZA: But the point is, in that case, the FTC nevertheless - even though there was the specter of private recovery, private litigants would take the matter to the court. The FTC went first. It used its resources to pursue the case in an instance where, obviously, the private litigants did sue.

And so, if we take that, one of the major factors is that private remedies would not have been adequate. What wasn't adequate about the private remedies, or what might not have been adequate to the private entities in the *Mylan* case?

COMMISSIONER VALENTINE: Because it involved a medical product, and there were many state hospitals and Medicare and Medicaid programs paying for the 1,000-percent price increases on the drugs. Many of the remedies needed to go to entities that were not represented by the private class.

CHAIRPERSON GARZA: Because there are indirect purchasers?

COMMISSIONER VALENTINE: And state or local entities were not represented by the private plaintiffs. They were represented by State AGs.

CHAIRPERSON GARZA: The State AGs, though, did sue and could have sued.

So, again, using *Mylan* as sort of an example of the FTC's policy, it still isn't quite clear to me why they thought there was a peculiar role for them.

COMMISSIONER VALENTINE: They discovered the violation. They brought the case. They insured that the restitution went to consumers, not to private attorneys' fees. And the fact that certain private attorneys followed on was, quite frankly, I don't think their issue, so long as there was no double recovery, which there was not.

And so, to the extent that their involvement more moneys went to victims rather than to the pockets of plaintiff's attorneys, I think they felt strongly that this was a case where their involvement was important.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: Yes, I just wanted to say, reading that 2004 policy again, and also looking at their

track record, how selective the Commission has been, I thought it was a laudable record that we saw, both in policy development as well as what their choices were.

The Chair is right to probe some of these facts. I think that is very illustrative. But I think this is a policy has worked quite well and showed a lot of restraint and still has the capability — the Commission still has the capability to use this in the right circumstances.

I guess I came down, having read this again, where former Commissioner Leary came down. He started with some questions, but, by the end of going through it, overall he was very satisfied with how this agency behaved in this area.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I don't have any comment, just a question.

When we were last discussing this, according to the staff stuff, half the Commissioners recommended number 2, and today only 2 did. I am wondering what caused everyone else to fall on the sled.

Similarly, it says that 12 Commissioners favored further deliberation of possible limitations. Today that number appears to be maybe one or two.

My question to my fellow Commissioners is, what happened?

COMMISSIONER JACOBSON: Well, the math was wrong, because at least one didn't.

COMMISSIONER VALENTINE: Yes. I don't think there were 12 on 3 and 4, quite frankly. There may have been sort of general, sure, we'll think further, but I think the staff memo helped us very much to think further in a way that was better informed.

MR. HEIMERT: The 12 was designed to represent that there was sort of a consensus that we wanted to look at this further, not to represent anything more than that.

COMMISSIONER VALENTINE: Right.

COMMISSIONER CARLTON: I would add – I was actually struck by the same thing – the memo made clear – at least clearer to me – that the Federal Trade Commission's actions were quite limited.

Now, what I am worried about is, just because in the past they have been limited, and maybe they have carved out some cases where it works, I am worried about voting for something like 3 without having a lot of qualifications, without saying, we are worried that you don't exceed your authority, that you don't go after cases where private

actions could otherwise take care of it. We don't want you to get into the business of seeking civil fines.

If you put those caveats in, then there is not much difference between 3 and 4. And then the only difference between 2 and 3 is this very limited set of circumstances in which the FTC says it will do things when there will be no private action. That seems reasonable. But without the modifiers I have the same concern.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I changed to not favor 4, and instead only 3, Commissioner Kempf, because I was persuaded by the analysis that we received in the statement of the FTC position.

And, while I continue to support 2, as you did, that is not a strong feeling on my part anymore, for the same reasons.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: I have a question. I guess it goes to Commissioner Valentine, and it is really following up on Chairman Garza's questions.

When the FTC brings an action, as it did in *Mylan*, and I am just not familiar with - does it, so to speak, preempt the field? I am not talking about preemption in a

technical sense but as a practical matter. Is it bringing litigation so as to get complete disgorgement of whatever illegal gains the defendants may have made.

And if so, how could there be a private case — you said there was — and the amount was subtracted? Subtracted from what?

COMMISSIONER VALENTINE: When the FTC began the case on its own, the theory was that it would seek to disgorge the unlawful gains, the 1,000-percent monopoly profit. Now, the problem is that the FTC has some limited ability to return funds to consumers.

So, the states, then, began working with the FTC, because of, as I said, the state hospitals and the various state purchasers under various Medicare and Medicaid issues. And the states have, actually, greater ability to return money to victims.

To the extent that private plaintiffs followed on, the FTC is not in a position to say, thank you, we don't need you; we can do it all ourselves. They have a right to bring those cases. But, in the way, the court, as I understand it, calculated final damages, the Federal Trade Commission's disgorgement restitution remedies were offset by any additional amounts to the extent that the private

plaintiffs proved damages above and beyond. They were supposedly entitled to that. Quite frankly, I think some of those settled. I think a lot of those settled.

COMMISSIONER LITVACK: But it does suggest that you may have an FTC action and private actions as well, hopefully not duplicative of each other, but at least supplemental.

COMMISSIONER VALENTINE: Right. You would have to really change the law to preclude that.

COMMISSIONER LITVACK: I thought that, and I may be mistaken, but I thought that what the FTC did was - using the word I used before - effectively preempt the field. They were bringing an action that would result in the total disgorgement of the wrongful profits, which would preclude, effectively, any private litigation, because there would be no damages to be collected.

But I gather from what you said that I am wrong.

COMMISSIONER VALENTINE: Well, I don't think they have the ability to prevent private plaintiffs' showing up in court.

COMMISSIONER LITVACK: Of course not.

COMMISSIONER VALENTINE: To the extent that the plaintiffs then chose to follow in the same court, it was

certainly easier for the judge to try to assess what was fairly due to the FTC and to restrict quite severely the amounts that went to the private plaintiffs.

But the extent to which *Mylan* went and settled with the private plaintiffs, that is —

COMMISSIONER LITVACK: And that may be the answer. I didn't mean that the FTC could prevent someone from filing the suit. They could effectively prevent them by having received all the money that there is to receive.

But if, as you say, the defendant wants to give out more money and settle, I guess that is their choice.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: Maybe some of the more experienced litigators can answer this question. I assumed that in the scenario that Commissioner Litvack was talking about, the defendants could fairly easily effect a transfer.

So, in other words, the FTC goes to court — assuming it goes to court — and gets disgorgement, and then a private — I guess it may depend on timing — while that is going on, private plaintiffs sue, is it relatively easy to get that suit if it is not brought in the same court, transferred?

COMMISSIONER LITVACK: Probably.

COMMISSIONER YAROWSKY: Yes.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I just want to say that, in an ideal world, the statute would provide that the FTC, once it acts, or the DOJ, if it ever exercises this authority, would be the exclusive remedy, and there would be no private action.

COMMISSIONER VALENTINE: That is correct. That is not what the statute says, though, unfortunately.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I see two problems with that perfect world, perhaps because I only see problems.

CHAIRPERSON GARZA: But you are always right. So, now we have two absolutes. You are always right, and you always see problems.

COMMISSIONER BURCHFIELD: If I can just get that in writing from my mother, that would be great.

The first issue is that I don't know that disgorgement of ill-gotten gains is always necessarily equivalent to loss.

COMMISSIONER VALENTINE: No, it is not.

COMMISSIONER BURCHFIELD: And the second issue is, the disgorgement remedy doesn't give the harm to the

individual's treble damages.

So, I would think that FTC disgorgement actions, if used prudently in the Guidelines, will be used - could provide some measure of relief and maybe serve as a lead action for plaintiffs in particularly difficult cases, but I would hesitate to make it the exclusive remedy, because I think we are cutting off remedies that might be otherwise available.

MR. HEIMERT: Anybody else have anything more on this? It seems we have a pretty clear consensus, and we can move on to indirect purchaser litigation.

[No response.]

All right. Let's move on.

Indirect Purchaser Reform

MR. HEIMERT: Commissioner Shenefield, we can begin when you are ready.

COMMISSIONER SHENEFIELD: I favor 2, 2(a), and 2(b).

As between (c) and (d), I prefer (c), as I did before, but would acquiesce in (d) if that made sense given everybody's vote.

And I favor (e), as well.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I vote for 1.

I think if I vote for 1 that means I can't vote for 2.

But if 1 doesn't prevail, even though I don't vote for 2, it seems to me that if *Illinois Brick* is overruled, then I would vote (a), (b), and (c).

I also want to add — I think this was in some of the previous proposals — that even though I — never mind. I will reserve that comment.

COMMISSIONER VALENTINE: I'm sorry. If you voted for 2, it would be (a), (b), and (c)?

COMMISSIONER CARLTON: I am not voting for 2. But, if 2 passes, my view is that (a), (b), and (c) would be relevant if you allow state indirect purchaser claims, which I believe, from my previous comments, I would not allow.

In general, just to make that clear, I would ban indirect purchaser claims, except in exceptional cases, being the cases in which direct purchasers choose not to sue. And I amplified those comments in a previous hearing.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: Okay. I would vote for 2.

Under that, (a), and (b). Not for (c), because even though (c) may seem like a cleaner way to change the

law, I am not in favor of preemption here.

And so I will live with the slightly messier situation of (d), but I think it generally solves the same problem.

And no on (e).

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I am where Commissioner Yarowsky is on this.

2(a) and (b).

I would also resurrect potential discussion, to the degree that is not included within (d), of consolidation of the cases within a single jurisdiction for all purposes, discovery and trial. But I am not attracted to the trifurcation proposal.

COMMISSIONER WARDEN: Was the *Lexecon* consolidation issue considered already resolved by us?

CHAIRPERSON GARZA: That is (b). (b) as in boy, isn't it?

COMMISSIONER WARDEN: Yes. Okay. That means everything.

MR. HEIMERT: That was what (b) was intended to cover.

COMMISSIONER VALENTINE: We need to make that

clear.

MR. HEIMERT: Okay.

COMMISSIONER JACOBSON: Okay. Resolution is adjudication to the — and judgment.

COMMISSIONER VALENTINE: I didn't understand that. I thought it might be in (d), but in any case.

COMMISSIONER BURCHFIELD: So (b) is for overruling *Lexecon*.

MR. HEIMERT: Yes.

COMMISSIONER KEMPF: *Lexecon* was not an antitrust case.

CHAIRPERSON GARZA: No. No. No.

COMMISSIONER YAROWSKY: I would prefer to avoid the rubric of *Lexecon*. It was in a different context. It is being considered in Congress in a different context. I would rather just talk about what we're talking about in this area.

MR. HEIMERT: (b) was intended to address the *Lexecon* problem in antitrust cases specifically.

COMMISSIONER JACOBSON: The problem formerly known as *Lexecon*.

CHAIRPERSON GARZA: Which we will now invent a symbol for.

MR. HEIMERT: Commissioner Valentine. And I apologize that Commissioner Carlton's initials were used twice, and the second time in alphabetical order, it was supposed to be yours.

COMMISSIONER VALENTINE: I was wondering why I had no votes.

I would vote for 2.

I want to skip (a) for a moment; I don't think we can flatly overrule *Hanover Shoe*. I would vote for (b), I would vote for (d), and I would vote for (e), noting that it is simply an encouragement in the exercise of discretion, not a strong recommendation, and certainly nothing mandatory or unduly directive.

Okay. On (a), what my concern is, and this is stemming somewhat from some of the conversations that we have had with judges, which I have found extremely insightful - If we were to entirely overrule *Hanover Shoe,* we would have great problems in certifying classes, because of the sense that every single defendant may be differently situated with respect to defendants.

And what I think we may need to do is to somehow modify *Hanover Shoe*, at least to the extent that if certain plaintiff classes are missing, you can't raise pass-on to

sort of get home scot-free as a defendant.

So, I think we need to do additional work there, and I do not want to fully embrace a total overrule of *Hanover Shoe*.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: I would vote 1, and because I feel strongly about 1, I am not going to opine on aspects of 2, because I feel strongly that 2 is the wrong approach. I am obviously in the minority, but I would have favored preemption and addressing the issues that used to be called *Lexecon*, but is now hereto referred to by a symbol.

And I am happy to explain my views if anyone wants me to, but not now.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: I would like to welcome the Chair to the extreme minority view here.

I vote for 1, as well. And I do not really have any backup on that. I think that it is the appropriate way to go. And we will discuss it in more detail, but for right now, 1.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: I am very much where Commissioner Valentine is, but I want to put my X in column

(a) for the time being, subject to further discussion.

So, 2: 2(a), 2(b), 2(d), and 2(e).

The problem with – and I will just speak briefly on this now - the problem with saying *Hanover Shoe* is overruled is that there are cases out there now that are beyond price-fixing cases. And I don't think anyone here really intends to overrule *Hanover Shoe* across the board. So I think, to some extent, this is a semantic issue.

The class certification problem is a deeply troubling one that we need to discuss if we are going to go the route that - it appears that the majority of the Commission is going to address it.

But the situation in this type of litigation today is unacceptable, and a call to maintain the status quo is equally unacceptable.

COMMISSIONER KEMPF: You have a no on (c)?

COMMISSIONER JACOBSON: Yes. I am a no on (c).

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I am no on 1. Yes on 2.

And I am an unqualified yes on 2(a), which I will come back to in a minute.

Yes on (b). No on (c). Yes on (d). And no on (e).

I will come back for a minute to (a), *Hanover Shoe*. I think it is a nonsensical decision. I am completely in favor of overruling it. I am fully confident that the court can cope 100 percent satisfactorily with adjusting rulings in light of an overruling of *Hanover Shoe*.

I don't see any parade of horribles or any single horrible over the horizon. I just think if you overrule it, it makes eminent sense. I am not worried about class certification, recovery, or non-price-fixing cases. I think it will just work out hunky-dory.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: Yes on 2. Yes on 2(a), 2(b), 2(c).

As an alternative to (c), I could live with (d). No on (e).

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I share the views of Commissioners Valentine and Jacobson, with one exception.

I am in favor of 2. I have some concern about overruling *Hanover Shoe*. I give some weight to the conversations with the judges, but the states' memorandum on this I found quite persuasive, and I also was greatly heartened by the states' adoption of the view that there

should be one recovery.

COMMISSIONER VALENTINE: Right.

COMMISSIONER WARDEN: And *Hanover Shoe* shouldn't be available as a defense – or, the overruling of *Hanover Shoe* shouldn't be available if only direct purchasers sue. But if you have both direct and indirects suing, why introduce the complication vis-à-vis the defendants of the pass-on defense? Why not just provide for a single recovery and let the directs and the indirects just split it up, which I think is an approach that also ought to solve the class certification problems. I am not positive of that, but I think so.

So, I favor 2(a) in the sense that I just stated.

I certainly favor 2(b). I think that is the most important thing to do here.

And I personally favor 2(c) because I think it is the right thing to do. I appreciate that it might be impolitic.

So, I will take 2(d) as an alternative.

And I also favor (e). You know, we are not trying to write a rule of civil procedure here. What we are trying to do is basically encourage the resolution of liability and damages and then let the defendant go home and let the

direct and indirect purchasers fight it out over dividing the spoils.

Now, in an ideal world, again, I might favor Commissioner Carlton's view, that, why have all these complications of direct and indirect and a lot of the indirect litigation is about *de minimis* injury, in my opinion, anyway?

Why not just totally preempt and abolish indirect purchaser actions? Let the direct purchaser recover everything. That is the most effective enforcement mechanism. But that is not going to happen. So, that is why, instead of that, I favor 2(c).

And, as a more politic alternative, 2(d).

COMMISSIONER VALENTINE: Thank you for saying more clearly what I was trying to say. I would agree that it is not just the statements we have heard from the judges, but the states' recent supplement.

That was very thoughtful and clear.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I had only one brief comment.

And that is, that I believe that - and Commissioner Warden, I believe that 2(b), which is allowing

the resolution of all of these claims in a single federal forum - will go a long way toward curing many of the procedural and substantive problems here, including the *Hanover Shoe* issues, because, in that forum, there are going to be few empty chairs to point to.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: The difficulty here is that the *Illinois Brick* problem that we have been talking about, which I take to be sort of the gross inefficiency of the current system, is not a problem, in my view, because of *Illinois Brick*, or because of *Hanover Shoe*. It is a problem because of the *Illinois Brick*-repealer statutes.

And so, at the end of the day, once I got away from the groupthink at our last meeting, it just seemed to me that the only thing that really could be said was that — and therefore the only true resolution is, in my view, preemption.

Now, if that is politically impossible, then that tells me that there is simply no political way to truly fix the problem. And if that is the case, then that is the case. But my concern about the ABA proposal or variations of it is that it doesn't clearly go to the core problem. So long as you don't have resolution through to trial in one

forum, you still have a lot of complication and difficulties.

I don't think it is easy to say, well, the defendants can go home and let the indirects and directs work it out and fight it out amongst each other.

I went to look at some of the economic, I won't say literature, but some of the things I could get on the internet about what economists are saying about how these proceedings would go, and, boy, pity the poor direct purchaser, because they are going to have to undergo more discovery and more expense just fighting with the indirect purchasers.

Because how do you allocate between the harm of the direct purchaser and the indirect purchaser. You have to determine some sort of pass through. You have to look at components of cost for the direct purchaser. Where the product is an input, you have to look at demand.

You know, the amount of work that would go into sorting it out seems to me just startling. And why the direct purchaser should somehow be involved in that is unclear to me.

So, I think that this is a morass. I am not convinced that the ABA proposal or any of the alternatives

really does clean it up. It does create uncertainty, on the other hand. And I am concerned about the concerns that people have expressed, AAI, and others, about the effect in overruling *Hanover Shoe*.

So, for me, if it wasn't preemption, which I think it won't be but should be, then my own sort of wish list would be to have something that would actually consolidate everything and actually allow it to be resolved through the trial stage in one place. And if there was any way to avoid the complication of sorting out and allocating between direct and indirect, that would be great, although, it isn't apparent to me how that could be done, except through settlements.

COMMISSIONER YAROWSKY: Yes. I have absolutely no sentimentality for the *Illinois Brick* decision. I have always believed that it was a rule of convenience, which the Supreme Court transformed into a rule of law. And I think within a few years they regretted it and started looking for openings to back away from it. *ARC America* happened very soon. Then we ended up with dual universes, state repealers, and the *Illinois Brick* decision at the federal level.

It was a mess. One great virtue of this class

action act, though there are many problems, in my view, with that act, because it is a product, understandably, of a compromise. But the one virtue of that act, which never thought about the antitrust context once - there was not a single word on either the floor of the House or the Senate about *Illinois Brick* - that, having appeared in the U.S. Code, it has now shown us a pathway, maybe, to go back and resolve some of this into a more harmonious system.

Now, it is not perfect. And I understand, Commissioner Garza, your view that if you are going to do it, let's just do it in a unified, monolithic way. I totally understand that. My problem, as I have said earlier is, I think the number of cases that will not be consolidated will not be great. That is not the perfect answer, but that will not be great. And it still respects avoiding preemption whenever one can.

Not just for the political expediency, that that is not going to work on the Hill, but I also happen to believe in trying to preserve federalism to some degree when you can.

So, I am delighted that this has opened a pathway for us to do this. I think this is going to be viewed as a very significant recommendation by this body and well

received on the Hill, as well.

COMMISSIONER JACOBSON: I agree. I think among the most good that we can accomplish is achieving some reform in this area.

I want to address the Chair's comments first, because I respect them profoundly. In fact, were I a legislator addressing this issue, I would vote to make *Illinois Brick* the law of the land for precisely those reasons. But there are three countervailing considerations.

One is that a majority of the states have spoken politically, either by judicial decision or by vote of their legislators, including the most populated state, California, that they want indirect purchasers to recover. And I think we may not agree with that, but I think we have to respect it.

Second, the historical background of the antitrust laws is that the Sherman Act was designed to supplement state laws. I think it is a dangerous precedent for the reasons that Commissioner Yarowsky was articulating in the antitrust area to get into the preemption business for that reason.

Third, this is an area where I think the perfect can be the enemy of the good, the perfect being a strict

Illinois Brick rule across the board, which has obvious benefits. It would carry out the thinking that commanded the majority in the Supreme Court in the *Illinois Brick* case. But it is a practical impossibility, in my judgment. It does go contrary to the will of the majority of the states.

