# ANTITRUST MODERNIZATION COMMISSION

## COMMISSION MEETING

Tuesday, May 23, 2006

Morgan, Lewis & Bockius LLP
Main Conference Center
1111 Pennsylvania Ave., N.W.
Washington, D.C.

The meeting convened, pursuant to notice, at 9:38 a.m.

PRESENT:

DEBORAH A. GARZA, Chairperson
JONATHAN R. YAROWSKY, Vice-Chair
BOBBY R. BURCHFIELD, Commissioner
W. STEPHEN 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 J. HEIMERT, Executive Director and General

Counsel
WILLIAM F. ADKINSON, JR., Counsel
NADINE JONES, Counsel
MARNI KARLIN, Counsel
MICHAEL KLASS, Economist
ALAN J. MEESE, Senior Advisor
SUSAN DeSANTI, Advisor
KRISTEN M. GORZELANY, Paralegal

C O N T E N T S

**Discussion of Civil Remedies, Federal Enforcement Institutions, State Enforcement Institutions, and Robinson-Patman Act Issues**



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: All right. Everybody's here. Let's get started on time. I know there are a number of Commissioners who have to leave at 5:00. I think we should be able to accommodate that. We'll make efforts to do so. I won't repeat the lengthy intro that I went through last time. The only thing I will do is remind folks that we do have an order, which is in front of you, to go over what we're going over, and because we are keeping a record, it will be helpful for people to use the flags and then wait to be acknowledged to speak so that we can get everything on the record.

And the other thing, just as a reminder – I think everybody appreciates this, but the purpose of this meeting really is, as much as anything, to get the tentative conclusions of Commissioners so we can start the dialogue. I think everybody knows that we're planning to have a further meeting on July 13 that will give us an opportunity to go back and refine and revisit our conclusions before the staff is directed to draft a report.

Today, we are going to begin with the issues that we didn't complete last time, and those will be civil remedies issues: treble damages, prejudgment interest, and attorneys' fees. On prejudgment interest and attorneys' fees, I think we may have gotten some indication last time, but folks wanted to consider it in connection with the treble damages.

And treble damages, we are changing the order of comments a little bit from what you have on your deliberation meeting order sheet: we'll start with John Warden. John Warden and John Kempf will essentially change places on the order list. And with that, I think we'll begin.

John Warden, do you want to begin?

COMMISSIONER WARDEN: Thank you, Deb. I asked Deb if I could go first, because I'd like to put before the group a proposal that is not captured by the ballot, if you will, that we have in front of us. It's an integrated proposal covering damages, and it springs from a couple of considerations that, just in very brief, are, I think that we have a lot of excess and unproductive social overhead in damage litigation today, and the costs are huge, and I don't think they are necessary for effective enforcement.

The second is that treble damages clearly are punishment, and I don't think punishment should be proposed on a preponderance of the evidence standard. Now I could write a legal brief about that, but that's the reason for part of this proposal.

The first aspect of my proposal is that whenever the government secures a criminal conviction by plea or trial that all unlawful gains made by the defendants with –and this is a different topic, of course – prejudgment interest shall be disgorged in that proceeding together with such fines and penalties as may be provided by law. The disgorged gains,

which you might equate with single damages, shall be apportioned among those from whom they were taken directly or indirectly by that court in a summary proceeding. And direct and indirect claimants may participate through counsel in that proceeding.

Fines and penalties shall accrue solely to the Treasury, but from those sums the Court may award money to any private party or its counsel found to have been a material factor in the government's instigation or successful conduct of the proceeding. And second –

COMMISSIONER VALENTINE: The Court may award, in its discretion, money?

COMMISSIONER WARDEN: To a private party that has been found to have materially contributed to the government's institution or successful prosecution of the case. That would come not out of the disgorgement, but out of the funds that would otherwise go to the Treasury.

In the case of acquitted criminal defendants I would permit private litigation only for single damages. And, in cases where there's been no criminal proceeding, I would adopt a rule where the Court may increase the amount to be recovered or disgorged depending on whether it's a foreign equity and other subject only if the plaintiffs prevail by clear and convincing evidence and the Court finds the conduct established by the clear and convincing evidence to have been clearly unlawful.

We discussed last week some of the other things that I had as part of this proposal, and I don't propose to, at this point, go back to those. So that's it in a nutshell. As I said, there's also an underlying issue of whether the remedy for money should be equitable remedy of disgorgement – which I think would greatly simplify proceedings, including the division of spoils between direct and indirect purchasers – or an action at law as it is now.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Yes. I just had a question for Commissioner Warden, and that is, that's pretty comprehensive and pretty well thought out. Whether or not I agree with it is a different question. But to make it easier to discuss and follow, do you have that available so that you could distribute it to the other Commissioners?

COMMISSIONER WARDEN: I don't have it available in writing in exactly the form that I stated it, Don, because I have interwoven some other things like contribution and so on. But if we had a secretary here, I could, in short order, have something prepared.

COMMISSIONER KEMPF: Just do a draft; I'll get it done.

COMMISSIONER WARDEN: Okay.

COMMISSIONER CANNON: You know, it might be helpful to go through the contribution and claim reduction, prejudgment interest. That would have the whole package.

COMMISSIONER WARDEN: That's fine, but I thought we kind of dealt with those things last time, and my views are pretty consistent with the way we dealt them. I favor both contribution and claim reduction, as we discussed last time. I favor relief only under federal law, except in the case of conduct having its principal effects in a single state as we discussed last time.

I favor recovery of counsels' fees as well as pre-complaint prejudgment interest by plaintiffs, although I would not allow those recoveries if the amount to be disgorged is greater – if the increased amount allowed by the Court as punitive damages, if you will, is greater than those amounts. I favor allowing a prevailing defendant to recover counsels' fees in competitor cases. We discussed, as I said last time, claim reduction and contribution, and I think what I favor there is pretty much what we as a group favored, which is to have both claim reduction and contribution and to use market share as a proxy whenever possible.

I'm not purporting to restate exactly what we concluded last time; I'll leave that to Andrew. With that understanding, I'd be happy to – if I can find a clean copy of this – just have it Xeroxed. It has a few more words about justification.

COMMISSIONER KEMPF: In considering, at least in my case, in whatever form we could get it reproduced, it would be just a lot easier.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: John, while that's being copied, I just had a question to clarify. So, in the instance in which the government had not already instigated litigation, would there be a private right to bring a cause of action?

COMMISSIONER WARDEN: Yes. As under existing law, subject to this law-versus-equity point that I mentioned.

CHAIRPERSON GARZA: And then the availability of damages would be single damages?

COMMISSIONER WARDEN: Single damages, unless the plaintiff proves the facts by clear and convincing evidence, and the Court finds that the conduct was proven to have been clearly illegal, which I prefer to a *per se* versus rule-of-reason dichotomy.

First of all, *per se* is a shifting category, as we all know. And secondly, some things are subject to debatable proof, but, if taken as proven, fall into the *per se* category even though it's highly unlikely what I might call *mens rea*, or real notice of illegality on the part of the alleged participants.

CHAIRPERSON GARZA: And the Court would have discretion to increase –

COMMISSIONER WARDEN: Up to treble.

CHAIRPERSON GARZA: – Up to treble. And just one other thing. The clear and convincing standard, I think, was

in one of our options in the treble damages.

COMMISSIONER WARDEN: Yes, it is.

CHAIRPERSON GARZA: What's the difference, as a practical matter, then, between the preponderance of the evidence and clear and convincing evidence in court?

COMMISSIONER WARDEN: Well, you'd have to have 15 law professors to debate that. Something between preponderance and beyond a reasonable doubt. It's the standard proof for fraud at common law. And I think it makes the finder of fact think a little harder.

CHAIRPERSON GARZA: And would the clear and convincing standard be for any antitrust violation, or would that be in order to obtain treble damages?

COMMISSIONER WARDEN: Treble damages. And I would leave the preponderance standard for single damages. I mean, the preponderance standard is the normal standard of proof toward action. And my concern only comes with the, what I would call, punitive nature of the treble recovery.

CHAIRPERSON GARZA: We can wait to get the copies and see if there's any further discussion of John's proposal or we could move on to Sandy in the meantime.

COMMISSIONER LITVACK: I had a question, John. You said it would have to be clearly unlawful. Are you making this like the patent area, where if you've got an opinion of counsel in advance – you'd have to weigh the privilege, obviously – it would kind of be a bar to claim that was

"clearly unlawful"?

COMMISSIONER WARDEN: No. I have nothing specific like that in mind, Sandy. I'm happy to have that developed through decisional law. It would be kind of odd to get an opinion of counsel for covert conduct, but I suppose it could happen.