So, with that in mind, I think the question is not really, should we go that route?, but how do we reform the existing structure? And that is the reason I voted the way I have. Just as Commissioners Warden and Valentine articulated, we have to be very careful about what we say, what we are doing, with *Hanover Shoe*. As I understand the majority of the Commission in this respect, and certainly my own view, the desire is to simplify price fixing, in particular, price-fixing class action cases, to achieve a single recovery so that the defendant is faced with treble damages, rather than some multiple of treble damages.

That means recognition of some pass-on, to the extent that you are going to have some indirect purchaser recovery. It does not necessarily, or even likely, mean that *Hanover Shoe* needs to be overruled. It does need to be modified to take into consideration this very special and difficult circumstance.

So, I think we need to be careful about that. Our report also needs to address the issue of class certification. I don't think anyone here is suggesting that there be different standards or that the result of the outcome of our recommendation be that more or less classes be certified going forward.

What you don't want is the situation through an "overruling" of *Hanover Shoe*, where the defendants, through the issue of impact, which is really the critical issue in class certification in 98 percent of the cases where it is contested, where the defendants can say, you can't show common impact, because there are different levels of pass through, depending on where in the distribution chain the defendant is located.

So, I think we need to be very, very careful that. The result of what we do does not enhance or detract from class certification as we know it today.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I just want to say for the record that it is a mistake to give up trying to get to the ideal world, or at least making it clear that that is where we would like to go, if by ideal world, you mean that *Illinois Brick* was correctly decided.

I thought the decision in *Illinois Brick* was well-reasoned. And, as the Chair said, I think the problem has arisen because states have passed these repealer statutes. *Illinois Brick* provides very strong deterrent effects. We heard at the hearings several litigators for plaintiffs explain that if you overrule *Illinois Brick* they are going to have a harder time getting cooperation from the direct purchasers, who often have the best evidence in the cases to go after the antitrust activity.

Now, I agree that the state repealers raise questions about state action. And I understand why some people may not like preemption. But the reason that I am in favor of preemption here is because I thought *Illinois Brick* was well decided and because there is something else going on. And that is, when you allow damages to go beyond the direct — when the direct actually bring an action — and you allow the indirect, putting aside multiple recovery, you run into the problem that you are starting to trace out the effects of an action in one market in other markets.

And the logic would take you not just to indirect purchasers, but to anyone who gets affected by a price change in the market that has been changed. That is where the logic would take you. I think that is very dangerous.

I think the reason that the Supreme Court to indirect purchasers was precisely for the reason that it became hard to trace. And if you start tracing it that way, there is no ending where logic could take you, if you wanted to pursue it.

And finally, I think figuring out the pass-on, as the Chair - I want to support what she was saying. You often have a variety of industries involved in indirect purchasing, as well as direct. And figuring out the competitiveness of each of those industries, figuring out the pass-on, I think, could raise serious problems. I believe that is one of the conversations with at least one of the judges that we had recently indicated. So, I find that troubling. And therefore, it is only in rare circumstances that I would allow indirect purchasers to go forward, as I articulated before.

Now, having said that, and listening to what everybody said, it is clear that I am in the minority. And, in 2, the distinction between (a) and (b), if (b) is interpreted to mean that in the resolution you will consider the pass-on defense, even though you are not going to overrule — I'm not sure I understand the distinction, then, between (a) and (b). But I guess that makes sense if people

have been saying that. If that is how they want to interpret (b), that they are worried about overruling *Hanover Shoe* - they would just rather not be bound by it. If that matters, I guess I would be forced to say, even though you don't like 2, would you go with – I previously had indicated that I would go with (a). I would happy to go with that if (b) is more broadly interpreted.

But I do want to underscore that I would rather not have to go with 2. Just so there will be no doubt on the record.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I disagree with a great deal of what Commissioner Carlton just said.

I don't think this is all that complicated. My view of *Illinois Brick* has always been, since the day it was decided, that it was driven by the ruling – incorrect, in my judgment – in *Hanover Shoe*, and that, in light of *Hanover Shoe*, the court wanted to do something that had both symmetry and what I will call fairness in light of *Hanover Shoe*.

The result is that, in many instances, the law currently provides that, in many instances – those who are injured by antitrust violations cannot recover. And those

who are not injured by antitrust violations can. To me, that is an absurd result, and we ought not be hesitant at all about overruling both of them.

It is very understandable to me why states immediately started passing *Hanover Shoe* repealers. It is a nutty outcome. And it is also understandable to me that judges don't like repealing *Illinois Brick* and *Hanover Shoe*. It is convenient to have it. It is administratively easier for them to have it. But, you know, administrative simplicity and judicial convenience don't strike me as the objectives of the law. Fairness and justice strike me as the objectives.

And I notice, by the way, we have more votes to overrule *Illinois Brick* than *Hanover Shoe*. And I understand the caveat language on a number of the votes to overrule *Hanover Shoe*. But I am not concerned about, "needing people who are not injured to sue, because that enhances enforcement."

The Department of Justice enforces the antitrust laws, and that, plus the remedies available to them, are fully sufficient to accomplish that. We don't need non-injured people with a roving warrant to go out there and sue for willy-nilly antitrust violations that they think they

see, although they were not victimized by them.

So, I think this is, as I said earlier, not all that complicated, and I am very pleased that we have come out with the recommendations that we have, in terms of the straightforward repeal of both of them. I understand that a number of people would have the repeal of *Hanover Shoe* accompanied by a number of bells and whistles, and I will wait and see what the report says on that.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: Contrary to Commissioner Kempf, I agree with virtually everything that Commissioner Carlton and the Chair have said on this subject.

My first choice would be the one that they have articulated, and I think the report should reflect that there was some sentiment, in whatever measure it turns out to be, for that, but there is a clearly, I hope, either a strong majority or unanimity that if that isn't to be done, something that we have all been discussing, and I won't try to repeat it, which is captured on the form, should be done.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: The reason that we are having this debate today is actually directly attributable to a political miscalculation made on a really lovely, crisp

fall day in 1980. I remember it.

After *Illinois Brick* came down — the day after *Illinois Brick* came down, it was a hubbub. Commissioner Yarowsky, you remember this, Commissioner Litvack, and others sitting around the table. I am part of the antitrust space cowboys at the table, so I remember all of this. But there was no antitrust activity on the Hill that caused as much activity and hubbub and concern as *Illinois Brick*.

And by the fall of 1980, essentially, a deal was proposed to overturn *Illinois Brick*. And what happened was that the folks who were willing to overturn *Illinois Brick* would not take the deal that was offered by those who were opposed to overturning *Illinois Brick.*

Of course, what happened in November of 1980 is that the Senate turned and changed hands. And, at that point, the debate on *Illinois Brick* was set aside for quite a long time. In reference to political will, there was not political will to overturn *Illinois Brick*.

I believe, Commissioner Yarowsky, you could probably concur on that. That was exactly the case. If there was will to do it, there weren't enough votes to get it done. And obviously, that is what happened. And that is why it went out to the states and why we have this situation

that we have today.

I am firmly convinced, and I am with Commissioner Garza and Commissioner Carlton on this, that you can say that, perhaps, because we are where we are today, then let's go ahead and get the federal courts to question this. It is too bad that Judge X, with whom we had a great conversation yesterday on the phone is not a Commissioner. We would pick up at least one more vote.

And I suspect, obviously, if the federal judiciary was around the table – it would have to be a much bigger table – but if there were –

CHAIRPERSON GARZA: To be very clear, everybody that we talk to, there will be a list, essentially, of everybody that we talked to. So, the issue is not that we talked to particular judges.

COMMISSIONER CANNON: In any event, the whole point is that not that we have this problem in various states. I mean, political will is a key concern here. And if there was political will to repeal state *Illinois Brick* repealers, then it would be done, but it is not done.

The discussion about *Hanover Shoe* really makes me feel more strongly about this because, in fact, I think you can clearly repeal *Illinois Brick*, but the discussion about

Hanover Shoe convinces me that you cannot repeal or reverse *Hanover Shoe*.

So, for all those reasons, and, in the end, I really strongly agree with Commissioner Carlton, that it just has always seemed to me that the further that you get away, both in time and geography and whatever measure you want to say, from the scene of the crime, from the scene of the incident that caused the damage, the harder and harder it is to be confident that, in fact, you have compensated those who have truly been damaged.

So, all of that - I know I am in the minority on this, and I understand and appreciate that, but I think it is important to at least put that on the record.

COMMISSIONER JACOBSON: Steve, just for clarification, are you supporting the repeal of federal preemption of state *Illinois Brick* repealers?

COMMISSIONER CANNON: No. I think that it is a state matter. If someone has the political will in an individual state to want to have that repealed, then that is what they should do.

At this point in time, I am saying, given what I think the ideal circumstance would be, plus the political realities of this, that I think the apparent thing to do is

to leave it as it is.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: Briefly, I just also wanted to clarify with respect to my position.

I really regard deterrence as being the main driver. I am convinced that the Supreme Court had it right, and I would recommend to anyone reading the AAI comments, which probably weren't intended to support my view. But on the other hand, if you read what they say about *Hanover Shoe*, and why shouldn't we repeal, it seems to me the perfect argument for why *Illinois Brick* was right.

The testimony and comments that we had, frankly - I wasn't convinced that you needed to have indirect-purchaser litigation for the sake of deterrence. In fact, there were very few cases in which you didn't have a suit by the direct purchaser or by the government, and you only had the indirect purchasers suing. We asked people to identify those cases to us.

One of the cases that was identified was the *Canadian Export Automobile Case*. That is not a good one, because that is one that I know something about, and that is not a good illustration. Other cases that people suggested to us were the *Microsoft* cases, which I went last night to

research a bit because I was not sure what was involved there. But there, it wasn't really an overcharge in the sense of the typical overcharge case, because the conduct, to the extent that it is the same conduct the government sued on, was exclusionary practices, and there, you had the rivals suing. So, what it was left with is, yes, there are cases, particularly in the pharmaceutical industry, where indirect purchasers did recover fairly substantial amounts, and the states were able to, apparently, get a little over $100 into the hands of individual consumers.

But, in general, we just did not see evidence that the indirect purchaser suits were needed to ensure deterrence. I just wanted to clarify that deterrence is really what I am looking at, as opposed to some concept of fairness, or even compensation given the fact that, aside from the pharmaceutical cases, it doesn't appear again, from what we were told, that there is a lot of compensation going on to the indirect purchasers. Either the recovery rate is very low - I think Commissioner Jacobson mentioned 18 cents on the dollar at some point. But on the other hand, we know that the plaintiffs' bar is very well compensated, so, that is the other aspect.

If I look at compensation, it wasn't a convincing

story told that there was a lot of compensation going on.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: At least for me, this session has been proof of the value of this kind of conversation among the Commissioners, because I have changed my mind, changed my view, although I want to add a caveat.

I am persuaded by what the Chair has said, and what Commissioner Carlton, Commissioner Cannon, all the rest - I think I am really listening carefully and trying to put aside my preconceived notions, which are pretty strongly held.

They are right. They are absolutely right. But then that leads me to say, okay, where do you go from there?

Commissioner Carlton and Commissioner Cannon say that they are in the minority, and they are, and I am now in the minority. But I think where you go, and I am sorry it is not here, is where Commissioner Warden said, which is that you at least acknowledge in your report that in some ways – and I wouldn't put it this way and many of you would not agree with it – that this is the right answer. This is the way to go.

But you also move on from there, because the realities are the realities that have been spoken about.

And you go to where I think the majority is and where I certainly was. I am just not persuaded that the views held by others are correct, and I would like to acknowledge that. And I would like the report to acknowledge whether they are correct or not correct.

But there is a substantial basis for the articulation of the views that have been expressed by the Commissioners - and then go on to talk about the Illinois Brick, if that is what you want to do, but I think it is important to acknowledge the substantial points that have been made by the Chair, Commissioner Carlton, Commissioner Valentine, Commissioner Cannon, and the others. I think they really are substantial and I thank them.

COMMISSIONER JACOBSON: Can I just make the point that I was trying to make before, which is that the position taken by Commissioner Cannon is different, I think, 180 degrees different, from the positions taken by Chair Garza and Commissioner Carlton. So, I don't see how you can join both of them.

COMMISSIONER LITVACK: Just so I can clarify, I do not agree with Commissioner Cannon on his point of view that we just leave it all to the States. I don't think that is what Commissioner Carlton was suggesting, and I do endorse

his point of view.

COMMISSIONER VALENTINE: Does that mean that you are voting for 1?

COMMISSIONER LITVACK: No. I don't vote for 1, but I join, as I said when he was out of the room, Commissioner Warden, in saying that, since that is not going to be the majority view, it seems to me it is important to acknowledge it but to move on and deal with 2.

COMMISSIONER JACOBSON: But 1 says no statutory change is appropriate.

I hear Commissioner Carlton and the Chair saying there should be statutory change, *i.e.*, a preemption of state *Illinois Brick*-repealers.

CHAIRPERSON GARZA: Actually, what the Chair said was —

[Laughter.]

CHAIRPERSON GARZA: — that the thought of preemption was ideal, but if there is no political will for it then there is no political will for it. And that means that we don't have the will to change the situation. I wasn't comfortable with the ABA proposal or the modifications.

So, actually, my vote was for 1. And I don't

actually see a statutory preemption in our slate of choices, here.

COMMISSIONER WARDEN: I don't think that Commissioner Carlton and I and, as I now understand it, Commissioner Litvack, all would, in the abstract, favor keeping *Illinois Brick* but preempting the repealers.

COMMISSIONER CARLTON: I agree with that.

COMMISSIONER CANNON: So, Commissioner Warden would vote for 1?

COMMISSIONER WARDEN: No. I wouldn't vote for 1, because it isn't written that way, as Commissioner Jacobson has pointed out several times.

MR. HEIMERT: I think that, for purposes of clarity, perhaps, we could add an option 0 or option 3, or whatever we want to call it, that is, in the ideal world, state indirect-purchaser-repealers should be preempted by federal law.

People can approve or not approve of that. We'll put something to that effect in the report, recognizing however many people it is.

[Simultaneous discussion.]

And then from there people could either choose option 1, which is, don't take any statutory action, or

option 2 with the different possibilities.

COMMISSIONER JACOBSON: And I would vote for that.

COMMISSIONER CARLTON: Using the word "ideal" is acceding that it is not possible?

COMMISSIONER LITVACK: Yes.

COMMISSIONER CARLTON: So, you could leave out the word "ideal."

COMMISSIONER LITVACK: Preferred.

MR. HEIMERT: Well, we will work on that. But if I could just review, people who had that view, whether it is ideal or the first, best option which we can work: Commissioner Carlton, Commissioner Garza, Commissioner Jacobson, Commissioner Litvack, and Commissioner Warden.

Are there others that I didn't include there who take that view?

COMMISSIONER BURCHFIELD: The view that you are discussing is?

MR. HEIMERT: The view that I am trying to articulate is, in an ideal world or preferred world, state indirect purchaser repeal laws would be preempted by federal antitrust law. *Illinois Brick* would be the rule of federal —

CHAIRPERSON GARZA: It is a different question, I

think, which is what Commissioner Jacobson was saying, too, because Commissioner Jacobson doesn't want to say preemption for a good enough reason.

And so his point is, if I were Supreme Being, here, I would say *Illinois Brick* was right, and that is the way I wish the world was. But he doesn't want to go the further step of saying, I would recommend preempting state law. Is that —

COMMISSIONER KEMPF: Let me break it down, because one can have two different views for preemption. One can say, there shouldn't be state rules on this, but, at the federal level, I am still going to reverse *Illinois Brick*.

I mean, those are two very different outcomes.

COMMISSIONER WARDEN: Yes. One could say that.

COMMISSIONER LITVACK: That is not what this one is saying.

COMMISSIONER KEMPF: I understand that. But I think, without clarification, it is confusing to the reader. To know whether, in light of the preemption of the state repealers, we do or don't favor reversal of *Illinois Brick* at the federal level. Those are two different issues.

COMMISSIONER VALENTINE: Correct.

COMMISSIONER JACOBSON: I agree.

COMMISSIONER WARDEN: Well, 2, as it stands, includes that, Commissioner Kempf in 2(c), for which you and I both voted, I think.

COMMISSIONER KEMPF: No. I didn't vote for that.

COMMISSIONER WARDEN: Well, I certainly did.

COMMISSIONER KEMPF: I am prepared, depending on how it was articulated, to do something on (c), but let me just marry the two here.

The way 2 and 2(c) fit together would still lead to an overruling of *Illinois Brick* at the federal level, and I hear a number of people here saying they favor preemption but would not overrule it at the federal level.

So, I don't think that 2, with 2(c) attached to it, is what these people are talking about. I think they are talking about something very different.

COMMISSIONER WARDEN: You are right about that, but that doesn't mean that one can't favor what Mr. Heimert was trying to state a minute ago. And if that doesn't sell in sufficient support to become a recommendation of the Commission, to join the alternative in 2. And, as we have discussed *ad nauseum*, some way of doing 2(a) and definitely 2(b), and either (c) or (d), the preference generally expressed has been for (d).

COMMISSIONER KEMPF: Let me, if I can, go back for a second.

The reason I favor repeal of *Illinois Brick* is that I think it was wrongly decided.

COMMISSIONER WARDEN: I think we got that point.

MR. HEIMERT: Okay. If we could go back to – I think we understand this idea. There may not be majority support for recommending preemption of the states' rules.

I had five Commissioners who favored at least having a statement to that effect in the report and then moving on to whatever our solution is: Commissioner Carlton, Commissioner Garza, Commissioner Litvack, Commissioner Jacobson, and Commissioner Warden.

Were there any others who wanted to join that sentiment?

COMMISSIONER VALENTINE: Yes. I would.

MR. HEIMERT: Commissioner Shenefield, Commissioner Valentine.

COMMISSIONER CANNON: I'm sorry. Say that again.
MR. HEIMERT: That the first, best alternative would be to preempt state indirect-purchaser-repealer statutes and leave federal law as it is.

COMMISSIONER SHENEFIELD: So it is both

propositions?

COMMISSIONER YAROWSKY: Both propositions.

COMMISSIONER SHENEFIELD: Okay. Then I don't agree with it.

MR. HEIMERT: I have 6.

COMMISSIONER YAROWSKY: Mr. Heimert, you are saying, who favors both propositions?

COMMISSIONER BURCHFIELD: *Illinois Brick* remains as precedent, and the *Illinois Brick*-repealer statutes are preempted.

MR. HEIMERT: On those two propositions combined, I have Commissioner Carlton, Commissioner Garza, Commissioner Jacobson, Commissioner Litvack, Commissioner Valentine, and Commissioner Warden.

Is there anyone else who wants to add his or her name to that list?

COMMISSIONER CANNON: So, this a modified 1?

MR. HEIMERT: Well, yes. Having cast your views on that, you could either opt for 1, which is don't do anything as a result, or you can cast your vote for 2, with some set of those options because we want to try to fix it.

COMMISSIONER CANNON: So, we kind of have a majority now for a modified 1?

MR. HEIMERT: No. This is irrespective of 1.

COMMISSIONER CANNON: This is new.

CHAIRPERSON GARZA: Can I ask – I don't think anything is getting clear. It seems to be getting muddier. We have to move on.

I think, Mr. Heimert, that you understand what it is you are trying to do. So why don't you write something up tonight, and we'll talk about it tomorrow. People can indicate what they are willing to support, and we can wordsmith it if necessary.

COMMISSIONER VALENTINE: Because it is also going to turn a lot on how it is written. I may not back this.

COMMISSIONER CARLTON: I just want to briefly respond to some of the points that Commissioner Kempf raised, because I thought they were good ones, and they should certainly be reflected in the write up of the report.

I would like to make the point that the main effect of antitrust action, although not necessarily on a particular industry, is the general effect it has on the economy in general, in influencing economic behavior.

Therefore, the fact that, in a particular industry, someone who is an indirect purchaser may not get compensated - although I understand the notion of why that

is unfair - my concern is more on the deterrent effect that gets created. And to the extent that there is a greater deterrent effect, that will have a much greater benefit for the economy in general if *Illinois Brick* were repealed, because it will have an undesirable effect on deterrence.

With regard to the victim/non-victim distinction, I think that is a false distinction, because if you have 100-percent pass-on, you are not a victim. What *Illinois Brick* makes clear is who can sue and who cannot sue. And the people who can sue are those who have what would be called direct antitrust injury.