COMMISSIONER LITVACK: Well, I'm not thinking of covert conduct. I'm thinking of conduct of the business a corporation engages in. A plan, not necessarily a conspiracy to fix prices, but rather a thought-out business plan that is ultimately held to be unlawful.

COMMISSIONER WARDEN: Well, there are opinions about that, obviously, in the antitrust field, and that certainly would be a factor to be weighed, assuming that the opinion was based on an accurate statement of fact and comported with reason. I don't mean correct or incorrect, but comported with reason. That would be a factor, but not conclusive.

CHAIRPERSON GARZA: Sandy, you're next on the list. Why don't we, while we wait for that, go through our preset order and allow Commissioners to comment or ask questions either about John's proposal or in general about the subject matter of treble damages.

Do you have anything more, Sandy?

COMMISSIONER LITVACK: No. I think I am, subject to considering John's proposal, obviously, where I was last

time, which is basically not favoring doing away with treble damages except I have been wondering, and really want to hear more, about whether or not treble damages might not be inappropriate in a case where there has been a government suit and a government conviction already.

In those circumstances, I'm just not sure that treble damages are warranted under any set of facts. So, I'm up in there on that one and would like to hear others.

COMMISSIONER VALENTINE: That would be 2(g), then, and sort of in line with the David Boies discussion that we had during the hearings?

COMMISSIONER LITVACK: Yes. I think that's correct.

COMMISSIONER KEMPF: Could I ask Commissioner Litvack a question.

Oftentimes, a government indictment is filed and there's a file on a civil class action within a week or two. So, the question I have is a timing issue. There may be a successful government prosecution and conviction, but it may occur a year after the filing of the civil suit, but before the civil suit goes to trial.

COMMISSIONER LITVACK: I meant to include, or at least to say I'm troubled by, the civil suit, which is often filed a day or two after the government's indictment, not even a year or a month. Maybe an hour. And those lawsuits, it seems to me, in the main – I'm not certain they add much.

I'm not certain the attorneys – that treble damages is appropriate. They're typically class actions where, candidly, the only winners are the attorneys. I'm just not sympathetic to that.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: I just want to add to Sandy. Actually, I think nowadays, the complaints are filed as soon as there's any word that there's been an audit or anything else. Forget the indictment.

COMMISSIONER LITVACK: True.

COMMISSIONER BURCHFIELD: A subpoena.

COMMISSIONER LITVACK: Yes.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: One thing I noticed, in terms of the first bullet: we say no change is appropriate, but treble damages should be available in all antitrust cases. I mean, that's not really the case today, with the NCRA and the Local Government Antitrust Act. I mean, there are certain carve-outs at this point, unless I'm mistaken about that. I don't think so.

MR. HEIMERT: I think the intention was to, subject to those carve outs –

COMMISSIONER CANNON: No technical changes. Essentially as it is today.

MR. HEIMERT: That was what was contemplated, but obviously that's also something we're looking at separately.

CHAIRPERSON GARZA: We're going to clarify in that in the option.

COMMISSIONER CANNON: That would be great.

And I think what John proposed is interesting. I'd like to see it in writing, and maybe we'll roll that around a little bit. But I'm more with Sandy on this. My initial reaction is no significant changes in this at all.

I had the same thought about follow-on cases, but to balance that out, it's usually – that's kind of the worst conduct. It's the hardcore cases, the cartel enforcement that we're trying to address. I'd love to hear some more debate about that, because that's really – I just haven't come out on that. And on timing, the same thing; these things get filed immediately. So, for now, I want to see more and hear more about – and debate with John – his proposal.

I would say no statutory change appropriate. Right now, I'm not coming down for de-trebling on criminal cases. The thing that just stuck with me from the hearings that we had on this was that the conclusion that a lot of people had, which was that even with treble damages, you hardly ever get to single damages, and I need to be more convinced that, in fact, if you went to single damages you would end up with actual damages.

I'm done.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: We've had a treble damage remedy for 116 years. It started as Sherman §7; it's now Clayton §4. For a statute that has been a cornerstone of antitrust enforcement for that length – and it's my view that the burden to show a need for change is a particularly heavy one. We had extensive hearings on the subject. There is extensive literature on the subject.

We have not been pointed to a single example of a serious injustice occasioned by an actual award of improvident treble damages. I think the burden of demonstrating a basis for change has simply not been met. The antitrust laws provide for multiple enforcement mechanisms as a check and balance very similar to our basic governmental structure. Government enforcement, as we know, waxes and wanes. Having an effective private remedy and an inducement to use it, which treble damages is, in my view, much more than a penalty, is central to enforcement of the antitrust laws. I think without private enforcement and without the treble damages that provide an incentive to enforce the laws privately, we're going to weaken antitrust enforcement.

The hurdles today to private recoveries are very high. The standing and antitrust injury rules have become increasingly strict since *Brunswick* was decided in 1977. Defense summary judgments and motions are granted vastly more frequently in antitrust than in other areas of the law.

Prejudgment interest is unavailable as a practical matter. Given all those factors, trebling, in my judgment, is essential to induce parties to sue.

Finally, I worry about the message. We are in an era, and eras can change in this business overnight, but we're an era of less-than-aggressive federal enforcement of the antitrust laws. The states, with all great respect to them, have been running scared over the last few years. There's not been much activity on the state side. And the key enforcement mechanism today and at other periods in our history has been the private action. I think we send a very, very, bad message about our faith in the antitrust laws as the mechanism for regulating our economy if we say we're going to cut back on the treble damages action, which is the foundation for private enforcement.

Briefly, on Sandy's proposal, I am very, very, sympathetic with the proposal, and I see no particular reason to encourage people who are purely free-riding on the efforts of someone else. But I think we'll find that in the real world making that distinction in practice is going to be extremely difficult. In the worst case in anyone's memory, the vitamins cases, one of the impetuses to the government's proceeding was some work done by indirect purchaser plaintiffs in the vitamins context.

Now, one or two cases were filed before the government got involved, but the vast amount of the cases

were filed afterward. How do you make that distinction? How do you know who was in there investigating before the government got involved. I think the line-drawing there would be very, very, difficult. And again, I think sending a message that we're going to cut back on private enforcement is the wrong message to send, particularly in 2006-2007.

So, my strong vote is no change.

MR. HEIMERT: Commissioner Carlton.

COMMISIONER CARLTON: I agree with much of what was said, and I would like to see John Warden's proposal and think more about it. I guess my sense on treble damages is a little different than what I've heard so far. I have a little angle on it, and it's this: the justification for treble damages is not punitive, in my understanding of what you're trying to accomplish or what we're trying to accomplish now; it's really to deter illegal activity. And the way you deter illegal activity is to deprive the person who engaged in illegal action of his gain. So then, the question is, why do you treble it? And the reason you treble it is that you don't observe all illegal acts; there's a detection problem.

If it weren't for a detection problem there would be no need to treble, and single damages, assuming there are single damages, would deter completely. And therefore, we have trebling because we can't uncover all actions. Therefore, it seems to me that there's an important

distinction between covert and overt activity, and I would, therefore – although I would certainly like to hear more about it – my current thinking is that, for overt actions, there should not be treble damages.

For covert actions, on the other hand, I think treble damages may well be appropriate. As John said earlier, he asked, has the case been made as to whether treble damages is working or not? I haven't seen a lot of empirical studies either. In fact, my sense is that it would be hard to do an empirical study because what you're very concerned about when you're trying to deter antitrust activity is not only the effect on the people who are doing the illegal violation, but you're trying to look at the consequence of your actions on people who are behaving perfectly innocently but are scared off of engaging in some activity.

So, therefore, I would, under – I guess it's 2 – go with 2(c), which is, if it's a joint venture with pro-competitive justifications, I think I certainly don't want to see trebling and, under (e), when the conduct is overt.

Now, I will add one other thing, which I'm not sure is in the proposal. It's sort of in 3 later on. And it's this: for hardcore conspiracies, hardcore price fixing, I think it's perfectly appropriate to do more than treble if they feel it's been particularly egregious or there was no question that it was a hardcore cartel. In their discretion

I would let them more than treble it.

Finally, I would pay special attention to international conspiracies. I can't remember if it was hearings on this topic or some other topic, but we talked about the problem that arises when you have an international conspiracy, a worldwide conspiracy, but only a small fraction of the customers are in the United States. In those situations, again, I would give discretion to the Court to do more than treble, taking into account the fact that customers in other parts of the world may not have a cause of action, not only in the United States, but any part of the world. And therefore, to deter I would have a higher multiple.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I guess you could say this is a very good discussion for a number of reasons. Let me reiterate what was stated by a number of Commissioners and that is, thanks to the staff for their hard work and excellent memos in preparation for the hearing on today's issues and last week's issues.