And I thought *Illinois Brick* actually made the boundary lines very clear of who can bring an action and who cannot bring an action. I don't think it is correct to say that it is open season for non-victims to sue. I think it is actually a very precise language that identifies what class of people can sue. They have to suffer antitrust injury in the sense that they have to pay a higher price for the product.

And then the third point I wanted to make was on injury. A lot of people suffer injury when prices go up. If I make tennis rackets, and the price of tennis balls goes up, and people stop playing tennis, I may get injured. But

I do not have standing on the antitrust laws, even though I am a "victim."

Our antitrust laws are not designed to compensate any possible "victim." It is really, I think, to try to focus our attention to create incentives so that, overall, there would be very few victims.

I just wanted to address those points because I think they would be useful in a write-up. I think Commissioner Kempf would bring them up because they have to be addressed.

MR. HEIMERT: Commissioner Yarowsky, do you want to make a final point and then we will move on?

COMMISSIONER YAROWSKY: Yes. Just quickly. I happen to take the same historical view as Commissioner Kempf, that *Illinois Brick* really was a reaction trying to deal with *Hanover Shoe*.

Remember, *Illinois Brick* dealt with privity. They had to come up with a concept, okay? *Hanover Shoe* dealt with the economics of the situation, and you can take your view of it. *Illinois Brick* was a bootstrap attempt to try to come up with a legal concept, and they used the concept of privity. It is a contractual concept: you have to stand in privity.

It is as good as any other concept to use, but let's try to remember what that decision was about. I feel that all these problems – and Commissioner Jacobson, I need you to help reconcile the fact that the antitrust federal laws are adjuncts to state antitrust laws, and so that is why I was a little confused about when you take the double-barreled proposal that Mr. Heimert stressed. We kind of throw that by the boards.

But I guess I have less concern, Commissioner Carlton, and others, that, one, there will be any problem with the judges; they will deal with choice of law in these various classes, no problem.

Second, economic analysis is challenging, but what I tended to notice is that the challenge will then be for economists to develop even more sophisticated analyses to parse through this. It is kind of a Darwinian concept that even applies to economists.

Lastly, I am not surprised that judges are concerned. I absolutely respect them. I helped choose a number of them. And I know that they care about that. The state judges all oppose the Class Action Act. The federal judges, for the most part, all oppose the Class Action Act. It has to do with caseload.

So, we are now talking now about caseload. Remember that the civil docket is backed up. There is concern about that. I totally respect it; we all do. But somehow I think we are going to muddle through. And I think most importantly for me, just for me, is that there is a real opening here because of this Class Action Act. It is not the perfect opening, but it is an opening.

And I think this problem, which is a mess - we can use that opening to try to do something important.

COMMISSIONER WARDEN: Madam Chairman, I move the agenda.

COMMISSIONER KEMPF: I want to change a vote, and it is in light of the resurrection of the preemption discussion.

The original vote has two abstentions in *Hanover Shoe*, but ten people voting to repeal, and nine voting to repeal *Illinois Brick*.

The preemption discussion carries us to a point where that vote may change substantially, and so, depending on where that leads, I would be against the repeal of *Illinois Brick* if *Hanover Shoe* were not also repealed. So, I would change from this.

CHAIRPERSON GARZA: Okay.

COMMISSIONER WARDEN: That makes sense.

Treble Damages Reform

MR. HEIMERT: All right. We'll move on to discussion of treble damages reform.

Commissioner Kempf, would you care to take the lead on this?

COMMISSIONER KEMPF: Yes.

I am really at (c) on this.

On 1, I am going to vote no, but that is subject to where we come out on the other discussion. Depending on where we come out on the other discussion, I might quickly flip over to a yes.

What is called the Kempf Proposal, I was really more of a scrivener than an advocator on that. I am content with that, but it is not something I say to myself, this is a burning passion that I am an advocate of.

I am not in favor of what I will call the Warden Proposal, although there are some things in it that I would like, for example, as part of the development of law by the courts.

COMMISSIONER VALENTINE: One second.

Commissioner, do you say that you do vote for 2 and all its subsections, (a), (b), (c), (d), (e), (f), (g),

(h), (i)?

COMMISSIONER KEMPF: I do, but that is a soft yes.

COMMISSIONER VALENTINE: Okay.

COMMISSIONER KEMPF: I was taking notes and whatever, but it was sort of teeing up as a laundry list of factors. I don't feel all that strongly on them, and I could be influenced by what my fellow Commissioners say to make changes there.

COMMISSIONER JACOBSON: What is your vote on 1?

COMMISSIONER KEMPF: My vote on 1 is no, just because I have some proposals that are up for discussion. But, depending upon that discussion, if I didn't like the way the discussion was headed, then I would immediately gravitate to no change.

So, that is what I said at the very start. It is completely in play for me.

And finally, on item 4, I would not favor that as it is articulated here, but I would probably have something in my own drafted piece that would have upward adjustment to some specified higher number for a maximum of, say, four-times damages for covert hardcore cartel conduct.

So, I am, again, in play on that one, as well.

On pre-judgment interest and attorneys' fees, yes

on 5. I would also vote yes on 9. And if I had to do 12, it would be adoption of the English Rule, which I would favor.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: For reasons which I can explain later, I, after much vacillating in my own mind, vote yes on 1. No on 2. No on 3. No on 4. Yes on 5. And I am inclined to vote yes on 10.

I want to hear some discussion, but I am just inclined in that direction.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: I vote yes on 1.

And I will, perhaps, hopefully, get a chance to talk in a little more detail about 2. But in the end, I think this one of those examples or circumstances where sometimes justice has to be done by a meat cleaver rather than a scalpel, and I am on the meat cleaver side of this, at this point.

And on pre-judgment interest, I vote yes on 5.

And attorneys' fees on 9, no statutory change.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: 1, 5, and 9.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: Well, I guess my views here are a little less – well, I kind of like number 2, the way Commissioner Kempf wrote it.

But what I am worried about is there have been some comments that say, come on; this will just put too much uncertainty into antitrust enforcement. I am sympathetic to those criticisms.

So, in an ideal world, I would say that 1.5 should be the multiple for (c) and (e). I would increase the multiple to five if it was a foreign cartel with significant foreign commerce.

Now, I understand that is likely to be a minority view. Let me just say that if you read standard antitrust textbooks, it wouldn't be. The multiple as a method of deterrence should differ depending upon the observability of the offense.

Therefore, I would, in the interest of consensus - if people wanted to go with number 4, I certainly like number 4 and I would vote on number 4 with the addition that, on number 4, I would have an even higher multiple for foreign cartels with foreign commerce.

I would vote yes on 6.

And if I understand III correctly, I think I would

vote yes on 9, 10, and 11.

And if there were adoption of an English Rule, I would vote yes on that.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I favor number 1.

On number 2, one of the issues I have is that some of the considerations there - it isn't clear to me which way they should cut. Whether the challenged conduct was criminal, I am not sure whether that would advocate reducing or increasing treble damages. In light of the discussion — I think we have heard discussion both ways. And even whether the challenged conduct was overt or covert, I am not sure which way that cuts in terms of increasing or decreasing.

But in any event, I would go with 1.

I would entertain the prospect of reducing treble damages, maybe to single damages, in cases brought by a horizontal competitor, because I think, first of all, there is substantial opportunity for abuse of the antitrust laws in those situations to restrict competition rather than to promote competition.

And number two, when there is a genuine antitrust problem, the direct competitor has ample incentive without

treble damages to file the lawsuit. So, I would not incentivize direct competitors to bring antitrust lawsuits because of the risks involved.

Now, on number 5, I would vote yes.

On number 9, I would vote yes.

And, in particular, on number 10, my sense is that, in a situation where reasonableness of attorneys' fees are being evaluated, the courts can and should take into account the fact that the government has done most of the spade work, such that the running up of additional attorneys' fees by private litigants should result in a reduction of the attorneys' fees awarded there. I don't think there is a statutory changed needed in order to accomplish that result.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER BURCHFIELD: And I would also vote for number 11.

MR. HEIMERT: Noted.

Commissioner Yarowsky.

COMMISSIONER YAROWSKY: I am going to vote for number 1, number 5, and number 9.

And I just want to note that I did really appreciate this kind of work.

[Inaudible.]

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: No on 1.

Yes on 2(a), 2(b), 2(c), 2(d), 2(e), 2(g), 2(h), and 2(i).

It seems to me that (f) is subsumed, in a sense, in the *per se* versus rule of reason in (a).

It also seems clear to me, Commissioner Burchfield, that overt should be less likely to attract treble damages than covert. That is my view.

COMMISSIONER BURCHFIELD: There is a boldness factor there, that if someone is bold enough to do it in the bright sunshine of the day, maybe they need an additional smack on the nose.

COMMISSIONER WARDEN: Well, maybe ought to sue and get an injunction right away, if it is overt.

COMMISSIONER KEMPF: For stupidity.

[Laughter.]

COMMISSIONER WARDEN: My proposal has attracted total opposition from the Antitrust Division. And as far as I can tell, not much support except from Eleanor Fox. And I will retreat to fight another day on this. I hope, as John has kindly suggested, I may have made some contribution to

thinking that influences us in the future.

No on 4, and no on 5.

I am yes on 6 in any case where treble damages are not awarded. If treble damages are awarded, I see no justification for interest.

No on 9.

Yes on 10. Yes on 11, in both frivolous cases and competitor cases.

And I agree with Commissioner Kempf that in all areas I would favor the English Rule. It is a little hard to see how you can have it in class action situations.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: Yes on 1, yes on 5, and yes on 9.

And yes on 10. And on 10, I would also be willing to recommend that judges consider reducing attorneys' fees in civil litigation that follows on criminal prosecution for the same reasons that Commissioner Burchfield has articulated. There often is not a lot of additional spade work being done.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: 1.

On 2, I am very sympathetic to the sentiment

behind 2, but, on balance, I am not going to go with 2.

With respect to 3, Commissioner Warden, I agree that it was useful to have thought about — to sort of go back to Stage 1 and think about what would be maybe a preferable system. It is a good thing for us to look at in considering the other issues. So, I do thank you for the effort that you made in proposing it.

4, I do endorse, although I think my note to myself is that I thought that 4, consistent with the question that went out for public comment - or what I thought was intended to get at the issue of the global cartel, where there was a sense that there might not be private actions outside the United States.

And therefore, given the reward to the wrongdoers of such a cartel, it may make sense to increase the multiplier. I was very surprised that not even AAI was interested at all in the possibility of increasing it. I think that perhaps it is because they couldn't separate from the other proposals. But, in any event, notwithstanding that Commissioner Carlton and I stand alone as the stinky cheese, or whatever it is - I will join him.

6 is another area where I guess I am standing with Commissioner Carlton, consistent with my vote from last

time.

9.

10, I voted for last time, but this time I think – not only because I think that it doesn't need a statutory change, but I agree with the way Commissioner Burchfield and then Commissioner Valentine put it.

And then 11.

COMMISSIONER KEMPF: No on 10?

CHAIRPERSON GARZA: 10, sort of yes, with a bracket, which is that I agree with the sentiment. It may not need to be a statutory change. As opposed to recommending that judges reduce the attorneys' fees.

COMMISSIONER BURCHFIELD: And my assumption is that that sentiment can be reflected in the report.

CHAIRPERSON GARZA: Right.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I support 1.

I had a passing fling with number 2

[Laughter.]

COMMISSIONER SHENEFIELD: But, on sober reflection, it seemed unadministrable to me.

Commissioner Warden's proposal – I think the word that we were using the other was that it had elegance. It

is elegant, but I don't support it.

I support 6, which seems to me to be the pristinely correct position.

And 9, 10, and 11.

And I don't support the English Rule.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: Well, I just wanted to comment primarily on the change of votes from the preliminary voting that I did to the voting that I did today and why I did that. And Commissioner Burchfield, thank you for starting that discussion on 10.

In May, I think I voted for 10, saying that one should consider reducing attorneys' fees in civil litigation that follows on criminal prosecutions. We had a long, spirited discussion.

Since then, I thought about it, and here are some thoughts just to put in the mix. One, I am very cautious now in thinking about Congress regulating attorneys' fees in any way. Whether it is the plaintiffs' bar, or whether they would set an hourly cap for defense counsels, or whether they would say that CEOs could not earn over a certain amount. The more I think about it, that is probably — I understand Congress is developing and considering remedial

schemes. But I think really regulating the professions, in terms of what people earn, is somewhat intrusive, and I am not raising this discussion to a constitutional level, but as you know, in Article 1, there is a stricture that Congress really shouldn't interfere with contracts.

Obviously, that is, existing contracts. We could be talking about future contracts. But I just feel very wary about reaching into that part of the private market. I know our discussion previously, though, took that as a small component of a larger phenomenon. But I think, as I stand back to look at that component itself, I feel very leery about it.

So, I just wanted to explain why I didn't vote for it this time. I understand the discussion that you started, Commissioner Burchfield, is that a court could consider that among all the relevant factors it might consider in setting fees.

I also think that, on 11, we already have a rule 11. So I am not sure what we are gaining by singling out what is called a frivolous suit. I mean, I think that is why sanctions are there, and courts have that power. So, I'm not sure what we are trying to tell the courts.

COMMISSIONER VALENTINE: Actually, that is the

question that I wanted to ask of those voting for 11 - what do they deem covered by "frivolous" that is not covered by rule 11?

COMMISSIONER YAROWSKY: Those are just the two main points.

COMMISSIONER JACOBSON: 1927, which says that there is a statute.

COMMISSIONER WARDEN: Well, I voted for 11, but I wouldn't have written it the way it is written. But I think the competitor cases are the ones that I am concerned about. And I have no idea whether it covers anything that isn't covered by rule 11 the way it is written.

I also think that when we were talking about producing fees in follow-on cases, we are not talking about interfering with contracts. That is, if you have a plaintiff, and he agrees to pay his lawyer a third of the recovery, he has to do that. We are talking about where the fee is taxed by the court against the other side. That is what I think we are talking about.

COMMISSIONER YAROWSKY: I take your point, but my primary concern that just arose over the last month or so, about Congress reaching in and regulating recovery – you know, what a profession earns.

COMMISSIONER WARDEN: Well, I am with you 100 percent on that, but I don't think anyone was thinking of a statute here, anyway.

COMMISSIONER VALENTINE: Commissioner Yarowsky, this was my proposal initially, I believe, and no one was trying to get at this.

If you look also at the recent ABA submission, which, although commenting on 2 and asking whether there is a related government action, the first comment is, well, that is largely unrelated to whether a civil remedy is appropriate.

But federal government proceedings, whether criminal or civil, rarely compensate this. To the extent that this factor is intended to invite the court's scrutiny of the relative contributions of the government and private plaintiffs to the development of the factual record in a case, the court should undertake that task in its review of attorneys' fee applications, not in its assessment of the remedies appropriate for the violation.

I think what one is trying to capture in 10 is simply within the leeway that various lone-star and fee-application rules provide for. If the follow-on actions are not really contributing that much, the attorneys should be

accordingly compensated.

COMMISSIONER YAROWSKY: Maybe it is the word "should" that got me more than anything as I kept reading this. Because, to the extent that one draws attention to the fact of follow-ons and what did you contribute - I mean, those are the normal – if you look at the totality of relevant factors, which a judge does in doing that, that would be a factor.

I guess I got hung up a little bit because it sounded like we were saying that a court should absolutely do this every time, and that just seemed a little categorical. But I think I am seeing the drift is moving into a little different state.

COMMISSIONER BURCHFIELD: Right. And if I could comment on that.

I don't support 10 as phrased. I think for many - in some respects, Commissioner Yarowsky, for the reasons that you are stating, I think there are two polls here. First of all, we do not want to discourage plaintiffs from suing in instances of severe cartel activity. We want to make sure that victims of that cartel activity are adequately compensated, and we want to make sure that it is deterred. So, to do anything less for them on attorneys'

fees than is done generally I think is not a good idea.

On the other hand, I recognize that if the Justice Department has obtained plea agreements or guilty verdicts from the defendants in those cases, those cases are lay-downs, and large law firms should not come in and run up huge legal fees that they will then submit for the defendants to pay when those legal fees are totally unnecessary.

And I think that, under the general notions, attorneys' fees are awarded for reasonable and necessary legal services, and that situation can be adequately addressed without any sort of statutory or rule change.

COMMISSIONER YAROWSKY: I understand.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: Yes. I wanted to respond to a question that Commissioner Burchfield raised in his comment. It may be moot in light of the votes.

I think 2 would be better phrased if it said that it may limit the award to, it says, "single damages." I prefer 1.5 damages, but put that aside. And, by the way, single damages doesn't capture all of the harm that you do to society, because there is lost consumer surplus. But putting that aside, instead of using the word "whether," you

would put the word, "if."

So, to award single damages based on a consideration of the following factors, and then, for example, if you went down to see if the violation was related to an otherwise pro-competitive joint venture, or if you went down to (e), whether the challenged conduct was overt, and leave out the word "covert" — if phrasing that rule would make it clear.

COMMISSIONER VALENTINE: And then you would have to drop rule of reason.

COMMISSIONER WARDEN: What I am worried about is a drafting problem.

COMMISSIONER CARLTON: And the second thing on 4 - I can't remember if I said what the multiple should be for —

COMMISSIONER VALENTINE: You said five times for foreign cartels.

COMMISSIONER CARLTON: Oh, okay. I just think that we need to specify a multiplier.

And I wanted to say something about the Warden proposal, even though it didn't get any votes, and I think that is an interesting idea. I think we want to recognize the idea in the Warden proposal, even though it didn't get any votes, I think it would be useful for there to be at

least some statement in the report discussing the idea of separating out damages, what someone pays versus what someone receives. I think that is an interesting idea, and maybe some future Commission can worry about it. But I think we want to recognize the idea in that Warden proposal as a valid for future consideration.

Regarding Commissioner Burchfield's rewriting of 10, that seems reasonable to me. I would be happy to go along with that.

And a number of people voted for the English Rule, even though that is not on the list, and I was curious whether that ever was on the list. I just don't quite remember. But, given the number of people who voted for it, I wonder if it would be useful to have it on a list.

MR. HEIMERT: I think it was on the list the first time around and didn't attract — we are trying to refine this down to ones that had more support for it.

COMMISSIONER VALENTINE: There were three votes for it.

COMMISSIONER CARLTON: Okay.

COMMISSIONER KEMPF: Well, there are only four who opined on it, and three of the four favored it. Now, the others didn't comment one way or the other, and I don't

remember it on an earlier discussion.

MR. HEIMERT: Is there anyone who would wish to favor the English Rule, at this point, so that we can have clarity, if there are more than three?

Commissioner Carlton.

Commissioner Kempf.

And Commissioner Warden.

All right. I hear no more.

Commissioner Jacobson.

COMMISSIONER JACOBSON: At one of our first meetings, I advanced a really eloquent argument, and Commissioner Kempf, who had agreed with me, responded to that argument by announcing that he disagreed me.

So, I am going to try today, since he is voting for number 2, as opposed to number 1, but said he might be nudged. Let me see if I can nudge him just a little bit in the number 1 direction so that we can get a broader consensus on it.

And the problem is the one that a couple of Commissioners have identified, that item 2 is unadministrable. And, as Commissioner Burchfield said, a number of the criteria really could be argued to point in very different directions. But the major point I want to

make on number 2 is that, because we have treble damages, particularly in rule of reason cases, which are not subject to criminal prosecution, particular in single firm cases, which are not subject to single prosecution, is to encourage enforcement of the antitrust laws in the areas.

And the result of that is that the most egregious single-firm and rule-of-reason conduct is effectively deterred. And you go back to an earlier era, when the folks who acquired the Edison patent on the motion picture projector were able to use that patent to bar not only manufacturers of film from running through their projectors, but ultimately were able to prevent competing movies from being allowed to be displayed in movie theaters.

And the result of this motion pictures patents trust, was the long-term monopolization of the motion-picture industry, and, I will use the technical term, screwing up of that industry for decades. And had there been — it was on the books, but it was not enforced - an effective treble damages remedy at the time, it is at least possible that that conduct would not have occurred, and the motion picture industry would be in better shape.

The clarity of treble damages in gray-area conduct makes the case for deterrence of the most egregious such

conduct compelling, and results today in a market situation where that kind of activity is avoided. And I fear that if we go to a discretionary treble damages regime in an area where there is no criminal prosecution, where the only remedy the government can get is a, "Don't do it again, please," that will have seriously undermined enforcement of the antitrust laws.

And so I would urge you to give some more consideration to the point.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: The only two comments were, number one, with regard to the English Rule, which I am sympathetic to, in this instance I am not convinced that it would be very effective, because a plaintiff's lawyer bringing a case could so easily find a judgment-proof plaintiff that the English Rule would be truly academic.

The second point I wanted to make is just to see if I am, as I sense I may be, the lone wolf in my view that something that needs to be done in the treble damages area on cases brought by direct competitors under the antitrust laws.

COMMISSIONER WARDEN: You are not the lone wolf on that.

COMMISSIONER BURCHFIELD: I would propose that we take a straw vote to see if there is enough interest in such a proposal – and I would be happy to draft something up –

COMMISSIONER LITVACK: To do what?

COMMISSIONER BURCHFIELD: To limit the damages –

COMMISSIONER KEMPF: 2(h).

COMMISSIONER WARDEN: It is 2(h).

COMMISSIONER VALENTINE: There are two votes for it, I believe. Oh, no, three.

COMMISSIONER KEMPF: I have three, and then I have four who have various things like "sympathetic," "passing fling," "uncertain."

COMMISSIONER SHENEFIELD: I withdraw "passing fling."

[Laughter.]

COMMISSIONER BURCHFIELD: I am in favor of 1, but I would support 2(h), if that does not detract from.

COMMISSIONER VALENTINE: I have got you down for that.

COMMISSIONER CARLTON: I have a question for you, Commissioner Burchfield.

Were you talking about damages, the multiples should be different, or were you talking about attorneys'

fees?

COMMISSIONER BURCHFIELD: My concept of 2(h) is that a direct competitor suing under the antitrust law should be entitled to recover actual damages, not treble damages. And rather than giving the court discretion in that sense, I would just flatly say single damages. And I don't support 2(h) as written, but I would support a proposal that limited damages in an action brought by a direct competitor to single damages.

COMMISSIONER WARDEN: I join that position.

Would you also join giving the prevailing defendant in such a case attorneys' fees?

COMMISSIONER BURCHFIELD: I would.

MR. HEIMERT: Does anyone else care to join?

CHAIRPERSON GARZA: Although I am not unsympathetic to that position and I considered it - I guess you could say I had a fling with it - I ultimately decided not to support it, in part because I think that the case law probably handles the abuse of competitor suits. The longstanding focus by the courts on competition and competitors, *et cetera*.

So, while I recognize that it is possible to have abusive lawsuits, I think the courts are alert to that. You

do have rule 11. You do have standing rules. You do have these other rules.

There, conceivably, could be the case in which a competitor complaint could be valid.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: As I said earlier, I drafted 2 as a scrivener based on a lengthy discussion that we collectively had where people registered strong views on (a) through (i).

Having now listened to the discussion, I am torn as follows. A, I am prepared to gravitate toward number 1, if that is what the sentiment is. I am very comfortable doing that. But, having listened to so many people earlier and today opine on various subcategories of 2, let me tell you what my own mind is. I would amend it as follows, to see whether it addresses the concern about unworkability, things better left to the courts, *et cetera*.

First, I would drop 2(c), I would drop 2(d), I would drop 2(g), and I would drop 2(i). So, I would just eliminate those from the list altogether.

Then, to make it more administrable, I would say, recommend statutory change that would retain treble damages, and provide that the court, in its discretion, may adjust

the award up or down as follows:

Per se, four; rule of reason, two; Single firm, two; Multi-firm, four; overt, two; covert, four; criminal, four; and competitor, two.

That makes it sort of much more workable. It eliminates half of them.

Now, having done that, people may still be of the view that it's too much of a quagmire, but that strikes me as something that accommodates the various concerns, at least to some degree.

CHAIRPERSON GARZA: So, can you go through – (a) violation was *per se*; that would be four.

COMMISSIONER KEMPF: In other words, some people have said that, for hardcore stuff, maybe we should go with an upward adjustment. Three may be enough; I don't know. But if we did that, that would certainly be a candidate to go up on. Rule of reason is clearly a candidate. Go down on it. It is clearly uncertain.

In (b), single-firm conduct is shakier than multi-firm conduct, so I would draw that distinction there.

(c) and (d), I would just scrub.

Overt versus covert, that is fine. I would have overt be two, because it doesn't look like the person

thought there was anything wrong with it. And covert is usually hardcore stuff. And again, I am happy to leave that at three, and could go down on overt.

Criminal, if there is a candidate to go upward, that would be it.

I would drop (h), competitor actions. You picked two.

Now, I am happy to simplify it further and have the downward adjustment to two times for the others here.

There is some part of me that is sympathetic to views expressed by several people, most strongly by Commissioner Jacobson that, do we really want to get into all this fine-tuning and stuff like that?

I am prepared to get into it, but also, if people don't want to, I am prepared to let it pass. I am comfortable doing that.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: I am reminded of something that Commissioner Jacobson said way back when we first started talking about this.

There ought to be a presumption that 110 years of history with the thing has some validity. It hasn't been perfect. But as we sit here between two, one-and-a-half,

four, five, three, six — I think the record speaks for itself. Just stay where you are.

See if —

COMMISSIONER VALENTINE: I believe the testimony we received on that was consistent on that score as well.

MR. HEIMERT: Should we resume after lunch? We will try to come back at 1:15, and we will resume.

CHAIRPERSON GARZA: When we come back, actually, we were going to start with patents.

COMMISSIONER CARLTON: Can I just say one thing?

In support of what Commissioner Litvack said and also following up on what Commissioner Kempf said, I think 2 would become very simple along the lines that he suggested. And I would just go with (e), because in the literature, at least the economic and antitrust literature, the multiple depends on the testability. And for deterrence, that is the only thing that matters.

And therefore, 2 could become quite simple. If it is overt, it is whatever — two; I could live with two - and if it is not, it is four.

The only other point I want to make is, on foreign cartels, I think we are ignoring the difficulty that I think we could address. It would be difficult because of the

Empagran decision. And I am not sure why we are failing to address it. Maybe we addressed it somewhere else. I can't remember, to tell you the truth. I don't think so.

MR. HEIMERT: We will address FTAIA this afternoon. We will make sure that the report does reflect the various concerns that different Commissioners expressed about treble damages across the board.

So, that will be reflected in there, as appropriate.

COMMISSIONER VALENTINE: Are we talking about it if two or three people voted for it?

MR. HEIMERT: Well, it will be reflected as appropriate, as a footnote or a sentence about the concerns. As we have said, the report will reflect not only the majority, but the views of all Commissioners.

And if they would care to write separately to expand on their views, then we will do that.

CHAIRPERSON GARZA: Commissioner Valentine, just think of it this way: the Commission considered whether to do anything about treble damages, and the majority of the Commissioners said no. A few Commissioners thought that adjustments would be appropriate and explain why.

COMMISSIONER VALENTINE: Okay.

MR. HEIMERT: All right. We will resume at 1:15. We are going to change the order of the agenda slightly, to take up the patent and antitrust issues first after lunch.

COMMISSIONER YAROWSKY: Then will you go back to the same order?

MR. HEIMERT: Yes. And then after that, we will take the others in the order listed currently.

Patent And Antitrust Issues

CHAIRPERSON GARZA: Let's start.

We are going to start with patents and antitrust.

And Commissioner Shenefield, since you have a motion pending, do you want to address that?

COMMISSIONER SHENEFIELD: Sure.

First, it won't surprise anybody to discover that I have not learned anything more about patents in the intervening month than I knew before. So, I still feel a sense of inadequacy in dealing with some of these issues.

That said, however, my original motion to de-certify a whole range of issues that was then before us seems to be more of an awkward obstacle to making some progress more than anything else. So, to clear the decks for the discussion for the memorandum and the choices, I will withdraw the motion so that we can then - assuming

whoever seconded it also agrees. I think that was —

CHAIRPERSON GARZA: Commissioner Warden, I believe you seconded the motion last time. Do you agree with the withdrawal?

COMMISSIONER WARDEN: Oh. I sure do. I don't think I did say that.

[Laughter.]

COMMISSIONER SHENEFIELD: Let's assume it is withdrawn, and we can go to the merits and issues as represented in the memorandum that we received dated July 21st.

CHAIRPERSON GARZA: All right.

COMMISSIONER KEMPF: I have a question for the Chair, I guess we have eight -

CHAIRPERSON GARZA: We do; we have enough.

COMMISSIONER KEMPF: Are there others who will be rejoining us, or is what you see what you got?

CHAIRPERSON GARZA: Commissioner Burchfield, I believe, will join us. He is wrapping a telephone call.

Commissioner Yarowsky will join us when he can this afternoon.

Commissioner Cannon is gone.

And Commissioner Delrahim, we are not certain. I

think he was planning to come this afternoon. I don't know when.

COMMISSIONER KEMPF: Thank you.

CHAIRPERSON GARZA: All right. We will proceed then on the basis of the memo that the staff prepared, which they did, really, in light of the discussion that we had during the last meeting, and they have arranged it in terms of certain broad findings and recommendations.

So, these are all new in a sense. These are not what we voted on before. So, if the Commissioners who are present could go through as Mr. Heimert calls on you and indicate where you stand on the issues that are outlined here -

MR. HEIMERT: We'll start with Commissioner Carlton.

COMMISSIONER CARLTON: On 1, I vote yes. Yes on 2. Yes on 3, all of the parts. Yes on 5. Yes on 7, (a), (b), and (c). Yes on 8, and yes on 9.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: First, let me say that I thought the staff did a great job on putting this particular piece together.

I vote yes on 1.

I vote no on 2, because I hate to endorse anything the federal circuit has had to say on this subject.

I vote yes on 3, and I would add at that the end of the paragraph that is number 3, itself, "and by directly impeding competition." Period.

I vote yes on 3(a), 3(b), 3(c), 3(d), and 3(e).

Yes on 5, yes on 7, yes on 7(a), yes on 7(b), and yes on 7(c), with one word change. The Commission recommends that courts — I would change "courts" to "the federal circuit."

I vote yes on 8.

I vote no on 9. Perhaps somebody could persuade me on that. I think, on the whole, perhaps naively, I view the cross-licensing of patents that are substitutes for each other as really still being pro-competitive.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I also thought that this was an excellent piece of work by the staff, in terms of synthesizing everything that we have had to review, and I think focusing it better on the antitrust area where we do have some expertise.

I would vote yes on 1.

I was going to vote yes on 2, but I have to say I

somewhat agree with what Commissioner Warden says. Maybe we could find a way to say, thinking of the courts or principles articulated by the courts that would include both Supreme Court and federal circuit case law.

Yes on 3, and I have no problem with the Warden amendment, there.

I am wondering, in (b), whether we are talking about patent holders for trivial ideas, if "ideas" means inventions. I don't want to get confused with copyright language, but I am happy to live with "ideas" if we are comfortable with that.

And I am wondering whether, in (d), it is not just a patent holder but other users who may need to pay royalties. When you think of some of the recent cases that have gone up to the Supreme Court where the doctors were actually going to have to be paying royalties for reading that elevated blood levels may give you an increased risk of heart disease -

And then yes on 5.

Yes on 7(a), (b), and (c).

Yes on 8, and yes on 9.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: I am going along with

exactly what Commissioner Valentine had.

Yes on 1, 2, 3, 5, 7, 8, and 9.

MR. HEIMERT: And the subparts, as well?

COMMISSIONER LITVACK: Yes. The subparts as well.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Yes on 1, 2, 3, and all of its subparts.

Yes on 5.

Yes on 7, and all of its subparts.

Yes on 8.

9 is complicated, largely for the reasons given by Commissioner Warden. Are the substitute patents blocking off each other? I mean, this is a very, very difficult issue, and I think the sentence, as written, should not be endorsed as it is written.

I would consider talking about blocking patents, not blocking patents, the efficiencies associated with patents - But, all in all, I think it is not necessary for our report. I don't think we will make a major contribution.

I am not voting on 9, but I'm not voting in favor of it, either.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I vote for 1.

I vote for 2, as rewritten.

I am inclined to vote for 4, out of a sense of humility.

If there was a consensus around supporting 6, I guess I could be persuaded to do that.

No on 7.

Yes on 8.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: All right.

1.

2, with the suggested revision that Commissioner Valentine articulated.

3, and all of its subparts, including with the revision that Commissioner Warden proposed, and the two that Commissioner Valentine proposed, with respect to (b) and (d).

6, 7, 7(a), 7(b), and 7(c), and 8.

And, on 9, I am where Commissioner Jacobson was. But also, I am just not sure I understand what 9 was getting at. I would like to hear more about it.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I am yes on number 1.

Number 2, I'm yes, but I am not sure we have to do all that extensive work. I think we can just change that to — strike, "with the federal circuit" and just put in "believes." So, it says the Commission believes that the — and then the quote, and then just maybe add another cite.

Then, on 3, I am yes on the first sentence without "however." I don't like the "however." The "however" looks it is subtractive of 2. I think "however" is a bad word, there. It looks like waffling on something we just all endorse, so I would kill the "however," whatever we do.

But I would end 3 with a period after the word, "competition."

And I would vote no on all of the subparts. I don't disagree with any of them, but those are all the kind of things that are — we are talking about obviousness. It strikes me as though those are all obvious. It looks a little bit like we are talking down on someone to say all these things.

There is, after all, a requirement of non-obviousness to secure a patent. And that reflects the Congressional determination of everything that is in here. And they have already provided it. It says that you cannot get a patent for something that is obvious.

To say, here is a bunch of reasons why you don't want to give patents for obvious – it strikes me as inappropriate and demeaning to the courts and to the legislature. So, I don't disagree with any of it. I think it is unnecessary to say it, and I think it is unwise to say it.

On 4, I vote yes. On 5, I am strong no. On 6, I am a strong no. On 7, I am a strong no. On subpart (a), I am strong no.

And this is just a good example, by the way, the recommendations targeted at insuring the quality of patents – I don't believe that that is what they are targeted at. If I really believed that, I might vote yes. But, as I said at our hearing on this, some of them are inconsistent with that. The provision –

COMMISSIONER VALENTINE: I believe this is just referring to those that are directly related to improving - ensuring the quality.

COMMISSIONER WARDEN: Correct.

COMMISSIONER KEMPF: But some of those are inconsistent with that, and they have a different, in my view, ulterior motive. I was criticizing it, probably a little harshly. I reread it last time and do not backtrack

from any of my comments on further reflection.

The notion in (a), you should have a second shot in the patent office because that is where the real expertise is before you go to court. And then, when they go to court, you say, well, we give no deference to that expertise.

That is hard to reconcile the two of those together, and I think there is a different agenda, as I said last time, and so I would be opposed to that.

(b) is adequate funding. I favor that.

In terms of (c), again, the courts should avoid misinterpreting the statute. You know, that is a general rule that I subscribe to all the time. I think it is unnecessary and unwise to say it. Although I agree with that, I would not say it. I just don't think that it becomes us.

8, yes.

9, I am not sure on. Several people have said they might want to re-articulate that. If you are doing that, the first thing I would get rid of is the "nevertheless" word at the front of it. But, subject to how it is rewritten I might agree with that. Right now, I think I would vote no. There are some sentiments in there, if it

is rewritten, I might agree with.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: Yes on 1.

On 2, there have been various proposed rewrites. I think we are all leaning in the same direction. My rewrite was to insert after "that" – "with the federal Circuit that" comma "properly applied" comma "the patent and antitrust law are actually complementary" and so forth. But I think I could probably live with the other rewrites, as well.

On number 3, I agree with Commissioner Kempf's rewrite. I would strike the last sentence and eliminate "however" in the first sentence.

I am inclined toward 3(b) and 3(c).

I think that (d) is somewhat redundant of (b), and I am not sure if I understood Commissioner Valentine's explanation on how to reconcile the two, but I am open-minded about it.

On 4, yes.

7(b), yes. 7(c), yes. 8, yes, and 9, no.

MR. HEIMERT: Commissioner Carlton, is that your flag up?

COMMISSIONER CARLTON: Yes.

I just wanted to say a word about 9. Maybe it should be rewritten, but as I understood it, if there are two patents that are competing with each other, you are more concerned about the antitrust concerns when there is a settlement than when there are two patents that are complementary to each other.

If you have complementary patents, just like if you had complementary products, a separate monopolist of Complementary Product A and Complementary Product B can wind up charging higher prices than if they actually coordinate because it would in their mutual interest, actually, to lower the prices of their products.

So, I thought that was what 9 was getting at, and it seemed to make economic sense to me, was that you are more concerned when patents are competing with each other than when they are complements. So, I thought the economic logic, if I understand it correctly, was appropriate.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: I agree, Commissioner Carlton, that you might, in certain circumstances, have a concern with the cross-licensing of competing patents arising out of an infringement action. But I guess my other question is, well, why would you ever have a concern about the cross-

licensing of complementary patents? And, if they are complementary, why are you cross-licensing them to settle an infringement suit? Do complementary patents infringe each other?

Maybe it is the question of what we are talking about. I think complementary patents are patents that don't infringe. And I am assuming that the reference to competing patents that they are patents on the same process or technology, or whatever.

So, again, I am not sure of the terminology or what we are really trying to get at here.

COMMISSIONER WARDEN: As it is written, it doesn't look like it is actually related to its parent paragraph, patent settlements.

COMMISSIONER VALENTINE: Yes. I agree. I think that 9 is a much more general statement about cross-licensing in general that could take place as a matter of daily bread, whereas the intro part was talking about settlements saying, we specifically hadn't addressed those.

CHAIRPERSON GARZA: But I assume that 9 is indented – I mean, the heading is "Patent Settlements."

So, if 9 doesn't relate to settlements, what is it doing there, and why don't we have something on patent

settlements to address?

COMMISSIONER LITVACK: I understood, as I think Commissioner Carlton did, that it did relate to patent settlements. It seemed to me to be obvious that it is correct to view it in that context.

COMMISSIONER WARDEN: The settlements that we are concerned about are ones in which the infringed firm pays the infringer to stay out of the market.

COMMISSIONER JACOBSON: If the patents are blocking, that is the patent settlement that you really want to encourage, more so even than the settlement involving complementary patents, because if the patents are blocking, and they are both valid, then no one can practice the particular invention.

So, you have just got to be careful here. I think we ought to either stay out of this, or write it up in a way that takes those considerations into account.

COMMISSIONER LITVACK: You are right about the consideration, but you presume the conclusion when you say they are both valid. The concern is that they are not.

COMMISSIONER VALENTINE: Right. Right. Right. Right.

CHAIRPERSON GARZA: But blocking patents, I take

it, under the terminology here, are not complements, okay?

So, the bullet just seems – it is not clear to me what we are saying.

The Commission knows that the cross-licensing of patents that are substitutes for each other raises more antitrust concerns than cross-licensing patents that are complements to each other.

Well, more antitrust concerns suggests that we have antitrust concerns when they cross-license complementary patents. What is the nature of the antitrust concern there? Why are we talking about it?

Then it says, cross-licensing patents that are substitutes can raise issues. Okay. Well, so? And? Why are we bothering even to say something?

COMMISSIONER JACOBSON: There can be compulsory grant acts that you would have a problem with because they would stilt innovation in the complementary patent area.

But I agree, this is much too general, much too amorphous. I think it ought to just be taken off the list.

COMMISSIONER LITVACK: I would certainly agree with taking it off, because I think as we talk about it we have no idea what we're saying.

CHAIRPERSON GARZA: And I think that was, in fact,

because we didn't study patent settlements. We could have. We didn't. So, we really don't have a record developed that allows to deliberate on it and decide what to say.

COMMISSIONER WARDEN: Before Commissioner Shenefield leaves, maybe he can explain all this to us.

COMMISSIONER SHENEFIELD: If I heard myself explain it, I would accord it no weight whatever.

CHAIRPERSON GARZA: Well, Commissioner Carlton, can you —

COMMISSIONER CARLTON: I could go along with that. I think that is fine. If people want to remove it — I mean, it is true; we didn't have extensive discussions on this topic. I believe Shapiro did talk about it.

But I think the general statement that we make on patent settlements in that bullet would cover us. So, if people are uncomfortable with 9, I think the bullet is fine.

CHAIRPERSON GARZA: Commissioner Valentine, you were someone who initially had gone with 9.