Let me start with a question for Commissioner Warden, and that concerns paragraph one of his proposal, which, as I read it – and Commissioner Warden provided me a copy of this to me in advance – and let me reread this sentence that I'm focusing on. It says, "In all matters where the government institutes criminal proceedings and obtains a guilty verdict by plea or trial, all unlawful gains

made by the defendants and pre-complaint and prejudgment interest thereon shall be disgorged in that proceeding together with such fines and penalties as may be provided by law."

And my question for Commissioner Warden is whether the prosecutor in such instances has discretion to do plea deals with defendants for less than the full value of the gain.

COMMISSIONER WARDEN: It would be very difficult to not accord the prosecutor that discretion in my opinion. I've thought about that, as well, and it seems to me that the likelihood is that the private claimants will be another party at the table and not necessarily in one room with the defendants and the prosecutor, but will be pressing the prosecutor pretty hard in their direction. But, yes, the prosecutor would - may I hand this out now, Madame Chairman?

CHAIRPERSON GARZA: Oh, yes. Please.

COMMISSIONER WARDEN: Let me just explain this that I'm handing out. First of all, as it says on it, it's a draft. It wasn't intended for publication in the federal register or anything like that. It's my own think piece. The background section, obviously, is not part of a proposal. It's an explanation of my own thinking. And I see on a quick reading what is my present view, and that's the last sentence of paragraph five on page three. My view is that a prevailing defendant may recover counsel fees in competitor

cases, not in the instance where the plaintiff had revenues of greater than some amount of money. And I would also make the right to recover in competitor cases subject to the Court's disallowing it if it would work a manifest injustice, which I think, in my view, would be in the very, very, small plaintiff case.

COMMISSIONER BURCHFIELD: Thank you. That was helpful.

Let me just continue my thinking on this and it's been somewhat evolutionary. I take to heart the testimony that we heard before the Commission about the – even with the treble damages remedy, full compensation is being obtained. And I also noted the sparseness of testimony on examples of treble damages wreaking severe injustices on defendants.

Putting all that on the one hand, on the other hand I am troubled by the availability of treble damages in competitor cases, because I do sense that competitors sometimes game the antitrust laws and use them, essentially, for anticompetitive purposes by suing competitors with the threat of severe treble damages liability and even payment of attorneys' fees, and I suspect no general counsel hates anything more than having to pay his adversaries after a very difficult litigation.

And second, I am troubled at the other extreme of the concern raised by Commissioner Litvack, which is the availability of treble damages in non-*per se* cases. It seems

to me that in the *per se* world of cartel conduct, the testimony before the Commission was that those were the cases in which the criminal remedy, plus the civil recoveries that have been reserved, aren't always providing – and some people have testified that they almost never provide – full compensation to the victim. So, in the *per se* cases, where everyone agrees the anti-competitive activity is the worst and the effect is the greatest, I would be inclined to allow treble damages to continue. It is the non-*per se* cases, the instances in which the actor does not have clear legal markings that the activity is illegal, that bother me in a treble damages perspective.

My bottom line here is, those are my inclinations, but given the differences of view that we're hearing, including the difference in view of Commissioners for whom I have a great deal of respect – as to whether even *per se* cases should receive treble damages or not – I wonder if we have before this Commission sufficient weight of the evidence to justify changing a remedy that has been in effect for 116 years, as Commissioner Jacobson has said.

I am persuadable on this issue, but I do agree with Commissioner Jacobson. It's a heavy burden, and we should be well persuaded that a change is necessary before weighing in here.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: I'll pick up from where

Commissioner Burchfield left off. I think this is one of the heaviest burdens, for this Commission to overcome that assumption. The remedial structure is a major plank of the antitrust laws. Now, there're disparate provisions of the antitrust laws. It's like an archaeological dig. We see what history has done over these years, but there are some central pillars, certain foundational structures. Obviously, Sherman 1 and 2 – we can list four or five statutes. But those are the statutes. Those are the violations. The remedial structure then came into play, as did – and we'll talk about this later today – the deep estate and federal enforcement. It doesn't mean everything is perfect, but, on the other hand, if we don't at least acknowledge that there is a structure there, and if we just do everything as a kind of random situation that just happened to find its way into Title 15, I don't think that would be doing justice to the deliberative effect of what Congress, and then eventually the courts, did with the antitrust laws.

I think the private action – one thing I am at least a little familiar with is the legislative history surrounding it, and I know that at least Senator Sherman and a number of other people really wanted a full court press. We can disagree with that, but what they wanted, and these were his words, was a "first-person enforcer." The government was fine, but the government was far away from the agrarian society that was America. They wanted first-person

enforcers who would be able, as Dennis said, to detect violations that the all-seeing, all-knowing federal government might not see.

And so this is where the birth of Adam Smith's self-interest – it all came together, at least in the debate that launched – the Sherman Act and eventually carried 25 years later in the Clayton Act. So I really start with that view, that it's a pretty important plan.

I also agree that the staff did a terrific job of listing every possible option that we should consider, and I think that we have a very full group of them. But that's listing the options. When I really think back on the hearing, if there was ever a clear and convincing argument about where the vast spectrum of witnesses came down, it was on no change, basically, to the treble damage remedy.

So, we have two pages of options, but the truth is that a very interesting, distinguished group of witnesses all kind of converged on a general assumption that change was only indicated if you could sustain a very heavy burden. I think Commissioner Warden has done an amazing job of coming up with a completely different structure, and it's very cohesive. I'll have to study it some more, so I'd like to reserve a little time to read through it and think about it.

But one thing, Commissioner Warden – it's not a matter of disagreeing; it's just my view – I think we have to think through carefully whether we really want to equate

antitrust damages with punitive damages. I mean, we see punitives in a number of places, and usually those are very extraordinary situations. It's funny, but people think there're just people receiving $100 million in punitive damages every three days. The truth is that in the last 25 years there have probably been – if you look at final judgments or settlements that held – there have only been 25 or 30 cases. 25 that were over $20 million in punitive damages. It's a very extraordinary remedy, and somehow, between juries and courts, they eventually get it right. I mean, juries can get it wrong, and judges come in and make sure that these excesses, if there are any excesses, are taken care of. So, I view that very carefully.

Now, the Anglo-Saxon tradition was very obsessed with fraud, probably for very good reason, because anybody can make these charges. And so there's a tremendous amount of jurisprudence, starting with Blackstone onward, about fraud – pleading it with particularity and also coming up with a high burden of proof. And I think that we carry on that tradition. I think that in the antitrust context we need to think very carefully whether the typical antitrust violation rises to that level, but I have great respect for the jurisprudence of fraud.

Lastly, I just want to talk about a few of the variations, because I'm trying to be very open here to see if there may be some deviations from my general view that no

change should occur. I think Sandy raises a good point, because there's something intellectually troubling about the scenario you sketched, but as a few Commissioners said, I think we really do need to see the empirical side of that because there could be so many variations.

Dennis mentioned joint ventures. We heard a few witnesses, Tad Lipsky and others, draw a great deal of attention to them – I think we've already done that – I think Congress already did that with the National Cooperative Research Act in its various renditions. So, if people want to report joint venture activity to the antitrust agencies, they can reduce their damages, as long as they don't engage in *per se* offenses.

I think Commissioner Burchfield also mentioned – well, I'll just leave it there, that I'm trying to be open to possible variations, so I'll certainly consider what you said, Sandy. But I think, Dennis, on NCRA aspect, I think that may take care of the joint ventures.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I've been looking at Commissioner Warden's thing he passed out, and there are a number of things that I find sympathy with. There are others that I don't agree with at all. So I think if we're going to consider it, I don't want to do it as a package. I'd rather do it by specific pieces within his overall four-page document.

One thing that I would be particularly interested in, if we are going to consider this in his first proposal, is the view of the Department of Justice in particular. I can see the Department of Justice saying, we don't want to run a disgorgement proceeding; what we want to do is go out and catch other price fixers, and it might be nice if we had king-of-the-universe powers to bring all the affected parties in and achieve a fair and equitable distribution of the ill gotten gains, *et cetera*.

But if we do that on our present budget, that means we're going to take the number criminal prosecutions we currently have and reduce them by 50 percent, because the resources have to come from somewhere. So, I would be interested in the DOJ's reaction to a proposal before I would seriously consider it, because it obviously has enforcement implications beyond the procedure here, absent budgetary relief.

Let me then go to the outline that we have handed out and that we used last time. On items 1 and 2, I am torn for reasons that have been expressed earlier. I may well gravitate to voting yes on 1, which is no change. But I do find a number of things within 2: the (a) through (g) that are of potential interest to me.

Oddly enough, I am not particularly sympathetic to what I'll call follow-on action relief. I'm open to persuasion on that, but that's usually hardcore price fixing

and I think the added risk of treble damages might be a good thing there, in terms of its deterrent effect, notwithstanding what Commissioner Carlton said. And I also have some sympathy with several of the others that are in there, which we can discuss and alter.