COMMISSIONER VALENTINE: Yes. I guess I do think there was some testimony on this as well, but if the majority wants to just say — certainly I would be happy to say either the staff should draft a rewrite that is more precise and maybe capture more specifically what we want, if

they can tell what that is -

CHAIRPERSON GARZA: How would they know what we want? That is the problem.

COMMISSIONER VALENTINE: Right. Or get rid of it. I'll live with getting rid of it. But there has got to be something – there is something useful one could say here, is the problem.

COMMISSIONER CARLTON: I think the point, the sentiment, which I think is captured in the bullet - maybe we could reread some of the testimony, but when there is a settlement, and there are competing products, that raises more concerns than when there are not. I think that has to be true. Whether we want to say it because there are complications that someone could add, I don't know if we want to get into that.

As far as your question, Commissioner Garza, as to whether complements can ever arise as part of a settlement of an infringement, I assume that probably does happen. I assume that you could probably have patent disputes over complementary products that are complements but maybe trigger patent violations. But I think the sentiment is a simple economic one that it is not necessary to highlight it as a special topic, because I think it could be interpreted

as being covered by the bullet point.

CHAIRPERSON GARZA: The one thing that I would say is that the bullet point, as it is written, refers to the fact that there is ongoing case law development. And really, I think that what this gets at is the reverse-payment settlements, which 9 doesn't.

I think what we had decided was that, while it was a very interesting issue and a live issue, because of where it stood, we weren't going to take it on to study. So, what I would suggest we do is basically identify an important issue. Talk a little bit about why it is important. Reference the fact that it is in the courts.

We have got on the record what we have got from Carl Shapiro and whoever else we have. And so therefore we have collected some testimony and evidence on the point, but it is not ripe, as it were, for us to deal with it.

COMMISSIONER VALENTINE: That is fair.

COMMISSIONER JACOBSON: Second that.

COMMISSIONER CARLTON: I can live with that.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Three things.

On item 3, which I would end at the first sentence, let me address part of the infirmity with the rest

of that. The failure to strike a proper balance between competition and patent law policy can harm innovation. For a court addressing a patent law matter, the court implies that the statute has been given to them. The court doesn't balance it against the competition law, racial discrimination law, or anything else. It is just the question of applying the patent laws.

I don't want to make it sound like we are saying that, in applying the patent laws, you should take into consideration something that it is not proper to take into consideration. I think the first sentence captures what we want. The rest sort of sounds like — and then I would ask my Commissioners to reread (a) through (b). As I said earlier, I don't disagree with any of that stuff. I take it all to be implicit in why we have a non-obviousness requirement to begin with, but it just reads to me like it is condescending.

And, not only that, but all of it is captured in 7(c) and better. The Commission recommends that the courts and the PTO should avoid an over-relaxed application of the obviousness standard and not allow patents on obvious subject matter that thus harm competition and innovation. That strikes me as getting to the conclusion without all

this other stuff that strikes me as inappropriate.

Finally, on 9, I would agree with the decision to just take that off of there. Whenever you hear of a case where the infringer is paying a royalty to the patent holder, it strikes you as counterintuitive and something wrong must be going on. But now there has been a body of literature that has been developed that says, no, that makes sense and is pro-competitive in various circumstances.

So, without us really wading into that thicket and understanding it, I think we are better off leaving that alone.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I would agree with Commissioner Kempf's suggestion to drop "however" from the third sentence in 3, at the end. And it would not bother me to drop the second sentence and then get rid of "for example" and put "however." "To grant patents on obvious inventions, however," I think is important. I don't think it will explain why the rigorous adherence to the policy adopted in the Constitution and the statute is in reality important.

That is what this does, 3, in all of its subparts. And then we have our recommendations in 5 and 7. I don't

think there is anything condescending or patronizing or whatever about it. I think we should say these things.

COMMISSIONER VALENTINE: I second that.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: I agree with Commissioner Warden. I think it is important to note that, Commissioner Kempf, 3 is suggested by staff as a finding.

So, before you come to your recommendation for 7(c), you have to give the basis for your recommendation. Why are we, as antitrust lawyers, suggesting something about the standard and the way the courts are applying the standard relating to obviousness?

Well, the reason we are is that it has an impact on competition policy, and here is the nature the impact. That is how I took what the staff was doing here, and I do think it is essential to do both, state the findings and give the recommendation.

MR. HEIMERT: Anyone else have thoughts on this or should we wrap it up and move on to the next topic?

All right. We'll move on to FTC-DOJ Clearance.

FTC-DOJ Clearance

COMMISSIONER VALENTINE: I have to go first, right? On I, I have two little 3s for the two proposals.

Should we call them Proposition A and Proposition B?

MR. HEIMERT: Something funky had happened in the formatting. Those were supposed to be check marks that 11 people had agreed to. So, we didn't really have them for further discussion; we had taken those as settled issues from the last meeting, unless people had rethought their views on recommending clearance.

COMMISSIONER VALENTINE: The only thing that I find odd about this is that one is saying that the FTC and DOJ should do it all alone. They should just go ahead and do it, and we will back them on it.

The other one is recommending that Congress encourage FTC and DOJ to do it. Those are two different things. Now, I am, quite frankly, happy to do whichever one will get this goal accomplished at the end of the day.

COMMISSIONER KEMPF: Let me ask a procedural question of the Chair.

I thought the way we left it was that you and the Vice-Chair were going to explore this matter informally along the lines that Commissioner Valentine has raised to see which one of the powers would be more effective.

COMMISSIONER VALENTINE: I agree. I think that is right, because we all want it to happen. The question is,

how do we find the best vehicle for getting this clearance system in place and happening?

COMMISSIONER KEMPF: And I think the Commissioners, as a group, charged the Chair and Vice-Chair, at their suggestion - we weren't preaching to you - with going and informally exploring this issue and then reporting back to us, and then we would be happy to proceed whichever way the powers that be thought would be most constructive.

COMMISSIONER VALENTINE: Right.

CHAIRPERSON GARZA: We made an effort to informally explore and have nothing concrete to report back to you.

COMMISSIONER WARDEN: I would like to note that I don't think that the two checked items are inconsistent.

COMMISSIONER JACOBSON: They are not; they are completely consistent. And we agreed on them just as it says here last time. We agree to pursue both.

So, I think the staff's memo is right on.

COMMISSIONER BURCHFIELD: If you change the word "encourage" in the second to "support" — "Support implementation," does that help?

CHAIRPERSON GARZA: Yes. I think "encourage" was a soft "encourage."

I don't think, Commissioner Valentine, the way it was written here was necessarily meant to –

COMMISSIONER VALENTINE: That the FTC and DOJ couldn't act without Congressional direction.

If it means support, then okay. This makes sense, and I can live with both.

MR. HEIMERT: All right. With the preliminaries out of the way -

COMMISSIONER VALENTINE: On the issues for further deliberation, I would vote for 1.

And with respect to the particular tiebreaker under 2, I believe that (a) is probably the wisest.

If we do not get consensus on (a), then I would recommend (e).

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Yes on 1, and I would make it a short time period.

On the tiebreaker, I am no on 1, just because I think the arbitrator procedure, which I might otherwise be inclined toward, adds to the time problem. What we are trying to do is address a time period here. And I think the arbitrator - to think that that is going to be a speedy process, I am concerned that it won't be.

So, I am more comfortable with (b) flipping a coin, or (c), a possession arrow.

My concern on (d) is that the filer could game the system, so I am inclined no on that.

And I am inclined no on (e), but I am open to persuasion on (e).

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Just a point of clarification. (d) is not gameable by the parties. It is gameable by the agencies but not by the parties. You can't game which number you get. It is not unlike a wheel in federal Court.

COMMISSIONER KEMPF: Okay. If that is the case, I am content with either. I am indifferent among (b), (c), and (d), as you now have them.

COMMISSIONER JACOBSON: I am going to be a little more nuanced on this. I vote, as I did before, 1, provided that it is drafted in a way that does not automatically clear the deal once seven days have passed.

I don't think the death penalty, from the agencies' perspective is the correct remedy if they –

COMMISSIONER WARDEN: Well, that is not part of 1 as it now stands.

COMMISSIONER JACOBSON: Okay. Well, that was not clear to me. I want to make it clear.

With regard to the various tiebreaking alternatives, I continue to believe that the odd-even file system is better unless we can devise an arbitration system, unless there is a person or small set of persons who do this as their job and whose turnaround time is 24 hours or less. If that would work, then I think that is the optimal solution because the agencies can game the others –

COMMISSIONER VALENTINE: My understanding of the system that was set up in 2002 is that there was a slate of what I would call "approved neutral" – people who really understand the stand. It might well even be ex-FTC and ex-DOJ types. So, like a WTO panel, you have got smart lawyers on board to immediately step in and resolve it. And they did use that arbitrator, and it worked very well in the one case in which it was used.

I think it can be structured to make it a speedy process implemented and overseen by people who really know and understand the system.

COMMISSIONER JACOBSON: I think that is going to work well in some cases, but in other cases the filing itself is going to be confidential. And you can't tell a

partner at a law firm who happened to work in the Justice Department or the FTC what deal was proposed. You just can't do it.

So, I was thinking more of an ALJ-type individual, an employee of the federal government. But let's talk about that later. I would prefer the arbitrator.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: 1.

And to me, our job is to say, you ought to clear it within a certain number of days and, frankly, whatever tiebreaker they choose to use, they should use it.

I feel a little awkward, frankly, voting one over the other. I suppose that if the agencies were at loggerheads and couldn't decide between themselves maybe we could suggest pluses and minuses of them. But I doubt that we have got anything here that they haven't thought of.

So, I am going to confine myself to just 1 - tiebreaker.

But I am only interested in saying, "After a certain amount of days, it just has to be cleared." I don't care how you do it. It has got to be cleared. And implicit in that is that they adopt a tiebreaker, but I wouldn't presume to tell them how to do it.

COMMISSIONER KEMPF: Don't you want to have something that says, "And, if necessary, figure out a tiebreaker." And then leave it to them.

CHAIRPERSON GARZA: That is fine.

COMMISSIONER JACOBSON: I think it is necessary to have a hard tiebreaker, because it wasn't too long ago that they came out saying, "It is going to be cleared in nine days, and we have a possession arrow for the ninth day." And, lo and behold, deals are still being cleared on the 30th day. So, I think you have to tell them, you actually have to do this now. No kidding.

CHAIRPERSON GARZA: One is recommend legislation, and I just take it on faith that if there is legislation that says to me, I have to clear it by a certain amount of time if I am head of the agency, it will be cleared. Because I am not going to want to go up and talk to my oversight committee on the Hill and explain why I didn't.

So, to me, the key to 1 is legislation saying, as opposed to the agencies committing and saying we'll do it by then, which really means we'll try to do it by then, whereas this would be basically telling them they will do it by then.

I respect your views, but that is why I say with

1, there is legislation in place. I am fine with saying, get a tiebreaker, because that is implicit; you have to do that.

I just wouldn't go further.

COMMISSIONER JACOBSON: Why not just put that in the statute then? Have the statute say what 1 says, and say, in Part B of the statute, that the agencies shall, within 30 days of enactment here develop a tiebreaking system such that this happens.

CHAIRPERSON GARZA: And I think that is there, because if you read 1, it says, recommend legislation, blah, blah, blah, and adopt processes to meet that requirement.

COMMISSIONER JACOBSON: Then I am with you.

MR. HEIMERT: Commissioner Warden, why don't we get the rest of the initial views on the table, and then we can come back and have the discussion?

COMMISSIONER WARDEN: I am in favor of 1. I would be happy to have it in the way the Chair and Commissioner Jacobson have just been discussing.

I am also happy with 2(a). I would take the 24-hour addition to (a).

This is a situation where it is far more important that the decision be made rather than what the decision is.

And so I don't see why you can't have some federal official, a general counsel of the Treasury Department, or something, make this decision.

You know, they walk over there, they sit down and make their pitches, and he says, "You."

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: 1 I agree with, and I guess I, too, would be comfortable with stopping there.

But if we did not stop there, I would favor the odd-even filing, because it worked in federal court. It is easy. It is simple.

My second choice, I guess, would be an arbitrator, but for reasons I can't very well articulate, I just have the feeling that that gets to be a morass. A guy comes in - I am an arbitrator; I have got to decide this issue - and when he doesn't decide it in 24 hours, what happens? Nothing.

So, I would either leave the process or just say odd-even. You worry about the agencies gaming the process, but I really don't. I don't think they are going to sit around and try to game the process.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I am a long-time skeptic

of congressionally-imposed deadlines on agencies, because I just think there are too many ways that agencies can let them slide. And unless you have got some sort of penalty, and I can't conceive of one that makes sense here - we considered a number of potential penalties.

COMMISSIONER WARDEN: How about a refund of the filing fee?

COMMISSIONER BURCHFIELD: I would be surprised if that was as big a motivator in the government as it might be in private practice.

COMMISSIONER JACOBSON: And their personal purses.

COMMISSIONER BURCHFIELD: I could reluctantly go along with 1, but I am very skeptical that it is going to make much difference.

And I would advocate including, in any recommendation that we make, a tiebreaking mechanism, and I would favor 2(a), with the 24-hour turnaround on it, even though I also have skepticism that that would work.

Maybe an arbitrator may be more sensitive to the deadline than a federal agency would be.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I would vote yes on 1.

And, on 2, regarding a tiebreaker, I am not

convinced how serious a problem it is, but just to move matters along, I would be in favor of 2(a) with a 24-hour deadline.

MR. HEIMERT: All right. Anyone want to discuss further?

Commissioner Kempf.

COMMISSIONER KEMPF: Yes.

I had said that I was indifferent. There is a consensus building around something that is not on the paper. And that is a version of 2(a) with a 24-hour shot-clock on it. I'm happy with that. If that is gaining support, I am comfortable with that, although I am comfortable with any of them.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: In part for the reasons that Commissioner Burchfield said, I was hesitant even on 1 for the same reasons. Much more so on suggesting an arbitrator in 24 hours. What happens when the 24 hours isn't met? Shoot them?

[Laughter.]

COMMISSIONER KEMPF: I suggest that we include a death penalty.

COMMISSIONER LITVACK: The decision right or

wrong, I submit to that the filing odd-even is the fastest way to get it, right or wrong. You will know the second it is filed.

As soon as you impose another person in the process, and you mandate a time by which he or she must act, I don't think you have solved the problem at all.

COMMISSIONER CARLTON: Well, you could amend it to say, if he violates 2(a), you go to 2(d). That would be fine with me.

COMMISSIONER JACOBSON: How about where the Chair was, which is, you pass 1, with Commissioner Burchfield *dubitante*, and then part of the statute that the agencies shall figure out a way, within 30 days of the enactment of this statute, to get this done and to assure that it is done.

They have been through it. They have been through the pros and the cons, they can do odd-even, coin toss, arbitrator -

COMMISSIONER VALENTINE: Could we at least make 1, then, more precise? Instead of saying, "To adopt processes" change it to "include a tiebreaker mechanism" to meet that requirement?

COMMISSIONER WARDEN: A deadlock tiebreaker.

COMMISSIONER JACOBSON: And to adopt a tiebreaker mechanism.

COMMISSIONER KEMPF: I am happy with that.

COMMISSIONER CARLTON: Can I just ask a question?

On 1, we right now have "e.g., seven calendar days."

MR. HEIMERT: We used that as an example because I think seven was the number that was tossed about the last time, but there was no particular reason for seven versus nine versus five. And that is what we put in the model statute.

COMMISSIONER CARLTON: I don't care about any of those, but we do want to make it clear that it is a short period of time. I don't care if it is five, seven, or nine, but I don't want it to be seven months.

COMMISSIONER JACOBSON: I suggest we write a letter to either the Chairman of the FTC and the AAG or, more particularly, to Jeff Schmidt and Bob Kramer, asking, should it be seven or nine?

The nine from the earlier iteration was put in there for a reason. It was thought out. So, I would like to, before passing on whether it is seven, five, four, nine, or twenty-two, hear from the agencies what they think a

reasonable deadline is.

To me, it can't be any longer than 10, honestly, but as between four, five, six, seven, eight, nine, and ten, I would like to get their advice.

CHAIRPERSON GARZA: The one thing I know they will say is that they don't like a statute telling them they have to get it done by a certain time. That will be the first thing the three pages of letter will say to you.

And then the next thing will be – I have no objection to doing it; I am just saying that that is – they won't say the clearance agreement but – was it nine days? It will be whatever number that they had agreed to in the clearance –

COMMISSIONER JACOBSON: My suggestion is withdrawn. Let's go back to the clearance agreement and look at that number. I agree with you.

CHAIRPERSON GARZA: Does anyone on the staff happen to know?

MR. HEIMERT: It was guaranteed within nine days.

COMMISSIONER JACOBSON: Then they have chosen nine twice. Presumably that was done with some thought. So, I would go with nine.

COMMISSIONER VALENTINE: It was nine when I was

there. Not under the agreement, but as an informal matter.

COMMISSIONER WARDEN: Why?

COMMISSIONER VALENTINE: I think, quite frankly, that it was, by the time you got recommendations from the units as to whether you had the expertise, and the front office reviewed it, and you discussed it with the Justice Department, there was actually a very reasonable anticipation that it could all get done in nine days.

COMMISSIONER WARDEN: If not sooner.

COMMISSIONER VALENTINE: And that is why I think it is fair to ask whether it might be seven.

COMMISSIONER LITVACK: They probably built a cushion in.

COMMISSIONER VALENTINE: I am sure there was a cushion because they were going to be reporting statistics on it.

COMMISSIONER WARDEN: I like seven.

COMMISSIONER JACOBSON: Alternatively, we could have the Chair and Vice Chair just have a dialogue so we don't get three pages of why nots.

CHAIRPERSON GARZA: Yes. Why don't we —

COMMISSIONER KEMPF: It worked so well, last time.

CHAIRPERSON GARZA: Well, we have always gotten

quick feedback from the FTC and the DOJ. I think it is just a little more difficult when you are saying, go get Congressional sense.

COMMISSIONER WARDEN: Quick feedback? The DOJ comment on — after I was in Washington —

CHAIRPERSON GARZA: Well, we have gone back. When we have gone back to get informal feedback from them, we have gotten it very quickly. They've been very responsive

COMMISSIONER WARDEN: Okay.

COMMISSIONER JACOBSON: The written comments come while the meeting is beginning.

MR. HEIMERT: For your information, under the 2002 agreement, at least based on our analysis of it, it was eight days for them to try to reach agreement or not, and then there was an arbitrator after 48 hours. So, there was a total of 10 days you would get a decision.

COMMISSIONER WARDEN: Well, that is almost —

COMMISSIONER JACOBSON: I am fine with seven or nine, but the agencies want nine. I think we should use that number.

COMMISSIONER VALENTINE: Seven or nine with an inquiry.

COMMISSIONER WARDEN: Next. Moving right along.

MR. HEIMERT: Okay. Next, we'll move on to State merger enforcement.

State Merger Enforcement

COMMISSIONER JACOBSON: Can I just make an administrative suggestion?

I think this is a decisive enough subject that the number of Commissioners that we have, albeit a quorum, is insufficient for consideration of this issue. I would urge that our report will be better for it at the end of the day if we defer this until we have the Commission in session.

We were divided down the middle last time, hence my suggestion.

CHAIRPERSON GARZA: Where were we?

COMMISSIONER WARDEN: Well, the people that aren't here can give the votes to the staff, can't they?

COMMISSIONER JACOBSON: Yes, but this is supposed to be sort of the resolution of this issue among the Commissioners. This is one where I personally think we ought to defer – we are missing Commissioner Yarowsky; we are missing Commissioner Cannon; we are missing Commissioner Delrahim.

CHAIRPERSON GARZA: Well, I take your point that last time – the reason it is on here is that last time we

didn't have a consensus.

COMMISSIONER JACOBSON: How do we get a consensus missing three Commissioners?

CHAIRPERSON GARZA: What is the number of Commissioners we expect tomorrow?

COMMISSIONER WARDEN: You are not going to have Commissioner Shenefield.

MR. HEIMERT: We are going to have no one who is currently not here. No one is returning with the exception of Commissioner Yarowsky, and maybe Commissioner Delrahim. We are not sure.

COMMISSIONER VALENTINE: Did Commissioner Cannon say he was going to call in?

MR. HEIMERT: Commissioner Cannon is going to try to call in, but it was unclear.

CHAIRPERSON GARZA: That means that we wouldn't take this up until probably September. If you want to have everybody there, August is not going to fly.

COMMISSIONER JACOBSON: I think it is important and divisive enough that I would counsel doing that, myself.

COMMISSIONER KEMPF: May I offer a suggestion? I don't object to Commissioner Jacobson's suggestion, but I think it would be helpful to have a discussion, at least in

my case.

If you look at these, you will see I am in favor of (a), (b), and (c). I am not sure that doesn't just reflect sort of a tentative view of mine on them and I want to choose among them. I would be interested in hearing some further discussion on this even if I don't take any action on it today.

CHAIRPERSON GARZA: Why don't we do this. We'll recognize that we'll take it up later, but if we could have a short discussion just to see where people are right now, who are here —

MR. HEIMERT: Why don't we go around and find out where people are, of those people who are here, and that may give some sense of where our consensus is leaning, if people have reconsidered.

Commissioner Warden.

COMMISSIONER WARDEN: I remain in favor of 2.

I notice that I am being recorded as being in favor of (a), (b), and (c), like Commissioner Kempf.

Among those, my preferences would be the following, I would take (c) first, (b) second, and (a) third.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: I am where I was last time.

CHAIRPERSON GARZA: Where is that?

COMMISSIONER JACOBSON: 1, yes; 2, no.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: Also where I was last time. Yes on 2, (a), (b), and (c).

MR. HEIMERT: Did you have a preference ordering those, Commissioner?

COMMISSIONER CARLTON: (c), (b), and (a) would be the order of preference.

MR. HEIMERT: Okay.

Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I am still at 1.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: I actually was changing my view a bit. I was leaning toward 2(c), with some interest in developing more verbiage to explain how it would work.

And I am not sure I agree with exactly the way it is stated here, but I thought that some sort of sense of where a merger has a nationwide impact, there should be an option so that if the federal government is investigating it, the states can be involved in the investigation. The

decision of the federal agency would be final on the point unless they agree that it should be treated as a local matter.

But then I think that it wouldn't be right of first refusal. I think that the federal agency, once it took something, would have to, basically, look at it. But if it didn't look at it, it would have to be handled by the States. But if it looked at it, it would have to do a full investigation.

COMMISSIONER WARDEN: I accept that amendment.

CHAIRPERSON GARZA: So, that is where I am leaning. And if we couldn't come up with something that seemed to make sense there, then I would revert to 1.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: I am still with 2, and my order of preference would also be (c), (b), and (a).

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I think I am still with 2.

My order of preference is (c) first.

I think, upon reflection, that I have some doubts about (b). And the doubt is that there have been too many of these states that have used state enforcement for anti-competitive protectionist activity rather than a really

anti-competitive concern.

They are concerned that, if the merger occurs, the factory in their state will be shut down. And so, there is as much cause to be worried about them asserting jurisdiction as there is comfort, since the focus they have is not always on competition, but rather on parochial anti-competitive concerns.

So, I think where I am now is – I don't like the preachiness of (a), although I am content with that over the present regime, but I sort of like the first refusal. So, that is my first choice and my strong first choice now.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I am still with 1, although I am tending to think that our encouragement of the increased cooperation and coordination could possibly be even stronger than, perhaps, what we voted on before. And I probably would say that 1 should be supplemented with a comity-like concept.

And to the extent that there are very significant localized effects, the states should be leading or playing a role where things tend to be more national and evenhanded, which would not be, I think, some of the retail and the gas areas where you see states actually legitimately interested

in aspects of mergers that affect their areas.

I would, on the more generalized national ones, sort of be advocating that the feds should be leading. But I am not sure that I see that anywhere except as an enhancement to something on which we all already agree, which is increased coordination and cooperation.

COMMISSIONER WARDEN: We're going to defer to your desire.

CHAIRPERSON GARZA: We can discuss it now or we can wait and discuss it later.

COMMISSIONER VALENTINE: Let's wait.

COMMISSIONER KEMPF: I think most of us did discuss it now.

COMMISSIONER JACOBSON: I just had one remark, but I can reserve it until the next discussion.

CHAIRPERSON GARZA: All right. So then we will defer this until we have more Commissioners able to participate in the discussion.

COMMISSIONER VALENTINE: And we have decided that we are affirmatively precluded from meeting in August?

CHAIRPERSON GARZA: There is no date that would work.

MR. HEIMERT: We have not looked for dates in

August to meet because there seemed to be a strong sentiment not to have meetings in August.

CHAIRPERSON GARZA: But I think you went out at some point and asked for dates.

COMMISSIONER VALENTINE: I don't think it was ever tried.

MR. HEIMERT: I don't have my calendar in front of me. I don't recall if there were dates in August that worked for everyone. I just don't. I would have to check it.

COMMISSIONER VALENTINE: I think we could consider —

CHAIRPERSON GARZA: All right. Then, when Mr. Heimert calls, will all Commissioners please respond with dates that are open or not?

I am sorry. I didn't realize that we had a blackout in August.

COMMISSIONER KEMPF: Some of us have huge problems on our schedule, already, in September. So, for me, August would be more workable than September.

CHAIRPERSON GARZA: When does Congress recess? Is that in August?

MR. HEIMERT: Typically. I don't know if they

have a specific recess date. They are trying to get out early for elections.

CHAIRPERSON GARZA: Well, I may be dreaming that August wasn't a good time, but we can try.

COMMISSIONER VALENTINE: Just try.

COMMISSIONER JACOBSON: We can set aside an hour and a half.

CHAIRPERSON GARZA: It would be a short meeting, and there are people from out of town. And so, the idea of having – I know we have something scheduled in September.

I am a little reluctant to schedule a meeting in August, as well.

COMMISSIONER JACOBSON: If we do it here, can we do a video conference?

CHAIRPERSON GARZA: We have a FACA issue. It is more complicated than that.

MR. HEIMERT: The people we most need to be here are not here right now.

COMMISSIONER JACOBSON: Video conference is a FACA issue?

CHAIRPERSON GARZA: We have to get rooms and – we'll figure something out. We will see if people are available, but –

COMMISSIONER WARDEN: Well, if this is a one-and-a-half-hour meeting, it could be tacked on to something else.

CHAIRPERSON GARZA: We do have something in September. The only thing is, too, we can talk about it —

COMMISSIONER JACOBSON: We have got to get all 12 people here for this.

CHAIRPERSON GARZA: Yes. And videoconferences are a bit unwieldy. So, we will check.

MR. HEIMERT: We will work something out.

COMMISSIONER JACOBSON: How many people are going to be at Laguna Beach?

CHAIRPERSON GARZA: Not 12.

MR. HEIMERT: And it is less than 15 days away.

CHAIRPERSON GARZA: And we have to give notice. The FACA issue I mentioned —

COMMISSIONER KEMPF: I can change my schedule to go to Laguna Beach.

[Laughter.]

CHAIRPERSON GARZA: We have a requirement to give certain notice. Is 20 days, 30 days?

MR. HEIMERT: 15, and we need 5 extra to get the notice in.

CHAIRPERSON GARZA: So, we need about 20 days' advanced notice to give the public for meetings.

MR. HEIMERT: All right. We'll move on to FTAIA.

FTAIA Amendment

COMMISSIONER VALENTINE: This is actually going to be difficult with such a small group of people, too, I fear. But I guess we have to make a stab, right?

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I would actually like to go with 4(b).

And the issue is, I don't necessarily want to encourage courts to apply the exact wording, proximate cause, but-for cause of *Empagran*. I don't just think saying, allow the courts to continue development of the act without referencing *Empagran*, which has narrowed the issues and the problems, substantially helps us that much.

And therefore, I am wondering if we should say that the courts should elaborate the case law based on the following principles that we think are consistent with *Empagran* or embody the spirit of *Empagran*. And then we say, pursuant to 4(b), what we think those principles are.

And I think, beyond that, that is my vote.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: Well, I must say that the staff's memorandum convinced me that I don't have sufficient training to fathom this statute and its prongs and what ought to be done with each one of them.

I think the statute is terribly, terribly written. And I am not interested in how many angels could dance on the head of the proximate-cause pin. Of the ones at the beginning, number 3 is clearly the best in my mind.

I would prefer, although the memo says that Professor Fox's and my formulations don't address various prongs of the statute, I would be for one or the other of those.

And I must say —

COMMISSIONER VALENTINE: Is that (b) or (c)?

COMMISSIONER WARDEN: (a) or (c). I have (a) or (c).

I think 5(b) is as bad as the statute now, inextricably bound up and so on and so on. To me, the problem is not with total subject-matter jurisdiction in the sense of what the FTC or the Department of Justice can do. As far as I am concerned, that can be fairly expansive.

The problem is, with private actions in which people who suffer injury outside the United States assert

claims for treble damages under our law that are not afforded to them under their own law. And that is why I formulated mine in terms of private rights of action, and I think that is exactly – although hers is broader and applies to the government as well. I think that is pretty much what Eleanor did.

In looking through the memo, I was surprised at some of this, in the sense that I thought, clearly, those people who bought here, in this country, and resell to India, suffer injury in the United States by reason of an anti-competitive combination in the United States. And they ought to be able to recover. And I don't know whether U.S. export trade would be enhanced or impeded by allowing the manufacturers to do what they purported to do there.

So, my test certainly would cover that. I accept this business about the transient shipment of product from, let's say, Poland to Texas – to be picked up in Texas by a Mexican company and sold to Mexico. That doesn't sound to me like something that we ought to be concerned with just because it crosses our border physically.

That is where I am.

COMMISSIONER VALENTINE: So, you are 5(a) or 5(c)?

COMMISSIONER WARDEN: My preference is 5(c). I

would also go with 5(a). In lieu of either of those, I would accept 3.

But I wouldn't try to get into any kind of formulation that relates injury in term to harm to United States commerce. It seems to me that you should have to have suffered your injury in the commerce of the United States and in the United States.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: I must say that I feel totally stymied by this and feel perfectly inadequate to make any meaningful contribution here.

With that said, therefore —

[Laughter.]

COMMISSIONER LITVACK: My basic instinct is to recommend no statutory change, and allow the courts to develop the application of the act because I don't know how to change it and I don't think anyone here knows how to change it.

And sometimes, you know, leaving things as they are and letting it develop is a wise thing to do unless you have, with some confidence, a better idea. I do not.

Having said that, if we are going to recommend something, I would recommend only 3. It is simple; it is

direct. It is the only one, at least to me, that has clarity to it and says it as simply and as directly as I think you can say it.

Beyond that, again, I know I do not have the expertise to improve upon this, and I don't know if anybody on this Commission does, and therefore, my basic instinct is to let it develop. My next instinct would be to simplify the language as set forth in 3.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: My inclination was just to say 1.

And I think I may have come out similarly to where Commissioner Litvack is.

And when I read the memo, I thought that the cases after *Empagran* seemed to be getting it about right. It didn't seem that the courts were having that much of a difficult time reading where Congress was or where the Supreme Court thought Congress was.

So, I think my preference would be 1.

A second soft preference would be for 4(b).

And a third, softer would be - if I had to select a formulation, I kind of liked (d); just change "a" to "the."

COMMISSIONER KEMPF: Change 5(d).

COMMISSIONER VALENTINE: The Delrahim suggestion.

CHAIRPERSON GARZA: Commissioner Delrahim's suggestion. Such effect gives rise to the claim of the plaintiff.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER VALENTINE: It is effectively what the court did in *Empagran*.

COMMISSIONER KEMPF: I tell you, I don't have strong feelings either way. I agree with the Chair that the courts seem to be doing a fine job post-*Empagran*.

And therefore, I am not uncomfortable leaving that process. I think where they are headed is some version of what I will call 5(a), or 5(c).

And so I am content. I think my first choice would be 3, but 5(a) and 5(c) are fine with me, too.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: If I thought the courts were careening in the direction of 5(a) and 5(c), I would support item number 1.

As I have screeched loudly before and continue to screech to anyone who will hear me, you can't really say that you like the way the courts are going unless you parse

the *Empagran* decision and recognize that there is a different result that bars victims of price fixing from suing — I'm sorry. But allows victims of tying and monopolization. And that is just unintelligible.

So, no, the *Empagran* decision is not correct. We are saying we like the outcomes, because those have all been price fixing cases, and the foreign plaintiffs have all been dinged. Okay, we can say that. But that would be the result under the Warden Formulation, which I strongly think, of all the alternatives here, the best. I think we maybe can wordsmith it a tiny bit more, but perhaps not.

So, I strongly go with Commissioner Warden's 5(c).

And I support 3, if it would be read to be the same as 5(c).

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: Well, I don't know that this is an either/or decision. It seems to me that you can be in favor of both for the explication of *Empagran* and also propose alternative statutory language.

It seems to me there are two issues. One, who has standing to sue? And two, do you have standing to sue in the United States if there was a conspiracy abroad that had an effect in the United States?

I don't have a real strong view unless those two points get across.

So, I am in favor of 4.

I am definitely not in favor of 4(a), because, as I read *Empagran*, I can't clearly understand it. Maybe it is just me, but I do not find that clear. I think the memo made this very clear. The use of the word "proximate" sometimes, "direct" sometimes.

I mean, these are nuances that may matter more to lawyers and be more significant to them. But as I was reading them, I couldn't tell as an economist how to apply different standards to determine the word "direct" from "proximate."

So, I would be in favor of 4(b) if we can agree on our articulation of the principles. And, like I said, the two are standing - you have to have antitrust injury in the United States - and then two, that a conspiracy abroad does have an effect, if it is a price-fixing conspiracy, on prices in the United States.

COMMISSIONER JACOBSON: I don't think that is an issue; I think the issue is foreign purchases.

COMMISSIONER CARLTON: Yes. But they wouldn't have antitrust injury in the United States if they were

purchasing abroad.

COMMISSIONER JACOBSON: But that is the issue before us, right?

COMMISSIONER CARLTON: But I thought *Empagran* talked about having a proximate cause in the United States.

COMMISSIONER JACOBSON: Just one clarification.

Is the staff talking about the Supreme Court's decision in *Empagran*, or the District of Columbia's decision on remand, because they are different animals?

MR. HEIMERT: When we originally drafted, it was contemplating the D.C. Circuit's further refinement, if you will, of the Supreme Court's decision.

COMMISSIONER JACOBSON: The one that distinguishes but-for cause from proximate as the rationale of the decision, which I continue to laugh at.

MR. HEIMERT: Correct.

COMMISSIONER CARLTON: Also, if people want to change the statute and make it clearer, I would be happy on that score. It seems to me that whether you adopt 3, 5(a), or 5(c), those all seem relatively similar to me, anything with that sentiment.

I do think we should say something about exactly what Commissioner Jacobson talked about, which is what I

find confusing. These distinctions between words that I always thought were synonyms. And if we don't think they are synonyms, I think we should say so and say what we think.

And finally, I would like, at the end of this, if Commissioner Jacobson could expand a little more about his concern about tying versus price fixing so I could better understand that.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: After flying from New York yesterday with Commissioner Warden I went back to my office and tried to parse this, and it simply made my hair hurt.

[Laughter.]

COMMISSIONER BURCHFIELD: I am, like Commissioner Litvack, confident of only one thing. And that is that I am really struggling here to try to figure this out.

But it seems to me that there are three concepts here that need to be taken into account. The first issue is — and putting aside private recovery — is there a cognizable violation of the United States antitrust laws?

The second concept is, did that violation of the United States antitrust laws harm competition in the United

States or its territories?

And the third concept is, does the plaintiff claim injury that is in some way related to that diminished competition resulting from the violation of the United States antitrust laws?

I typed out what I thought would be the test here, and I will pass it around, not because I think it is the solution, but because it shows where my thinking is on this.

I am reasonably confident that improvements can be made under each of the three categories, but this is an effort to try to address these three points. The problem I had with the recommendations that were set forth is that none of them addressed the issue in a comprehensive way. And I worry that, by endorsing any of the recommendations, we are going to add to the confusion by not addressing it in a comprehensive way.

So, that is where I am, so I guess you can't record me as a vote for any of these.

COMMISSIONER KEMPF: Can I ask a question for clarification?

COMMISSIONER BURCHFIELD: Sure.

COMMISSIONER KEMPF: I think Commissioner Warden may have said the same thing.

You have a private plaintiff not recover damages, and my question is, does that leave an injunctive action in play? And does it leave the government with a roving warrant to go about these things, as well?

It struck me that one of the things I liked about the simpler articulations was they seemed to rule out government and private actions. And they seemed to cover injunctive as well as monetary relief.

COMMISSIONER BURCHFIELD: My instinctive reaction to that, Commissioner Kempf, is that unless the plaintiff could meet these three criteria, the private plaintiff would not have an action for an injunction.

The government would need to meet only the first criteria to have a cognizable action for an injunction. But I hadn't specifically thought about that issue.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: Well, before I get to what I was going to say, Commissioner Burchfield, you left out the word "substantial;" was that intentional? In subpart (a), "Recently foreseeable, direct," —

COMMISSIONER BURCHFIELD: I did leave out the word "substantial," and I am amenable to putting it back in there, but I don't think that it adds much. A *de minimis*

effect, presumably, would not be actionable, but if it improves it to include "substantial" in there, I am happy to put it in.

CHAIRPERSON GARZA: The reason I ask was because the case law has been, "Reasonably foreseeable, direct, and substantial."

So, if you had something that left out the word "substantial," the question would be, well, what change did you mean to make, there?

That is why I wasn't clear whether you were thinking that the current requirement - that it be substantial was problematic.

To me, it looks like an articulation on how the Supreme Court intended to rule on the *Empagran*. I think this what the – trying to implement. So, except for the word "substantial," I personally don't have any problem with this.

But the reason that my flag was up is that I did want to ask Commissioner Jacobson to explain, because I haven't been able to figure it out myself, what is the distinction that you are drawing between price fixing and tying and monopolization?

Why is it that *Empagran* treats differently

plaintiffs in tying and monopolization cases versus plaintiffs in overcharge cases, price-fixing cases?

COMMISSIONER JACOBSON: Let me make very clear that I am not advocating this distinction. I am advocating quite the opposite, that there should be no distinction.

CHAIRPERSON GARZA: I just want to understand why. Why is there a differential effect?

COMMISSIONER JACOBSON: Give me a minute or two.

It is based on the D.C. Circuit's endorsement of a Southern District decision involving a tying arrangement. Now, let me just give you the facts of *Empagran* and then compare the tying case.

The *Empagran* facts - you have a foreign buyer and a foreign seller. You have an international cartel that has raised prices in the United States and elsewhere in the world. The U.S. effect of that international cartel is a but-for cause of the plaintiff's harm, in that, but for the U.S. effect, the increased prices that the foreign purchaser suffered would not have been incurred because lower prices in the United States would have generated, through competition in a global market, lower prices abroad.

COMMISSIONER VALENTINE: Or arbitrage.

COMMISSIONER JACOBSON: Or arbitrage.

So, there is but-for causation there, but the D.C. Circuit held that there was not proximate causation because it was not the U.S. effect that was the proximate cause of the injury in what I view as something of a tortured distinction between the words "proximate" and "but-for."

How is that different in the tying case? According to the D.C. Circuit and according to its endorsement of the Southern District decision, you would have a different result on the following facts:

You have a tying arrangement imposed by a firm — it doesn't matter, but let's say the firm is in the United States. The result of that tying arrangement is to exclude from sales and the market a competing U.S. seller. That is the key, that you have excluded a competing U.S. seller. You still may have a foreign purchaser buying from a foreign seller, but because of the exclusion of the output of the U.S. firm that was excluded by the tying arrangement, the foreign purchaser is paying a higher price.

That, the D.C. Circuit says, is sufficient proximate cause to allow that case to proceed. Therefore, the outcome is that a purchaser buying from a foreign seller in a price-fixing context cannot sue. But, at least on the facts that I gave you, a foreign purchaser buying from a

foreign seller in the context of a tying arrangement can sue. And to that outcome, I say, huh?

CHAIRPERSON GARZA: And what case is that?

COMMISSIONER JACOBSON: I don't remember the name.

MR. HEIMERT: Is it the *Caribbean Broadcasting*?

COMMISSIONER JACOBSON: I'm not sure that is it. It is a Southern District case. If anyone has the D.C. Circuit —

COMMISSIONER VALENTINE: That is not correct —

MR. HEIMERT: — cited by the D.C. Circuit.