I am against item 3, and also 3(a) and 3(b). I'm against item 4. I would also vote no on 5 and no on 6. On prejudgment interest, I would vote yes on the first one, with no change – on page 2, on 7, yes; no on 8, and there's no reason to consider anything beyond that in 8, then, but if there were a majority that favored 8, then I would vote yes on 8, no on (b), no on (c), and yes on (d).

So, if I'm limited to treble damages, then I'm against 3, 4, 5, and 6. And I'm torn between 1 and 2. I might gravitate to 1, for reasons that have been articulated by others, but I am open to persuasion on all of items (a) through (g), because I have some sympathy for each of them for varying reasons and to a varying degree.

As I said, follow-on actions, while they may not be that difficult, there may be less of an enforcement mechanism than a pocket-lining exercise, and they do tend to attack the hardcore conduct. And the others, I think, have been discussed already by others, and for the reasons they stated, I would have some sympathy for various of those.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I would, with respect to

treble damages, for many of the reasons that have been articulated, vote to stay with 1, no statutory change and that treble damages should be available in all cases in which they are today. That would accommodate both the Standards Development Act and NCRA and CPRA situations.

You know, this is not only an area where this has been the greatest mode of deterrence throughout our history, but the number of witnesses who consistently testified that there was no need for change was quite extraordinary.
The one issue that I'm wondering about – and this is in conjunction with 2(g), which Sandy proposed – follow-ons are both somewhat analogous to the overt cases that Dennis discussed. Once the government sues, anybody who follows on is simply taking advantage a now-overt situation. On the other hand, it is a *per se* violation in most cases. We don't have that much evidence of this leading to undue deterrence.

And one thing I'm wondering is whether it could be addressed by a suggestion from the Commission that in follow-on cases the court consider awarding attorneys' fees at the lower end of the multiple, or the lower ends of what is permissible, given whatever mechanisms they're resorting to. I do believe that some courts have started doing this. When it's clear that the government has really borne the burden of discovering evidence of doing the groundwork, and private attorneys are simply piling on, and their contribution is not that great, they should not be awarded disproportionately for

simply copycatting.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: My thinking was along the lines of a number of other folks'. Personally, I approached things from the angle that Dennis did, which is considering the reasons that we have treble damages. Foremost, I think, being the issue of deterrence, detection, and successful prosecution. And that does seem to be the point to a lesser need for treble damages in vertical cases. In cases involving distribution, merger agreements, or joint venture agreements – most monopolization claims, which are going to involve, of course, the dealings between the defendant and the plaintiff, which are obviously overt and open and known.

So it does seem to me that you have much less of a need for treble damages there. And while I think, to John Yarowsky's point, that there certainly was a good rationale for introducing treble damages to incite prosecution of antitrust cases, I think now may be a time to make an adjustment, given how we've seen the system develop. When I consider the options that the staff collected that have been out there, though, I am a little bit troubled by line drawing along the lines of whether it's *per se*, rule of reason, overt, or covert, just because of administrability issues and also because of the effect it might have on the way the courts are looking at the development of law, which I think we would be reluctant to toy with.

And so I've been thinking about procedural kinds of approaches. And one, actually, that I was thinking of that no one's mentioned was 3(a), which would allow a court, in instances of rule-of-reason cases where it wouldn't seem appropriate to award treble damages to make an adjustment, which may actually result in some courts finding antitrust violations that they should but don't find, because of the treble damages hammer. So, I was actually thinking about the ability to give the judge discretion, and whether to award multiple damages.

I was also interested in the clear and convincing evidence standard, although it wasn't clear to me how much of a difference that would make. On the follow-on actions I – again, people pointed out that the deterrence issue may not be there in the sense that the plaintiffs haven't had to necessarily go out and discover anything. On the other hand, it is a little hard to suggest to Congress that they give a break to the hardcore cartel defendants.

For that reason, I was interested in John Warden's proposal, which seems to be somewhat elegant in its theoretical structure in that you have the government action. You have full disgorgement, you have summary proceedings, and you eliminate a lot of the waste, I think, that goes on in these follow on actions. You take the lawyers largely out of it. You award a bounty for those who helped to detect and bring to the attention of the government these claims.

On the other hand, I had the same thought that Don Kempf had, which is that I would like to know what the Justice Department thought of that and what impact that might have on its enforcement program; we wouldn't want to do anything that would have an adverse impact. So, if we're seriously considering it, I would like to suggest that we get the views of the Justice Department and, for that matter, other people as well – that proposal or other aspects of John's proposal.

COMMISSIONER VALENTINE: Deb, can I just ask for one clarification? You are actually not really recommending 3(a), because you're not talking about statutorily specified considerations; are you simply saying that a court, in its discretion, would be able to award single, as opposed to treble, damages, or are you suggesting that you actually want to specify statutory considerations?

CHAIRPERSON GARZA: Well, I think it might be useful to specify some statutory considerations.

COMMISSIONER VALENTINE: And then what would those be?

CHAIRPERSON GARZA: They would basically be along the lines of willfulness, whether it was covert or overt, whether it was rule of reason, *per se*. But it would be up to the judge. I suppose it could be in the legislative history or in the statute. I haven't thought about how it would write out, particularly since I'm assuming he's the only

person who's interested in it.

But it seems to me that it's a procedural method that allows a court to act reasonably in those instances where there might otherwise be an abuse or strategic behavior by a competitor. I also thought about the limitation according to the nature of the plaintiff, which I think was in – Steve Cannon would know.

Was that in the 1986 legislation that the Justice Department backed?

COMMISSIONER CANNON: Yes.

CHAIRPERSON GARZA: And the only thinking there was that it might be somewhat difficult in particular cases to draw that line, whether a plaintiff was a competitor versus a non-competitor. But it would get at the same thing. But I was looking for procedural things, and it seemed to me that the judge's discretion might be the best way to go.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Like many of the rest of us, I've always been intellectually troubled by an across-the-board rule on treble damages, but today, on May 23, 2006, I haven't figured out a very satisfactory way of carving it back. So, my default position is yes on 1, no statutory change is appropriate.

I do want to think in somewhat greater detail about John Warden's suggestions. I am open to persuasion on either the follow-on point, or the joint venture or non-*per se*

suggestions. I'm interested to hear you, Deb, talk about them – the conscience or discretion of the judge. I'm uneasy leaving it that loose, however, and, as of this reading and for the purposes of the staff's writing, I would go ahead with 1.

MR. HEIMERT: Shall we begin with some discussion?

Commissioner Jacobson.

COMMISSIONER JACOBSON: I'd like to briefly discuss some of the alternatives to automatic trebling that we've talked about. I think we can put overt against covert and competitor cases and single firm conduct and vertical conduct in the same bucket for purposes, at least, of this piece of the analysis, which is, these are the cases where the government, as a matter of practice, and as a practical matter, really does not and could not enforce criminal –

The only remedy available to the government is an injunction. And it's a big deal. It's not precisely a slap on the wrist, but it's not a lot more than a slap on the wrist. So, a well advised company considering what course of conduct to engage in, could easily come to the conclusion that, if I get caught I'm going to get enjoined, unless there is a mechanism to really deter an advance.

We need to talk both about deterrence and inducement, and I'll get to that in a second, because they're not precisely identical. All of us have been involved in some respect in these cases; everyone knows that I

represented American Express. But look at Visa; Visa's a joint venture, but Visa and MasterCard had rules that prohibited every bank in the United States from issuing Discover cards or American Express cards. That was overt; it was a joint venture. I know a lot of people would disagree, but a lot of people would say that's as flagrant an antitrust violation as one can imagine.

Regarding *Microsoft*, there are people here who view this differently, but a lot of people would be of the view that cutting Netscape's air supply was a pretty egregious antitrust violation. And yet, if Microsoft were thinking this way, and we were to change the law in the manner we've been talking about, Microsoft would say, well, I think I can beat divestiture pretty well. That scares me. But other than that, I'll get an injunction that will tie up the courts for years. And if the worst I'm going to face is single damages from Netscape, why not go ahead and do it, because the certainty of getting caught and prosecuted and losing is not that great.

So, I think it's precisely in the overt versus covert cases, the competitor cases and the single firm cases, that you really need an inducement for people to sue, and you need treble damages as a deterrent effect. Without them I think a number of more flagrant vertical and monopolization restraints that we would see out there would necessarily increase and perhaps would increase significantly.

I have the same reaction to, although a different rationale for, worrying about the discretionary aspect. The discretionary aspect, I think, has a mild reduction in the deterrent value and probably not an acute one. But it has a major, major, effect on the inducement of people to sue. If the recovery is that uncertain that I can only get treble damages depending on what judge turns up on the spin of the wheel and how the particular judge assesses the case, the calculus of many people is going to be that it's not going to happen.

So, again, with all of these issues, has the case been made to change something that has been in place and has been a cornerstone of enforcement for a long period of time? I just don't see it.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: Well, I'll respond a bit to what my colleague, Commissioner Jacobson said. Not as to *Microsoft*; I won't speak about that, but I can't imagine, frankly, that American Express required any inducement, despite the level of legal fees involved, to sue Visa and MasterCard other than its own business interest, which I think it probably calculated in the hundreds of millions, if not billions, of future profits.

Be that as it may, I want to make one thing clear about my proposal. My proposal does not seek to abolish treble damages. It is a fine-tuning proposal, which is

addressed to certain, very specific concerns that I urge you all to reflect on. The concern that has been expressed about the burden on the Justice Department, I share. And my view is that the saved cost of private litigation in these cases that I would commend to the government at the foot of the criminal judgment, so to speak, is far greater than any addition to the budget of the Antitrust Division that might be required to carry that out. But we certainly don't want to divert – we don't want to cut the number of cartel cases in half.

Seeing as single damages don't equal actual damages, I really don't know how to address that, because whatever the academic's cite, they are supposed to, in this and in all other areas of the law. And I believe, under my proposal, the court would have the credibility to require disgorgement of all unlawful gains, and it's hard to see how damages can be any greater than that.

I understand these ripple effects and so on and so on, but I don't think those are real world concerns. I also want to make it clear that paragraph number one of my proposal was not intended to avoid the trebling feature. I said, "such fines and penalties as the law may provide." I'm perfectly happy to have the law provide a penalty, if you will, in addition to the criminal fine, equal to double the amount of the disgorgement, or whatever other multiple Congress might find appropriate. There is a suggestion that

it should be higher in cartel cases. I'm not necessarily opposed to that.

In terms of whether we should have clear and convincing evidence for antitrust cases versus fraud, I actually thought Vice Chair Yarowsky's suggestion about the possibility of requiring pleading with particularity, probably would be a good idea across the civil process. But that goes a bit beyond my proposal. And you would always have the argument in any covert action case, in any event, that the evidence is in the exclusive possession of the defendants and so forth.

I really think that it's a simple matter of justice, in my view, to require this kind of remedy to be conditioned on clear and convincing evidence and clearly unlawful conduct because, as Dennis says, there's a question of too much deterrence. But I look at it more from the standpoint of the board of directors or CEO who finds himself in a Kafkaesque nightmare, because he had no idea that the course of conduct the company had embarked on was even close to the line. I wouldn't give him a free pass on a legal opinion, as Sandy asked earlier.

I think the statement as to the testimony given by the witnesses at the hearings on this matter, the statements that have been made this morning about that is accurate. We all bring our own experience of cumulative centuries, actually, to this table. And I think that is what is behind

my proposal. I also think that if you'll recall the hearing on exclusionary conduct, the question was addressed at that hearing, as well. There was, I thought, fairly widespread support for at least considering the limiting of treble damages in that context. But, rather than overt versus covert, *per se* versus rule of reason, or single firm versus concerted activity, I am in favor of what I set out, which, by the way, to some extent is 2(d) and 3(b), and, as an alternative, 3(a) on the discussion outline.

Anyway, I ask you all to think about what I've put forward, recognizing that it wasn't advanced as a platonic ideal, but as a working draft.

COMMISSIONER VALENTINE: John, could I ask for one last clarification? You said that there were two corrections that you were making to the statements circulated. One was to five, where the counsel fees, as may be allowed by the court, would be awarded not if the plaintiff had revenues greater than x, but would be awarded in competitor cases. Then you had one other small amendment about something as equity may require.

COMMISSIONER WARDEN: I said I would only permit the Court not to award them in competitor cases, if it would work what I called a manifest injustice, which would be the tiny competitor suing the giant where there could be a problem of deterring enforcement.

COMMISSIONER VALENTINE: Okay. Thank you.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: The discussion is fascinating, because I have come almost – well, not quite – full circle, but certainly somewhere where I didn't expect to be.

I realize that my proposal, or my musing – and I don't think it was a proposal, but my musing – was really directed to something not on point. It was directed to my concern, which really is a different subject and was therefore misplaced. With the attorneys bringing these follow on cases, getting huge fees, doing little work, ending up with class members receiving relatively little compared to what the attorneys do, I think it's a perversion of what we started out with.

I was therefore intrigued by Commissioner Valentine's suggestion that maybe we do something with respect to the attorneys' fees, or at least say something. But now, when Commissioner Warden expanded upon his proposal to say that he was not ruling out a doubling or tripling of the amount of gain, so to speak, as part of the penalty or fine – For me, that really puts a different perspective on it. And I want to take another quarter of a step back and say I have never been convinced, and I am still not convinced, that the treble damage remedy itself is a major deterrent to anything. Certainly not, in my judgment, to a price-fixing cartel. To the extent there is a deterrent,

it's jail. I've always believed that. I still believe that. It's criminal fines and it's personal incarceration that really represent, I think, the greatest deterrents.

And I am, therefore, dubious about the treble damage award in that context. Having said that, I am mindful of the point that Vice Chair Yarowsky and Commissioner Jacobson make; this is a statute of many years' duration. Congress did believe that treble damages should exist and that private attorneys generally did serve a legitimate function. I think that's probably right, even though I'm not sure what the evidence is at this juncture, 100+ years later, to support that. On the other hand, I haven't seen any evidence to dispel that, so I stay with it.

But I think that we have – and I use the word "we" in the most general sense – perverted the system by the kinds of lawsuits that do impose costs unfairly upon society, which Commissioner Warden talked about. If that is so, then I wonder aloud whether A) Commissioner Warden's suggestion doesn't make sense, because it combines both. And as Commissioner Burchfield pointed out to me privately earlier, if there is a good and there is deterrence to treble damages, what difference does it make where the money goes? And I think that's right. B), if not Commissioner Warden's proposal, then I want to think about what we may do, whether it's along the lines of what Commissioner Valentine suggested or otherwise, to deal with what I think is a negative factor

in antitrust cases.

And by the way, antitrust doesn't have a monopoly on this problem, in my judgment. So, if I were writing all the laws, I'd change them, but that's not the task that we have, to recommend anything on them. So, I would do what we can here and say, that is something that we should address to come 100 percent around. Therefore, I am tending to favor either (a), letting the laws stay the way they are and do something on the attorneys' fees to recommend doing something to address the issue that I've identified, or (b), perhaps even supporting the proposal of Commissioner Warden.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: Two points. One, on the private causes of action against conduct that's not *per se* unlawful or appropriate for criminal prosecution, I do realize that there is a difference, potentially, between an antitrust case and a business contract case. Of course, in antitrust actions, you do have the deadweight loss umbrella effect. You've got the problem of the incentive to sue, because the harm is to the marketplace and goes beyond the harm to a particular plaintiff, which is one of the reasons I was hesitant to say that multiple damages would never be appropriate in non-*per se* cases.

But again, this is driving me to think that, because our concern is with the frivolous cases and the perversions, as Sandy mentioned, we should give the judges

some leeway in adjusting multiple damages.

The other thing I want to raise is, obviously, as Steve Cannon and others have pointed out, we do have the NCRA, which did implement a single damage scheme for certain types of conduct, and I'm surprised we haven't seen anything empirically about that and what the effect of it has been. But we certainly haven't seen the house of cards fall down. Certainly, no one has said to us that the effect of the NCRA has been to allow anticompetitive joint venture conduct to proceed.

So I take from that – if you can look at that as a kind of experiment, it seems as though it was an experiment that at least did no harm and, to me, suggests that going down the path of treble damages for non-*per se* and non-criminal conduct has some value if we can find a way to do it.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Yes. You know, as I've listened, and I really have enjoyed this discussion, I'm beginning to think that we may be looking at the wrong variable. I'm not really sure why we're thinking about the remedial structure of the antitrust laws. I think what I'm hearing is that there's so much uncertainty, not because of the remedial structure, but because of the substance of the law. I mean, what we're talking about, what I worry most about, is importing the nuanced system of the Sentencing

Guidelines into the antitrust laws, into litigation, based on statutory laws put into the courts, and suddenly we have all these nuances that judges are going to apply.

I do believe in discretion to some degree, but what I'm saying is, I'm beginning to feel that that's maybe where we're going. And I think that's, perhaps, compelling because the substantive state of law is still shifting.

If judges have the discretion to impose single, double, treble damages, we'll have a lot of diversity in that application. I think the real revolution in antitrust law has occurred in the last 20 years, at least in our lifetime, and in terms of looking at non-price restraints and a variety of other things.