CHAIRPERSON GARZA: So, in your hypothetical, the seller is a foreign seller?

COMMISSIONER JACOBSON: In both the price-fixing case and the tying case.

CHAIRPERSON GARZA: Okay.

And the buyer is a foreign buyer?

COMMISSIONER JACOBSON: Yes.

CHAIRPERSON GARZA: And why is there — I am unclear as to why —

COMMISSIONER JACOBSON: Because in a tying case it is considered proximate cause because of the exclusion of the sales of the U.S. firm. It is considered to be the proximate cause of the —

CHAIRPERSON GARZA: Because it is an effect on export commerce?

COMMISSIONER JACOBSON: No. It is just the reduced output attributable to that seller's output not being on the market – you know, a play on words, a proximate cause –

COMMISSIONER VALENTINE: Yes. It is more directly connected. You can literally try the harm more closely to the absence of the U.S. exporter's activity.

COMMISSIONER JACOBSON: My fundamental point is that a lot of official Washington, having made the arguments – the standard articulated by Commissioner Warden – and I think intellectually supported by most of us, that foreign sellers selling to foreign purchasers, the foreign purchaser can't sue. That was the argument they made to the Supreme Court in the *Empagran* case. But now they are saying, no, the D.C. Circuit's decision was okay.

And the people who are saying it is okay are saying it is okay not because of the analysis. They are saying it is okay because the right result was that the foreign purchaser was not allowed to sue.

I'm saying that I agree, that that is the correct result, but let's not encourage the propagation of this

distinction, which can only confuse things going forward. It can't make things any clearer. Let's have a clear rule. That is one of the few things that this Commission can really make a contribution on; propose to Congress something that is clear to fix what is either an existing mess or a looming mess. I would put this in the category of looming mess.

COMMISSIONER VALENTINE: Which is why I would prefer 4(b).

Maybe we could take what Commissioner Burchfield - but we have to change some of it.

COMMISSIONER JACOBSON: Yes. Commissioner Burchfield's (c) has the same problem.

COMMISSIONER VALENTINE: Well, (a) doesn't work either, because it is not the conduct that has to occur in the United States. There has to be an effect, a reasonable, foreseeable, substantial, direct effect on U.S. commerce, which is domestic commerce, U.S. territorial commerce, U.S. import commerce -

But the conduct could occur. It could be the price-fixing conspiracy in France that Commissioner Carlton is talking about.

COMMISSIONER WARDEN: In the U.S. ***"or" had***. He covers that.

CHAIRPERSON GARZA: So, Commissioner Jacobson, in your hypothetical – I am not familiar with the case – why does that tying arrangement have the direct reasonably foreseeable and substantial effect in the U.S.? I am not sure why it doesn't fall under the first prong.

COMMISSIONER JACOBSON: Because of the effect on the U.S. firm whose output is curtailed.

CHAIRPERSON GARZA: But that is an effect on a firm; that is not the test. The test is effect on U.S. commerce.

COMMISSIONER JACOBSON: But there is an effect on U.S. commerce because that firm engages in U.S. commerce.

Look, I am not defending the case or the analysis. Let me make that clear. But I think, under an *ALCOA* or a *Timberland*-type analysis, the government could sue in that case against the tying arrangement, and properly so.

COMMISSIONER WARDEN: I think that Commissioner Burchfield has stated what I think the Supreme Court stated, and more articulately.

But I still find (c) too scholastic for my tastes, and I think that, for example, were indirect purchasers

permitted to sue, the foreign indirect purchasers could easily claim that their injuries were proximately caused by whatever happened here, that they ended up buying down the road.

That is why I would prefer the formulation of 3, 5(a), or 5(c), that the injury has to occur in the United States or in U.S. Territory. If you substituted that for your (c), you would have covered the waterfront of what is covered in the statute more literately and solved the problem that both Commissioner Jacobson and I have referred to.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I am willing to consider that amendment or others to this, and my hope was to set forth something that would address, in a somewhat more comprehensive way, the problems that I think we have all identified with the statute and, to some degree, with the developing case law.

Let me say a word about proximate causation. Whenever I hear that term I think about the old *Palzgraff* decision – of the first year of law school.

For good or ill, and with all due regard to Justice Cordoza, may he rest in peace, there will forever be

debate about where legal causation ends. There is factual causation, which Commissioner Carlton has very articulately pointed out can lead from sunspots causing changes in the dates of harvest in Nebraska, versus legal causation, which is, how far is the law going to provide relief to victims of a particular act?

And that is necessarily a somewhat arbitrary cutoff. I am sure I do not feel that I am prepared to say this moment where I think that cutoff should be in this particular context. But in numerous other contexts, tort law and private civil litigation, generally, the courts every day draw those lines.

And I am comfortable – if we give the courts a commonly understood signpost, like the term proximate causation, and all of you unanimously shook your heads when I said *Palzgraff*, I think they are going to get it right. I don't know that we can be much more specific that that.

But again, I am willing to consider alternatives.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: At the risk of being a total outlier here, it just seems that this discussion proves, at least to me, what I said at the outset; I don't know what we are really adding here.

If we are simply rewriting more elegantly, as Commissioner Warden says, the Supreme Court's language, I don't know what that does. Are we really going to go to Congress with something we say, you know what, this clarifies everything.

I don't think so, and I think this discussion demonstrates it. So, I come back to where I started. Let it be.

COMMISSIONER WARDEN: Well, Commissioner Litvack, I think 3, 5(a), and 5(c) are all clearer than the current state of the law.

COMMISSIONER LITVACK: As I said earlier, I think 3 does because I think it is the most simple. Barring that, I would just let the development be. What I was really responding to, recognizing that Commissioner Burchfield did a great job here, is, we are just fooling around with Supreme Court language.

COMMISSIONER WARDEN: With this?

COMMISSIONER LITVACK: Yes.

COMMISSIONER WARDEN: Or with the statute?

COMMISSIONER LITVACK: Yes.

COMMISSIONER VALENTINE: I actually think Commissioner Burchfield's thing may be more helpful trying

to answer some of the issues that are being thrown at the courts than 3 is, although I don't disagree with 3.

COMMISSIONER BURCHFIELD: The problem I have with 3 is it addresses one aspect of the problem, which is the injury issue, but it doesn't really address the violation issue or who can recover.

COMMISSIONER WARDEN: Right. Your (a) and (b) do that. If you substituted either 3 or 5(c), I think you would have something that works.

COMMISSIONER LITVACK: But to reiterate what the Chairman said, which I think is true, you are just paraphrasing what the Supreme Court said.

COMMISSIONER WARDEN: Not if you change to, injury has to be suffered in the United States. That is not paraphrased. That is maybe what they should have said. It is easily administrable. It doesn't lead to this debate of how many angels on the head of the pin.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I would like to propose the following amendment to Commissioner Burchfield's proposal: I would strike "a private plaintiff may not recover damages" and, in lieu of that, put in "no cause of action may be brought." That would address both the governmental private

distinction and the damage and injunctive relief distinction.

So, I would just replace it with "no cause of action may be brought for violations, unless" - bang, the rest of it would stay the same.

COMMISSIONER JACOBSON: Then what would you do with (c)?

COMMISSIONER KEMPF: (c), I am open to debate or discussion, so far.

In other words, it seems to me we have his (c), 3, 5(a), or 5(c), and I would try to get something that takes the best from all of those and something that we can coalesce around. That would be my instinct.

COMMISSIONER JACOBSON: I guess my point was that the whole thing was a standing type of statute and (c) is ultimately, no matter what the articulation, a limitation on an individual plaintiff's ability to sue.

COMMISSIONER WARDEN: You would have to put the private plaintiff concept back into (c) if you took it out of the heading.

COMMISSIONER KEMPF: No. You could strike the private plaintiff part of it there.

COMMISSIONER JACOBSON: My own view is that *ALCOA*

is a sufficient limitation on the Justice Department. I don't see any reason to do anything different than that.

COMMISSIONER KEMPF: I probably would strike "by the plaintiff" in (c). Just say the injuries claimed were proximately caused, *et cetera*.

COMMISSIONER WARDEN: I don't know if that works, because the whole point there is — the whole point was to deal with claims of injury, not in the public sense. That is dealt with in (b). But in the particular party sense —

COMMISSIONER KEMPF: But if you eliminate "by the plaintiff," it still continues forward. It doesn't subtract. I think it adds the government in there.

COMMISSIONER WARDEN: Do you have a tally? I mean, we could go on, but do you have a tally?

MR. HEIMERT: There is one for a bunch of everything.

COMMISSIONER KEMPF: Everybody favors something like 3, 5(a), or 5(c).

And when I say everybody, I would put the Garza-Litvack exception to that. They opined on those, assuming a consensus.

MR. HEIMERT: Commissioner Valentine had a different view.

COMMISSIONER VALENTINE: I don't think that is right.

I think there are some of saying that 3, 5(a), and 5(c) don't answer the full problem. And so we are not adding anything by doing that.

COMMISSIONER BURCHFIELD: In fact, I would say that we are injecting confusion if we propose those standing alone.

COMMISSIONER VALENTINE: Yes.

COMMISSIONER WARDEN: And why is that, either of you?

COMMISSIONER BURCHFIELD: I will take a stab at it.

I don't think those, standing alone, are the ultimate questions that you should get to, after you have worked your way through the question of whether there is a cognizable antitrust violation and whether there is an adverse effect on competition in the United States or its territories by that violation.

Only in that circumstance do you get to the question of what injury the plaintiff can recover.

COMMISSIONER WARDEN: I agree with that, but wasn't that the case law prior to enactment of any of these

statutes? You always had to satisfy what you have written as (a) and (b).

Am I wrong in thinking that?

COMMISSIONER JACOBSON: I don't think so.

COMMISSIONER VALENTINE: That is largely correct.

But to simply say that the Sherman Act and the FTC Act shall not apply to injury not occurring within the U.S. or U.S. territory -

Okay. So, now you get *Empagran*. There are effects in the U.S. Territory —

COMMISSIONER WARDEN: No. I agree with you. I wouldn't word it that way.

COMMISSIONER VALENTINE: So, you want 5(c).

COMMISSIONER WARDEN: Mine is expressly addressing only private actions, and I think 3 was basically intended only to address private actions, although it doesn't say that.

And I agree with Commissioner Jacobson that the law that existed before the FTAIA was even passed was a sufficient constraint on the government. I agree with Commissioner Kempf, maybe you ought to include private injunctive relief along with damages and whatever limitation you impose here.

But as to the government, I don't think that we needed a statute to restrain enforcement, and I don't think you need one going forward, because they are in the business of deciding what is sufficiently in the United States to warrant their attention and not interfere with other jurisdictions unnecessarily. Whereas the private plaintiff is only out to get three times or whatever claim he can prove, even though he suffered it in Bangladesh.

COMMISSIONER JACOBSON: It is a shame that our legislative folks aren't here to give us the background of the statute, but it is my recollection that the principal thinking underlying the statute was to carve out U.S. export commerce.

COMMISSIONER VALENTINE: It had nothing to do with this. Congress did not remotely contemplate any of these issues, whether somebody who bought something in the U.K. or Bangladesh could sue in U.S. courts. They were trying to protect export cartels.

COMMISSIONER JACOBSON: [Inaudible.] — something about private standing that Commissioner Warden was suggesting —

MR. HEIMERT: Commissioner, can you speak into your mic?

COMMISSIONER KEMPF: I think we need to have a further discussion before we come to any closure on this, especially since we are missing four people.

COMMISSIONER VALENTINE: I agree.

COMMISSIONER KEMPF: I would just suggest – first of all, let me respond to Commissioner Warden's thing – I would be concerned if we had limited private plaintiffs that someone might take that as signaling that it is okay for the government to do this, whether or not they have done it in the past, and whether or not they felt restrained. And so that is one of the reasons I would broaden it to cover both injunctive and government suits.

I like the addition of "substantially" in (a).

(c), I would struggle with to try to accomplish what is currently in 3, 5(a), and 5(c), and I would like to try to come back and see if we can't get a piece we could coalesce around.

CHAIRPERSON GARZA: Can you and Commissioner Burchfield come up with something to circulate for the next meeting on that?

COMMISSIONER BURCHFIELD: Sure.

COMMISSIONER WARDEN: Let me ask you to consider a question before we do that. Are you biting off a hell of a

lot more than we need to legislatively if we try to cover government enforcement, when the problem that I think exists, and the only problem we know exists, is private treble damage recoveries?

COMMISSIONER VALENTINE: Yes. I would support that.

COMMISSIONER WARDEN: And I think you are dealing with that problem; it buys you a lot less interest and concern.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: If I could respond to that. It presupposes that whatever recommendation we are making here is a recommendation for legislation —

COMMISSIONER WARDEN: That is right.

COMMISSIONER BURCHFIELD: — as opposed to guidance that we, the Antitrust Commission, are giving to the courts for the further development of the case law.

And when I originally put this forth, I did not really put it forth as legislation, but I would be happy to consider -

COMMISSIONER WARDEN: Yes. I think that is the way I would go is legislation.

If we were to provide guidance to the courts, it

would have to be in terms of 3, 5(a), or 5(c). And I am not sure you necessarily get here from there in the language of the existing statute. So, I would go the way I just said.

CHAIRPERSON GARZA: In terms of what Commissioners Burchfield and Kempf are developing, it may be best to frame it for our next discussion, both, one, in terms of principles under 4(b), and two, what it might look like if it was legislation.

And three, whether it would cover all causes of action, or just causes of action by private plaintiffs.

Does that make sense?

COMMISSIONER JACOBSON: I would give some thought to at least using the concept that we don't want a foreign purchaser of a foreign seller suing in our courts when the governments of that purchaser's domicile have decreed that they have different remedies in that country, which was the essence of —

COMMISSIONER VALENTINE: That was the essence of Breyer's opinion, as well.

COMMISSIONER JACOBSON: And the government's brief.

COMMISSIONER VALENTINE: And the briefs of many of the foreign governments that filed.

COMMISSIONER JACOBSON: Can I suggest that maybe we take this up tomorrow?

CHAIRPERSON GARZA: Well, we are not going to have any more people tomorrow, is the issue.

COMMISSIONER JACOBSON: Then that is a really bad suggestion.

[Laughter.]

CHAIRPERSON GARZA: It will be on the agenda for the next time that we meet, which will either be in August or September.

MR. HEIMERT: So, we will take a 10-minute break, and then come back for regulated industries.

So, we will resume at 3:25.

Regulated Industries

CHAIRPERSON GARZA: The final issue for deliberation is regulated industries mergers.

MR. HEIMERT: Commissioner Litvack, whenever you are ready.

COMMISSIONER LITVACK: 1, no. 2, yes. 3, no.

And, as to 2, I believe I favor 2(b).

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: 1, no.

If we go with 2, I favor 2(b). I favor 3.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I am 2(a).

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I like 2(a), but I am not sure I like the last sentence.

In other words, the regulatory agency should take as binding what the antitrust agency says about the antitrust concerns, and then the regulatory agency can decide what to do, because they may have a broader public interest.

COMMISSIONER LITVACK: But what are you objecting to, the last sentence?

COMMISSIONER CARLTON: Yes. The last sentence says, as I understand it, that the regulatory authority can decide, after balancing the antitrust harm in some other public good, that, on balance, the public good outweighs the antitrust harm and go forward. And as I understand 2(a), the Department of Justice could then sue, and that seems peculiar to me.

As I understand it, the regulatory agency has the antitrust concerns and then other concerns. My view is the antitrust agency should be the one giving the determination about the antitrust concerns, and then let the regulatory

agency figure out, how does that fit into my broader scheme of my public interest?

I think I would vote for 2(a), but omit the last sentence of 2(a). And then, in the formulation of the working of 2, I would strike the words, in the second line, "and challenge."

COMMISSIONER WARDEN: Well, let me, as a point of information – what Commissioner Carlton is saying about the last sentence of 2(a) applies to the body of 2 itself, where it says, "concurrent authority to review and challenge."

If you want you want to change it, and I could go along with the position that he has articulated, you would have to change the body of 2, and then you would have to say in (a), "regulatory agency could approve, prohibit, or impose conditions" *et cetera*.

COMMISSIONER CARLTON: I agree with that.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I would be no on 1.

I am no on 2, and I will come back to that.

And yes on 3.

If there is some sentiment to do some version of 2, then I suppose, as between binding, presumptive, and how much weight to give it, I would favor (c).

Again, I would take out the last sentence in any of them, and make textual revisions that Commissioner Warden has alluded to.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: The points that have been made are good ones.

I am inclined toward 2(b), but let me express concern about the last sentence, as well.

I believe that if the agency is required to give presumptive weight to the antitrust agencies' views on competition, then that allows the antitrust agency to separately challenge the merger after a delicate balance does threaten to undermine the authority of the regulatory regime. That is a concern for me. I can be persuaded on it, but I raise that concern.

As between (a) and (b), I prefer "presumptive" to "binding" for, among other reasons - if the antitrust agencies' conclusions are binding on the regulatory agency - It is difficult to understand how an entity affected by that antitrust agency's competitive analysis would ever be able to challenge that in court. And putting that determination beyond judicial review is a concern for me.

So, I am at 2(b), striking the last sentence.

And on 3, I could be persuaded on 3.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: I think I am on 2(b) with the last sentence. That is to say I would favor allowing the antitrust agencies to go to court to challenge a transaction that had been approved by a regulatory agency.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Ditto the Chair's comments and vote.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: All those of you who voted for 2 with the last sentence extracted, and the text modified, I think 3 is that.

To take a count of what the sentiments seem to be, I think you would amend the second sentence of 3 to say, "The agency participates in any assessment of competitive effects that it provides must be given presumptive weight" or "should be given presumptive weight," or whatever.

But 3 is the one that says that the agency is the one that cannot independently challenge the transaction after it is approved by the agency.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I guess I am going to

make a request similar to the request that was made with respect to the state enforcement.

I believe Commissioners Shenefield and Yarowsky were the most heavily involved in the regulated industries area and headed up our working group.

I think that, while all the rest of the world is moving towards eliminating the role of regulatory agencies in competition analysis and review, we have just turned 180 degrees on where we were a week or two ago and are eliminating the role of the antitrust agencies and vesting it solely in the regulatory agencies.

I would hate to see a world in which, if *EchoStar-Direct TV* were up in front of the DOJ and the FCC, and DOJ recommended a challenge and the FCC decided not to challenge, that the DOJ would be stripped of any ability to challenge that merger.

So, I think I would like us all to go back home and think about what we are doing and wait until Commissioner Shenefield and Yarowsky are here and we can have a more fulsome and well rounded discussion.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: I agree with that.

I also believe, based on prior remarks that I

recall each of them making, that each of the four Commissioners who were missing would vote for some variation of 2. So, I do think we have something of a skewed outcome here, which does concern me.

Having said that, and Commissioner Valentine just hinted at it, the process in this country for several decades now, led by many, but certainly in part, by the work of the Shenefield Commission in 1978-1979 has been to move away from regulation in the United States.

It has been a remarkably successful effort that we have exported to other nations as they have gone from less authoritarian structures to more democratic structures.

It is one where, if we went for item 3 here, giving more weight to the regulatory agency determination, we would be backpedaling dramatically.

It also, forward looking, an almost unintelligible way to go, because, wholly apart from what we do, the process in the economy generally, and certainly in the Congress, has been to give regulatory agencies less and less authority. So, we could be inadvertently creating a situation where there is a total vacuum of authority to address the consequences of mergers and firms in regulated industries.

And so I would like to see what others say, but if we are not going to do that, I would like to implore you to really think about whether you don't want to vote for some version of 2.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: Well, I have no aversion to waiting for the other Commissioners to join us.

I don't share Commissioner Valentine's view that we are heading toward that conclusion at all. Two people, as I can count it, were in favor of 3. Commissioner Warden pointed out that those who are taking out the last sentence of 2(a) or (b) effectively are endorsing 3. That is quite correct.

The only one who I think that applies to is Commissioner Carlton. And, by my count, Commissioner Valentine, Commissioner Jacobson, myself, the Chair, and I think Commissioner Burchfield were all of a mind to be a 2, and, in the main, 2 (b), although I think Commissioner Valentine was a 2(a), and generally favoring, as the Chair said, the inclusion of the last sentence, i.e., that the antitrust agency would reserve the right to sue, if necessary.

So, as to waiting, I don't know that we are

dashing headlong toward a different conclusion.