During that time period, 60-65 percent of the judges that are now on the bench have come up through that new view, so, in a sense, they should be aware of what we're calling the new antitrust. But if we make distinctions between overt and covert, *per se* versus rule of reason, and we'll go down the list – and I think it's important that we intellectually consider all of them – what that tells me is that the state of the law is very uncertain, and it's troubling many of us. But I don't know if it's the remedial state of law; there you have certainty. And whether we say we're talking about punishment, deterrence, or whatnot. The message of the antitrust laws with treble damages is that, veer into the spear of antitrust violations, and you're going

to regret it. I don't like tampering with that message.

What we may have to do is look at this cornucopia of violations, some of which leave different people at this table very uncertain about why they should be part of the competitive structure. But I think if we shift that uncertainty into the remedial structure – and that's why I appreciate what Commissioner Warden did, because what he's done is a coherent view, whether I agree with it or not; he's created a coherent system. We have a remedial system that's coherent and known, and what I fear is that if we substitute – too much technocratic nuance into it, we will undermine some of the messaging that I think we all want to continue to send out about the antitrust laws.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Commissioner Jacobson is the only one who I've heard give a resounding endorsement of proposition 1, no change. The rest of us, including me, have said we may gravitate there and are maybe most comfortable with that compared to other things, but have sympathy with one aspect or another of other things that have been raised or things that have been raised in Commissioner Warden's proposal.

I have three or four specific suggestions. One, I think we ought to take Commissioner Warden's proposal one and ask for comment on it generally, and from the Antitrust Division in particular. Two, I'm wondering – let me pull

several things together – much of the commentary we've heard is that some of these outcomes don't strike us as fair: gee, you shouldn't be able to get treble damages for that; that doesn't seem fair. So, as I look at the sort of menu we have, I gravitate, I think at this time, to a new proposal.

And one thing I don't like about Commissioner Warden's, or some of these other ones, by the way, is their length. One of the things I've always liked about the antitrust laws is that most of them are one sentence long, and they leave that framework to the courts. And I would like to have a consideration of something that would work off of what I call 3(a), which would say, a court, in its discretion – and then, instead of the statutory spine considerations, I'd say, may award single as opposed to treble damages where appropriate based on a consideration of the following factors. And then I'd include, essentially, all the ones that are in here.

Will that lead to some outcomes that may be inconsistent with each other, especially in the early years? Yes, I would think so. But it would ameliorate the present perceived and actual unfairness to a considerable extent. At least it might. So, I would tee that up for consideration.

And, just to go back to the deterrence for one second, one thing I think that treble damages do deter is many defendants from having their cases resolved in court. It's not a question of getting a bad decision. You get no

decision, because the prospect of a treble damage award is sufficiently significant that they will enter into an unwarranted settlement rather than run the risk of an even more unwarranted treble damage award.

CHAIRPERSON GARZA: Can I treat Don's suggestion as a motion, then, to put John Warden's proposal out for public comment?

COMMISSIONER KEMPF: The thing I was really proposing for comment was his proposal number 1. I would probably be inclined to take the rest of them, his other proposals, and try to boil down what's in 2 and 3 into sort of simple things a court would consider, in its discretion, in limiting the award to single rather than treble damages.

Now, I have no objection to putting it out more broadly for comment, but it's his proposal 1 is the one I most need public comment on.

COMMISSIONER VALENTINE: Could I make one comment on that? As currently phrased, I actually think 3 is somewhat backwards in its weight; I think it really should be, if this is actually going to be a statutory change, it would be keeping the treble damages available, but in a given case a court, in its discretion, could award single or double. The base presumption should be treble damages.

COMMISSIONER KEMPF: That is correct. That's what I intend; that's why I say mine builds on it, but exactly what you said.

COMMISSIONER VALENTINE: Okay.

COMMISSIONER WARDEN: May I ask a question? If you put this out in any form for public comment, may I at least have, you know, one day –

[Laughter.]

CHAIRPERSON GARZA: Before we put anything out, the staff will, basically – then we would all have an opportunity to comment on that and then put that out for comment.

Do we have a second on that?

COMMISSIONER SHENEFIELD: Second.

CHAIRPERSON GARZA: Okay. John Shenefield. Anyone else agree? Say aye.

COMMISSIONER LITVACK: We're only talking about the first.

CHAIRPERSON GARZA: This would be the proposal – right. We'll work on the wording, but the notion as I understand it is a proposal to have a consolidated process where there's a criminal action –

COMMISSIONER LITVACK: Yes. That's fine.

MR. HEIMERT: The ayes have it.

COMMISSIONER VALENTINE: Can I ask you one more question, Commissioner Warden? In paragraph three, does that cover civil cases as well as criminal cases?

COMMISSIONER WARDEN: It covers cases where there's been no criminal charge.

COMMISSIONER VALENTINE: Okay. And increasing the

amount to be disgorged by up to 200 percent.

COMMISSIONER WARDEN: Well, that's treble damages.

COMMISSIONER VALENTINE: That's treble damages. That's 100 plus 200, not just 200.

COMMISSIONER WARDEN: That's correct.

COMMISSIONER WARDEN: I've deliberately used the term "disgorgement," because that's an equitable remedy.

COMMISSIONER VALENTINE: Okay. Noted.

MR. HEIMERT: Commissioner Carlton.

COMMISIONER CARLTON: I just want to make a few comments. I think that if we adopt as our standard that we can't change anything unless there's evidence that we've seen to persuade us differently –

Although I appreciated all the hearings and the evidence that people put forward, basically what Hew Pate had asked was for us to do a study, a detailed study. In my view, that was going to be very difficult, and I think everyone agreed that would be difficult. That's why, in part, we didn't do it. We didn't even propose how to do it.

So, I think that it's too great a burden for us to have to say, clear and convincing evidence or leave it as it is, because otherwise I don't think we'll change anything. So then that leads me to think – actually what Vice Chair Yarowsky was saying – the Sherman Act was passed a while ago, and other people have mentioned it; it's done pretty well.

The question is, what have we learned since then?

And I think we've learned a tremendous amount, and I think we've come to an understanding of what is a better approach to antitrust and what's a worse approach. Some of the things we've learned, for example, are that we don't want to just keep going with the Sherman Act.

So, for example, there was the R&D Act in which they de-trebled; that was based on recognition that there was over-deterrence, or could be over-deterrence in R&D. That doesn't mean you want to give a blank slate to joint ventures to conspire, obviously, but at least you're recognizing that there is an effect from the antitrust laws.

And, therefore, it does seem to me that we want to pay attention to what has changed. Some of the things that have changed are that we now have a much greater recognition of what are clearly harmful antitrust violations that everybody's against versus those where you have to use judgment, and the law is evolving. And it seems to me that that recognition requires us, in the same way Congress recognized the value of joint R&D activity, to pay some attention to de-trebling.

Another thing that seems to me to have changed since the Sherman Act is the globalization of world trade. One of the things we were asked to look at was what its impact. And the impact of is that an international conspiracy now has a much greater impact and that the presence of the United States may have a greater effect on

the sustainability of such a conspiracy. It seems to me that we have to recognize that.

And finally, I think that it's fair to say that no one – well, maybe lawyers have thought about this, but I certainly don't think economists and law and economics professors – had thought about the rationale for why there were multiple damages. And in thinking about whether or not you want treble damages for antitrust violations, I think you should ask yourself what the difference is between a breach of contract and an antitrust violation. I thought Chair Garza did explain correctly that one might have a further effect. But that doesn't, by itself, justify trebling or not trebling. The multiple solely has to do with whether you can detect.

Now, some Commissioners here have pointed out that some of the testimony is that single damages aren't enough. Well, it seems to me we should fix that, not the multiple, because we do know that the multiples should vary a lot as a matter of pure logic, depending on the type of offense. Now, you don't want to make things too complicated. That's why I spoke earlier about covert versus overt.

But I must say that I am intrigued by Commissioner Kempf's idea, and I'd like to think further about it, that maybe we should have something that says "in the discretion of the court" and pay attention to these factors and list factors that would allow someone to use a multiple other than

one. That's how I would phrase it.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I just wanted to comment on Vice Chair Yarowsky's point, which is a valid one, that there is enough uncertainty in the substantive law that maybe the issue could be there rather than in remedies. I don't disagree with that point, and let me tell you why I am concerned with about the application of treble damages in some of those areas where the law is uncertain.

If the purpose of treble damages is deterrence, it is going to have less of a deterrent effect on people who do not think that they are violating the law when they're acting. It would have an unfavorable deterrent effect on people who were acting in a grey area that might be pro-competitive but who were afraid of multiple damages. If, on the other hand, the intention of treble damages is to be punitive, and it may be so – in the civil context, we do have situations where punitive remedies are available – if it is intended to be punitive, then my concern is punishing actors who commit substantive antitrust violations in areas of the law that are not crystal clear, or in business activities that are not clearly adverse to social welfare. That is why I expressed earlier my inclination to believe that treble damages might be overkill in certain areas. And for lack of a better delineation, I have indicated that I would certainly consider limitation of treble damages to *per se* cases rather

than the broad range of antitrust cases.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: Very briefly. As to some concern about the substantive laws' uncertainty, that's inevitable, in my opinion. That is something that I don't think we can change with specific statutes. That is something that has worked well. It's had good decades and bad decades, but, on the whole, the evolution has been a very good one, and the fact is that situations are almost of infinite variation. We don't have any choice, in my view, other than to allow the courts to apply general principles to those variations.

As to the distinction between antitrust and breach of contract, for example, I'm not so clear that it is clear. Major contract breaches can have incredible ripple effects in communities and suppliers of the affected party and customers and so on.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: I certainly am going to consider Commissioner Kempf's proposal about balancing or analyzing relevant factors – just to try to balance the pros and cons, just so we can all think about it. On the other side, I'm a bit concerned that if we list a group of relevant factors for a judge to look at, balance, make a decision, over time – and it's inevitable – we have the accretion of common law, as Commissioner Warden says, antitrust common

law. We might well have diversity all over the circuits and, in a sense, that will become the exercise. And then there will be forum shopping based on the center of gravity in a particular circuit.

I guess what I'm finding myself coming back to is some need for a ballast. If the substantive law is replete with nuance, then I'd at least like some balance in the remedial structure. I think if we have all these balls in the air we're not going to be sending out clear signals to everyone. I'm very sympathetic to Commissioner Burchfield's almost psychological analysis about people who actually don't know they're shoving off into an area fraught with peril.

That's a substantive area. That's a clarification issue and challenge. I just think we need to be very careful about having judges balance multiple factors; there's no way for us, or for Congress, to tell them how to do it, other than to list factors and then look up in 10 years and have a smorgasbord of different circuit rulings. That's the only thing, Commissioner Kempf.

COMMISSIONER KEMPF: I think when I raised the subject I recognized that danger, but I thought that it would be better than the current situation and would develop, over time, in a satisfactory manner. I actually have this reduced to a half-page; I could have this copied.

I've got a couple brackets for things that I don't agree with or I think should be discussed, for example,

whether the court could limit the award to single damages, which I would prefer, or another version that would say something-less-than-treble damages, to hold the possibility of a double damage award, for example.

CHAIRPERSON GARZA: Given that it's 11:05, I thought that, although I see a couple Commissioners have gotten up to leave, I thought it might be worthwhile to go around and just see where we are based on the staff's outline acknowledging that we intend to put out for public comment a version of John Warden's first proposal, and we may want to expand what we put out for public comment to include something like Don Kempf's proposal.

But if we could go around, and we'll catch up with the Commissioners that have left and just see where folks are right now based on deliberation outline. Jack, can we start with you and just go around?

VICE CHAIR YAROWSKY: Okay. You're just talking about treble damages?

CHAIRPERSON GARZA: Yes.

VICE CHAIR YAROWSKY: At this point, I'm at number 1, no change, but I'm open to go through the process and see how these two proposals develop.

CHAIRPERSON GARZA: Sandy, we're just going around and, based on the staff's deliberative outline, getting a sense of where people are right now.

COMMISSIONER LITVACK: If I heard John correctly, I

think I am where he is, but let me just state it to be certain. I am basically at number 1, subject to really considering the Warden proposal, because that does intrigue me.

CHAIRPERSON GARZA: Okay. Bobby.

COMMISSIONER BURCHFIELD: I am inclined toward 1, but could be persuaded that some modifications be made to de-treble damages in non-*per se* cases and perhaps in competitor cases.

CHAIRPERSON GARZA: John.

COMMISSIONER SHENEFIELD: I am in favor of 1 at the moment, but I'm very attracted to proposal number 1 of John Warden's several proposals. I'm not as enthusiastic about the rest of them. If the baseline rule were treble damages except in situations where there was either a guilty verdict by plea or trial, then his procedures would follow. That's something that I find sort of attractive in concept.

CHAIRPERSON GARZA: Debra.

COMMISSIONER VALENTINE: I'm at number 1. I do not object to putting out for public comment the Warden or the Kempf proposals.

CHAIRPERSON GARZA: Don.

COMMISSIONER KEMPF: I'm also inclined toward number 1, subject to responses to Commissioner Warden's proposal and further considerations, including mine, which I'll call the Kempf proposal. In other words, I'm not sure

that if I reflect further on it and hear the views of others that I would support it, but I'm inclined right now to think that there's some merit to it.

CHAIRPERSON GARZA: Jon Jacobson.

COMMISSIONER JACOBSON: Number –

CHAIRPERSON GARZA: John Warden.

COMMISSIONER WARDEN: I obviously am in favor of all my proposals as I've modified them.

[Laughter.]

COMMISSIONER WARDEN: Using the ballot, so to speak, 2(d), 3(b), and as an alternative to those, 3(a), as phrased, not as reversed. And I would be willing to consider 6.

CHAIRPERSON GARZA: Okay. Steve Cannon.

COMMISSIONER CANNON: Number 1.

CHAIRPERSON GARZA: Dennis.

COMMISIONER CARLTON: I'm in favor of 2(c), 2(e), and not quite in 3, but a higher-than-three multiple for foreign conspiracies or hardcore conspiracies. I'm also happy to think more about Commissioner Warden's proposal. I just had a question about proposal 1: if there's a hardcore conspiracy that the government finds, John, are they allowed, under proposal 1, to just get single damages.

COMMISSIONER WARDEN: No. I apologize for the vagueness of the phrasing. They are allowed to get single damages, which then get handed out to the injured parties.

COMMISIONER CARLTON: I see. Thank you.

COMMISSIONER WARDEN: The disgorgement fund. Plus criminal fines, plus civil penalties, which could be 200 percent of the amount disgorged if you chose it, or 400 percent, or whatever number you might want to pick.

COMMISSIONER SHENEFIELD: Which would go to the Treasury.

COMMISSIONER WARDEN: Which would go to the Treasury, yes.

CHAIRPERSON GARZA: Okay. Subject to seeing further comment on John Warden's proposal, I'm at 3(a).

So then staff will work up the request for public comment on what we're calling the John Warden proposal and the John Kempf proposal, right?

MR. HEIMERT: Correct. And we'll get Commissioner Delrahim's views separately.

CHAIRPERSON GARZA: Is it possible, before we take a break, to quickly go back around prejudgment interest and attorneys fees?

COMMISSIONER KEMPF: Madame Chairman, since I just wrote this down on the fly, before we send it out I would welcome input from Commissioners and the staff, then let me have a final look at it, and then we'll get it out.

CHAIRPERSON GARZA: Yes. I think staff will draw something up and circulate it for comment before it goes out in the Federal Register.

MR. HEIMERT: We'll discuss it initially with Commissioner Warden and Commissioner Kempf as appropriate to get their proposals and conceptualize.

All right. Should we do prejudgment and fees simultaneously?

CHAIRPERSON GARZA: Sure.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Where did we leave off? Could you refresh our recollection?

MR. HEIMERT: I'll try to recap.

This was preliminary and subject to revision, so if I've got things wrong, obviously, that's what we'll correct right now. And I also will note that because there was some confusion on what was the third option in the outline last time for prejudgment interest, we replaced that with different options under the second option, which was, generally, to award prejudgment interest. There is an (a) and a (b) part of that, one of which is mandatory versus discretionary, and the other of which is whether the interest starts to run at the damage or at the time of the complaint.

So, there are two nuances that may be worth discussing. At the last meeting, it was relatively evenly split between keeping the rule the same and awarding prejudgment interest more frequently, although the precise circumstances were unclear.

My notes indicate, and please correct me when we go

around, that Commissioners Burchfield, Cannon, Jacobson, Kempf, Litvack, Valentine, and Yarowsky were inclined to keep the rule the same. Commissioners Carlton, Delrahim, Garza, Shenefield, and Warden were inclined to provide prejudgment interest in more circumstances, although precise contours were still up for discussion.

On attorneys' fees, all Commissioners, except for Commissioner Warden were in favor of the first option, which is leaving the rule the same. Commissioner Burchfield was inclined to limit them in certain circumstances, as was Commissioner Warden. But perhaps they can articulate, again, precisely those circumstances.

COMMISSIONER SHENEFIELD: As we go around, can we add in what we might want to call the Valentine option?

MR. HEIMERT: I would welcome you to do so. On attorneys' fees, maybe Commissioner Valentine can articulate that option briefly, just so we know precisely what she's thinking, and then we can add that in as an option as we go around.