COMMISSIONER JACOBSON: Let me just observe, I am glad that someone here can count, because I certainly can't.

CHAIRPERSON GARZA: I was confused, frankly.

It wasn't clear to me where certain people were on the last sentence – on the concept of – and that is what I thought –

COMMISSIONER VALENTINE: I was surprised that most people were voting to eliminate the last sentence. That makes no sense whatsoever.

CHAIRPERSON GARZA: Let me just be clear. Commissioner Carlton, because you wanted to remove challenge, your view was that the antitrust agencies would not have separate right to challenge a transaction approved by the regulatory agency; is that right?

COMMISSIONER CARLTON: Yes. What I don't understand, and maybe somebody can explain it to me, is, let's suppose there is a regulatory agency that has some other justifications that allows it to approve a merger. Can the parties who are merging use as a defense, if the DOJ challenged, that there are these other public interest considerations? Who considers that? Under the antitrust laws, I don't think anyone can consider it.

I understand that the regulatory agency considers those. Would a judge consider that in a merger challenge by the DOJ - two merging firms, saying, well, there are other public interest standards. You can't apply the antitrust laws.

And wouldn't that mean, then, that the DOJ is not suing under the antitrust laws? That is my confusion.

COMMISSIONER LITVACK: Just, for what it is worth, to try to tackle that, it seems to me - others can disagree. I don't purport to be an expert here - The department that would bring suit would be claiming, in effect, that the agency had improperly weighed the various factors, not giving sufficient weight to the antitrust concerns, and that its judgment in allowing the merger to go through nevertheless, was inappropriate.

In other words, I think the agency would have a presumption in going forward, at that point, in terms of the correctness of its decision, assuming it gave whatever weight the statute provided to the Antitrust Division's concerns.

COMMISSIONER WARDEN: So you are talking about judicial review of agency action, not an independent antitrust case filed against the merging parties by the

department?

COMMISSIONER LITVACK: The answer is yes. That is exactly what I am talking about.

COMMISSIONER BURCHFIELD: That is right. In that event I can see allowing the antitrust agencies to sue.

But if, on the one hand, you have the regulatory agency approving a merger under a public interest standard, and then you have the Department of Justice filing a separate lawsuit down the street saying this violates Section 7, that doesn't make any sense at all.

COMMISSIONER LITVACK: I quite agree with you. What I had in mind is just what I said.

COMMISSIONER VALENTINE: Well, wait a second. Let's say that the FCC approved the *EchoStar-DirecTV* deal because they thought that cable provided adequate competition, and they have to balance out all the various networks and distribution channels, and the Antitrust Division is firmly convinced that cable is not an adequate competitive alternative and this deal substantially lessens competition? Are we saying that the DOJ can't sue?

COMMISSIONER LITVACK: I would say that the Department of Justice's remedy would be to seek a review of that decision made by the FCC, given whatever standards

applied, i.e., that it had to give conclusive or substantial weight to the government's view on antitrust concerns.

But as long as you have an FCC, it seems to me that they clearly have to be able to make a public interest judgment.

COMMISSIONER VALENTINE: No. No. Then we are going backwards.

COMMISSIONER JACOBSON: Yes. I agree with Commissioner Valentine.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I think I probably already said what I was going to say, which is that I certainly can see where the Antitrust Division or the FTC can go to the D.C. Circuit and say that they have misbalanced the public interest here, and therefore this merger can't go forward as an approved transaction.

But I just don't see how you can have the agencies – you are going to have two separate cases – there is going to be, in that *EchoStar-DirecTV* hypothetical, a group appealing on competition grounds in the D.C. Circuit. In a transaction like that, that is going to happen.

The question is whether the Antitrust Division goes up with that case or whether it files a separate

lawsuit in the District Court and litigates a parallel action. I don't even know how that would work.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I have a question for clarification. I am not sure what the current rule is on the power of the FTC or the DOJ to challenge a merger approved by a regulatory agency.

I can remember, in Greyhound's acquisition of Trailways, which I handled, there were a whole bunch of people who were unhappy with the ICC's decision to let that merger to go forward, and they sued in the D.C. Circuit, along the lines that Commissioner Litvack said. Their burden was to show that the ICC's approval of that had something that was consistent with the public interest - was not sound.

I have always sort of assumed that the Department of Justice or FTC can do the same at this time, but I don't know whether that is true or not. Does anybody have an answer to that question?

COMMISSIONER LITVACK: It depends on the statute.

CHAIRPERSON GARZA: Yes. I think the staff memo actually addresses what the current state of the law is with respect to various regulated industries.

COMMISSIONER VALENTINE: Yes, it does.

CHAIRPERSON GARZA: This is at the end of page 5. It goes through banking, energy, *et cetera*.

COMMISSIONER KEMPF: Okay.

COMMISSIONER VALENTINE: And generally, DOJ or FTC – the trend is to have a competition agency review all deals whenever possible – essentially eliminate regulatory bells and whistles. To the extent that we want to accommodate additional regulatory bells and whistles, those agencies should be forced to articulate why those additional bells and whistles are necessary.

COMMISSIONER KEMPF: So I assume that the agencies do not, at the present time, have an ability, outside of the review of the regulatory agency decision, to bring their own independent actions.

CHAIRPERSON GARZA: It depends.

COMMISSIONER VALENTINE: They do. They generally do.

[Simultaneous discussion.]

COMMISSIONER KEMPF: Okay. Two things.

One, I don't see any backpedaling from regulation. I don't think that is the issue at all.

COMMISSIONER VALENTINE: You are backpedaling

towards regulation.

COMMISSIONER KEMPF: No. That is what I am saying. I don't see any backpedaling toward regulation.

We have been in a sort of deregulatory mode since the 70's with air travel. The issue is a different one. The issue is, once we decide that, for whatever reason, this industry is going to be regulated, do you then let somebody else stick their nose under the tent and upset the regulatory scheme? And I think the answer to that is no.

I mean, that thing is addressed to Congress. And my instinct for most of the currently regulated industries would be to deregulate them. But once you say —

COMMISSIONER VALENTINE: And that is what Congress has done. And Congress gave airline mergers to the DOJ, not to the CAB. Congress gave trucking mergers to the DOJ.

We want the DOJ and the FTC to be reviewing and challenging these mergers on simply competition-based grounds, not on how many union members there are in their district, and not on whether they like trucks better than railroads.

COMMISSIONER KEMPF: I agree with that. But if the agency is where the decision resides, then I think that is a congressional decision that that is where it resides.

COMMISSIONER VALENTINE: And the only instance of that is the surface transportation board.

COMMISSIONER KEMPF: So, I don't think there is a problem there. But where the agency has the ability to make that decision based on its expert view of all public interest factors, including competition, then I think the appropriate relief, absent statutory authority, is for that to be reviewed by the court of appeals in a challenge to the agency decision.

Now, let me make one other thing. As between whether it is 2(a), (b), or (c), or 3 – and, as Commissioner Warden points out, that has the (a), (b), and (c) in it.

COMMISSIONER VALENTINE: 3 does not have the (a), (b), (c) in it as it is currently drafted.

COMMISSIONER KEMPF: Yes. It does.

I wouldn't use "no particular weight" – whatever weight it merits. And the reason I say that is, if I have a concern, it is the reverse of Commissioner Valentine's. Right now, if the FTC or DOJ challenge a merger in a non-regulated environment, and they go to court - they don't get any binding or presumptive benefit. They just go in as any other litigant, and say, we think this is illegal.

Now, a court, recognizing that those are the

agencies charged with those laws, may subconsciously give them particularly close attention, assuming they know what they are doing because it is the agency that is charged with doing it. But the court retains, at all times, the ability to give the allegations, the lawsuit, whatever weight they deserve. And my own reaction is that the agencies ought to have the same leeway. They are just the court of first instance.

I know last time we discussed - Commissioner Warden said, the proposed merging parties can always challenge it later in court. But I think the decider in the first instance ought to have the freedom to give the presentations by anybody, including the DOJ and FTC, whatever weight those presentations merit, and not be hamstrung by either having it binding or even presumptive.

There is no presumption in the federal court case if the two non-regulated parties decide to merge. And so I would be concerned with the reverse of Commissioner Valentine, that you are not diminishing the input from the antitrust authorities, but that you are, in fact, increasing the strength of their presentations.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: I had trouble deciding which

way to go on this. And I think one of the reasons is that it might be a little silly for us to suggest that there is a kind of one-size-fits-all proposal.

There are different features of different industries, and therefore different types of regulation. I guess I would be more comfortable with a report that basically outlined the kind of movement that we have had over time, where, in industries that were once thought to only be manageable through regulation, we've deregulated. We have exposed them to antitrust. Mergers and other activities have been subject to the normal antitrust rules. That should be the norm, as opposed to basically suggesting a particular rule that should apply in all contexts, which might just be rejected out of hand, in any event.

The other question I have, I guess, is whether or not — I guess I said I favored DOJ being able to sue. And, thinking about it, and the way that Commissioner Litvack put it, I wonder whether it is reasonable to suggest that the DOJ would go in and challenge a merger approved by an administrative agency. I don't know whether that would be, just as a matter of how the federal government works; I don't know whether that would ever happen.

I am not sufficiently conversant with

administrative procedures at this point to understand exactly how that would happen, if there are any inhibitions to being able to do that.

COMMISSIONER VALENTINE: I move once again that we table this until the entire Commission is here. Some of the difficulty here may be coming from this concept of dual and concurrent authority.

I personally would prefer only the FTC and DOJ to have authority on all mergers and that the regulatory agencies would give them input as to public interest issues. But I don't think this is particularly fruitful without the views of everyone here.

CHAIRPERSON GARZA: It is not clear to me that Commissioners Cannon or Yarowsky or Delrahim are going to be able to answer my questions about how, sort of, mechanically it would work.

COMMISSIONER VALENTINE: They have always been presumed to go first. The DOJ always goes first before the FCC on mergers.

It is just how it works. I don't know what we are talking about here about the agency being the one – a lot of these agencies don't even go into court and challenge. There is no review from the D.C. Circuit or district court

decision; it doesn't work that way.

COMMISSIONER WARDEN: I'm not sure I understood what you just said. There is no review from a D.C. Circuit decision?

COMMISSIONER VALENTINE: The situation is not that the FCC goes into district court, challenges AOL-Time Warner, and then the FCC or DOJ appeal that decision.

The current system is that the FTC or the DOJ decide whether to go to court or not.

COMMISSIONER WARDEN: Yes. But the FCC decides what ruling it is going to make.

CHAIRPERSON GARZA: My question really goes to Commissioner Carlton's point.

Commissioner Carlton makes the point – basically, the fact that you have got a regulatory agency that says, we think it is in the public interest for this merger to occur - DOJ or FTC goes to court and challenges it under the antitrust laws. The question I think he asked, which seems reasonable, is, do the courts have the capability, under the antitrust laws, to take account of the public interest considerations that the regulatory agency moved on –

COMMISSIONER VALENTINE: Yes, absolutely. Don't you think the defendants are going to raise in 500 briefs

exactly every sentence that the FCC said in support of their merger?

CHAIRPERSON GARZA: Well, I don't —

COMMISSIONER LITVACK: If I may, just to chime in one second.

As a practical matter, what has happened to date, and what does happen is just what Commissioner Valentine said. It is a comity between the agencies. When you take *AOL-Time Warner*, the FCC was not going to run out in advance, bless the merger, and then have the FTC file suit.

That is just common sense. But it is also what gives rise to the issue that we are talking about. That is the way it works as a practical matter. But that also, as I said, gives rise to the issue.

I was just saying to Commissioner Jacobson, suppose — we are not going to decide this today, obviously — but suppose you said here, under one of these, that the agency was bound to give conclusive weight to the antitrust concerns expressed by the Department of Justice.

So, the FCC sits and listens to a merger involving satellites and says, the FTC is absolutely right. From an antitrust standpoint, this is terrible. But, from a public interest standpoint, this is really good, because we think

that satellites cause, as Commissioner Jacobson just put it, sun rays - and having weighed it all, we are bound to accept what you say about antitrust, but that is not the only consideration in this world. There are other considerations, and we are charged with doing that. So, we approve the merger.

Now, are we really saying that, despite that, the government could go in the court and say, we don't care about all that because antitrust is the only thing that exists?

I don't think so.

CHAIRPERSON GARZA: That is my question.

COMMISSIONER VALENTINE: That is what statutes currently say.

COMMISSIONER BURCHFIELD: I want a clarification on that.

I have been looking back over the staff's memo, which I did read quickly but carefully enough, apparently.

It does allow, in the banking area, a separate challenge. But the challenge is not under the Clayton Act. It is under the same standards used by the banking industry.

So, that — I still think it is crazy that they can go into district court and challenge a merger while it may

be on appeal in a court of appeals, from the agency determination. But, as crazy as that is, at least they are using the same standard here.

It is unclear to me, reading the information about the FCC, and maybe one of the staff can say whether, likewise, in the communications context, the antitrust agencies have authority to challenge a merger approved by the FCC solely on antitrust grounds.

CHAIRPERSON GARZA: Well, they do. They obviously do.

MR. HEIMERT: It is Clayton Act, Section 7. The DOJ or FTC, if they have a telecom merger -

COMMISSIONER WARDEN: I think the logic of Commissioner Valentine's and Jacobson's position leads to 1. I favored 3. I appreciate the point introduced by Commissioner Litvack. I would have no objection to 3, with the antitrust agency having the authority, not to file an action in district court, but to seek an appeal, or seek review of the administrative agency's decision.

As a secondary thing, I have no objection to 1. It just seems to me that the authority ought to be in one place or the other. And, subject to judicial action — judicial review in one case, and trial and decision in the

other case - it ought to be in one place or the other. There is no reason why you should have an agency that has jurisdiction over mergers, and then the parallel ability of the Antitrust Division to bring injunctive actions.

That is what doesn't any sense to me. I don't care. Give it all to the DOJ.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: Yes, I have two comments.

One, I am not sure I have a clear answer to the question that I posed, but I wanted to respond to something that Commissioner Valentine said, because I think it is a good point. There certainly has been a movement away from regulation to relying on competition and thereby antitrust.

I interpreted the vote that preclusive weight be given to, say, the DOJ or the FTC, on antitrust matters to be a movement in that direction. That is, I would prefer to have the governmental agencies, the DOJ and the FTC, making all decision about competition. They are experts in it. That is what they specialize in. That should be given preclusive weight.

A subtlety that arises in some industries, particularly in telecommunications, is, as I understand it, the interest standard of the FCC is not just to prevent the

harm to competition but to promote competition. Now, I would be happy to delegate that to the antitrust authorities, because I think they probably have a pretty good idea about that, perhaps a better view than the FCC. That is, on competition issues, the comparative advantage I believe lies with the government agencies that specialize in competition. So, in my view, requiring reliance on antitrust agencies, rather than on the regulatory authority is a move away from regulation towards reliance on competition.

What troubles me is the illogic of having a regulation that says you have to have a public interest standard and then allowing the DOJ to sue in federal court. I don't see how it is a defense under the antitrust laws to say, well, yes, prices are going to go up, but some regulatory agency said that I am serving some other public interest.

Is that a defense under the antitrust laws?

COMMISSIONER WARDEN: No, of course not.

COMMISSIONER VALENTINE: National security.

COMMISSIONER CARLTON: I think there is something illogical about the setup. I think the discussion emphasizes, though, that what we are perhaps troubled by is

that certain regulatory agencies may impose, as part of their "public interest," special interests that harm the public.

That is something we are troubled by, and that is why we actually like the movement away from regulation to competition. But it seems to me our real beef is perhaps with the regulation than with the use of the antitrust agencies to evaluate antitrust matters.

COMMISSIONER VALENTINE: Which is why I truly want a single review. It should be one with input on – if it is bank safety and soundness from the banks, if it is the nationwide reach of the railroad system from the STB, if it is diversity from the FCC -

But to go the other way and put the final decision in the regulator that is most easily captured by the industry makes no sense whatsoever.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: The problem, at least one of them, is - what we are saying, and it is a view held, in varying degrees, by everyone here - because this is an Antitrust Modernization Commission, antitrust trumps all. You really don't need anybody else. The antitrust agencies make the decision. And, by the way, if there is some other

public interest standard, fine, they are bright people. Just tell them what it is and they will figure out.

But that is not what Congress has said. That really isn't what Congress has said so far. They could have. Maybe they should, but they haven't. They have found and have provided for these agencies that do have other standards, and other tests to apply.

And so, while there is some appeal to say, let's put it all in one place - I don't disagree. You can't put it all on the antitrust agencies unless you want to weed out all the other considerations - You can put it all on the agencies, but then you run into the problem that Commissioner Valentine says. You can ameliorate that but not solve or eliminate that, I suppose, by either "A", a conclusive or presumptive effect of the antitrust determination, or "B," allow the Antitrust Division or the FTC to go to court.

But I must say, at the end of the day, short of appealing the agency, it makes no sense. It just doesn't make any sense.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Yes, the concern that Commissioner Valentine - she said she is concerned that

there would be only one point of view on the antitrust aspect of it.

COMMISSIONER VALENTINE: That is not what I said, but -

COMMISSIONER KEMPF: Well, let me pick up on what Commissioner Litvack, and I thought Commissioner Valentine, had said.

For the vast percentage of proposed transactions, mergers, those are subject to federal court challenge. And there is no binding or presumptive effect. You just go in and, in addition to the perspective of the agency, there is the perspective of the merging parties. And my own view is that that same system that we use for that overwhelming portion of mergers that occur in society, should be the some one when it is a regulated industry.

The parties, or whoever the first decider is, whether it is the court or a regulatory agency, should each make its case, and the agency or court should give it whatever weight the respective sides carry on the strength of the positions.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER JACOBSON: Can I renew the motion to adjourn made an hour ago by Commissioner Valentine?

CHAIRPERSON GARZA: Can I ask, just because we did have the disadvantage of beginning to deliberate on issues with a little over half of us here.

In order to facilitate picking this up next time, can the staff prepare something short on each of these things that just basically enables us, next time, to see, and for the missing Commissioners to see, kind of where we were? I realize that there is a lot of uncertainty, but kind of note, as you understand them, some of the major points of discussion.

It is just a page.

MR. HEIMERT: We can try.

CHAIRPERSON GARZA: I just want to be able to see where we left off, and I don't want it to be completely wasted.

There should be a way to gel the positions, where we were, so that we can resume next time with that. Okay? And I am happy to work with you in getting that done.

COMMISSIONER VALENTINE: My condolences to the staff.

COMMISSIONER LITVACK: I have a question, too, which I hate to raise, given that it is a practical matter.

Given the number of Commissioners here, which is

not going to increase, as I understand it, tomorrow, and given the fact that I know Commissioner Jacobson has to leave by noon tomorrow, are we going to find ourselves tomorrow in the same position where we were today saying, let's defer this; let's defer that? If not, that is fine.

COMMISSIONER WARDEN: I don't think that is so, because a lot of what is on for tomorrow is where we already reached consensus.

CHAIRPERSON GARZA: The plan for tomorrow is to try to go over the larger document and to try to make sure that we are on the same page as much as possible so the staff can go on with certain things. So, really, it is for them to confirm that everybody still is where they are. It is possible that people aren't. And we will engage in some wordsmithing where it is appropriate to give the staff direction.

The problem is, to be honest with people, we can't hold up the staff's work because Commissioners don't show up. We can't defer everything just because certain things aren't here.

We went through the effort to have a two-day hearing because people said they wanted a two-day hearing, and I am reluctant to cancel it for tomorrow. I realize it

would be better to have everyone here, but I think Commissioner Yarowsky is planning to be here.

Commissioner Jacobson will be joining us by video phone.

COMMISSIONER JACOBSON: No. I am here tomorrow until about 11:30.

CHAIRPERSON GARZA: Okay.

I don't know about Commissioner Delrahim.

Commissioner Cannon won't be here.

MR. HEIMERT: He is trying to do it by phone.

CHAIRPERSON GARZA: So, we will do the best we can, but I do want to make sure that the staff is in a good position. I don't want them to have to twiddle their thumbs in August and September because we weren't able to come to some conclusions.

COMMISSIONER WARDEN: Here, here.

COMMISSIONER JACOBSON: I agree.

MR. HEIMERT: The Commission is adjourned.

[Whereupon, at 4:56 p.m., the meeting was adjourned.]