COMMISSIONER VALENTINE: What we would do, I believe, is create a 13 under attorneys' fees and say that, when an action is brought as a follow-on to a United States government criminal prosecution or investigation and is successful, the court should consider reducing the attorneys' fees to be awarded. And then it has to be some formulation like "based on the degree of effort evinced by the private

plaintiffs in pursuing their suit" or "the added value brought by the case," or something like that.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: May I suggest that, since we have discussed this once, all of these issues, fees, treble damages, and prejudgment interest, are related? I think that the discussion we've had just demonstrates that. We've agreed to put Commissioner Warden's proposal out for study. I think it's clear that we're going to have to have another meeting to address these issues. I see no useful purpose of re-voting on something that we voted on in the last meeting and suggest that we have, you know, one of our other later sessions devoted to the whole gamut of private enforcement after we've gotten the public comment on Commissioner Warden's and Commissioner Kempf's proposals.

MR. HEIMERT: Commissioner Kempf, did you have something to add?

COMMISSIONER KEMPF: Yes. That's fine with me. The only thing I would add is that my recollection of the last discussion is that there was at least I, and perhaps other Commissioners, didn't like 11 or 12, because we might say that defense can get it in or frivolous cases or major competitor cases, but we would go along with a change that would essentially adopt the English Rule: in antitrust cases, the prevailing party shall be entitled to attorneys' fees, making it reciprocal rather than one-sided.

CHAIRPERSON GARZA: To address Commissioner Jacobson, as I recall it we were very rushed, and a number of Commissioners said, well, I'd really like to consider this in connection with treble damages. So, subject to that, I would like to go through and get a quick understanding of where people are, because now we have had an extensive discussion on treble damages. We are going to go out for comment. But it may be that when we go out for public comment, we may want to add certain things, like Debra's proposal as well.

And so, I think it would be worthwhile, if we can do so quickly, just to get a sense of where we are and whether we need to add an option such as the prevailing party.

COMMISSIONER KEMPF: I don't view that as inconsistent with Commissioner Jacobson's proposal. He wants to defer in-depth discussion of it, and I think you're just saying let's take our temperature of this.

COMMISSIONER SHENEFIELD: Let's just do it.

COMMISSIONER VALENTINE: All right. We can do it. The truth is, though, I am going to say again it depends on how it comes out with treble damages. I would vote very differently on prejudgment interest. So, you're going to get the same problem all over again. Okay.

CHAIRPERSON GARZA: And so, if we go around – not discussion. Just vote where people tend to be in terms of prejudgment interest and attorneys' fees.

MR. HEIMERT: All right. And adding Commissioner Valentine's option 13 – and shall we add option 14, Commissioner Kempf, the English Rule, which awards fees to the victorious party, whether it's the defendant or the plaintiff in antitrust cases?

Is that accurately captured for these purposes?

COMMISSIONER KEMPF: Attorneys' fees shall be awarded to the prevailing party.

MR. HEIMERT: All right. Commissioner Litvack.

COMMISSIONER LITVACK: On prejudgment interest, well, again, it all does depend on how we come out. I would basically still be where I was, which was no change. On attorneys' fees, I have changed my view. I would think I would favor – and I don't think it's one of those listed – simply eliminating attorneys' fees in follow-on actions except where otherwise provided. And the reason I say "except where otherwise provided" is that class action has its own provisions. So, I'm not taking account of those. But otherwise, in a follow-on lawsuit, if someone wants to bring one, it seems to me that they ought to pay their lawyer.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I remain of the view that no change is appropriate on the prejudgment interest statute, and I am open to consideration of what will become number 13, the option under attorneys' fees.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I favor 8(b), 8(c), 9, and 13.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: 7, subject to how the Commission votes on treble damages, generally 9, but also 13.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Yes on 7, no on 8, and I favor what is now, I think, 14, the prevailing party.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: I would not change the statutes governing private remedies in any respect. I would support a section of the report that urged along the lines of Debra Valentine's suggestion, that attorneys' fees in follow-on cases be scrutinized carefully, and I would hold out in that connection through the common law process, the possibility of fractional multipliers, such that –

COMMISSIONER VALENTINE: That's a good idea.

COMMISSIONER JACOBSON: – The fees would be less than 1(x).

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: All of these things are addressed in my written proposal, but using this ballot, I am in favor of 8(a), 8(b), and 8(c). And to the extent that interest and counsel fees exceed the trebled component of treble damages, so it's related to the other subject, I'm in

favor of 10, in the sense that I've just expressed it. I'm in favor of 11. I'm in favor of 12. I'm in favor of 13, as amended by Commissioner Litvack, that they just shall not be awarded in follow-on cases. And frankly, I'm in favor of 14, the English Rule, but I don't think that's got a chance of going anywhere and I urge those who are generally in favor of that to think about the lesser included components that are listed here. And those who are concerned about the anticompetitive effects of competitor cases to think about the attorneys' fees in that context.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: Still no change on either, but really depending on where the treble damages debate comes out.

MR. HEIMERT: Commissioner Carlton.

COMMISIONER CARLTON: On prejudgment interest, I'm in favor of 8(b) and 8(c). I also hope that if we have a discussion of prejudgment interest, we'll address the question of whether it should be pre-tax or post-tax.

On attorneys' fees, as several people have pointed out, this will, in part, depend on how we come down on treble damages, but I'd be in favor of 9, especially if we de-treble in some cases. I'm inclined to 11 and 12. And regarding 13, I'm also inclined towards that. Regarding 14, I would be inclined to support an English Rule if we make no change in the treble damages.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: 8(c), 9, 11, and 13.

MR. HEIMERT: Did you have preference on 8(a) or (b)?

CHAIRPERSON GARZA: Well, my preference is for prejudgment interest occurring from the time of injury.

COMMISSIONER WARDEN: In all cases?

CHAIRPERSON GARZA: In all cases.

COMMISSIONER VALENTINE: So it's (b) and (c).

MR. HEIMERT: Okay.

COMMISSIONER BURCHFIELD: Andrew, I'm persuaded by some of the commentary as we went around the table, particularly Commissioner Warden's comment, and I would be inclined towards 11 and 12, as well 13.

VICE CHAIR YAROWSKY: I want to stay where I was, with one caveat, keeping both the same as they are. I do want to consider Commissioner Valentine's suggestion about follow-ons. I think this is the right area to consider such notions as opposed the treble damages area. So, I want to kind of work through that in this context.

MR. HEIMERT: Okay. Thank you.

So, we'll take a break for about 10 minutes, and then we'll reconvene and take up federal enforcement institutions.

[Whereupon, at 11:26 a.m., the meeting on treble damages was concluded.]

**Federal Enforcement Institutions**

MR. HEIMERT: All right. We will resume federal enforcement institutions.

And, Commissioner Valentine, if you could give your views on all of the topics. We're going to cover them together.

COMMISSIONER VALENTINE: Okay. Let's try the recover lost time. On questions 1 and 2 on merger enforcement, I will go for position 1: no statutory change is appropriate, subsequent merger enforcement under the HSR Act should continue to be conducted by the two antitrust agencies. Therefore, then, moving to assuming that dual federal enforcement authority continues to exist, should the clearance process be revised? I believe yes, and I would say some combination of 4 and 5. I do think that we should recommend that the FTC and DOJ implement a new clearance process based on the principles contained in the 2002 clearance agreement or other principles they deem appropriate.

But I think it probably is important that we somehow get Congress on board and insure that this time around we don't end up with a sort of Congressional veto. And so, if, 5, recommending that committees encourage that the FTC and DOJ do that, would help us to convince the Congress, I'm in favor of that. Alternatively, I believe we heard a number of suggestions – such as to indicate in our

report that the Chamber of Commerce and the Business Roundtable and every single person in the world wanted Congress to know that they thought that a merger clearance process based essentially around the 2002 agreement was the desirable thing. So, I'd be interested in some discussion as to how we get everyone on board to accomplish that.

You know, there's one thing we don't have in here, and I'm not sure I totally agree with the ABA proposal, but the ABA made a proposal that clearance should occur not just within a short period of time but, I believe, within nine days, and if not within nine days, that some kind of discipline or sanction be provided. But I think we might want to at least think about a way to truly incentivize – if there were ever a problem in achieving clearance to get it done and get some closure there. So, I'd be interested in discussion there.

On number 4, which is, to the extent that there are differences in legal standards that the agencies face in obtaining a PI, should the different standards be harmonized, yes, and I would recommend a statutory change to insure that the standard for obtaining a PI in the cases is the same for both agencies. I do not think there is a justification for difference based on the particular industry that you happen to be in and which agency you end up in front of.

I guess that, if so, I would do (b), that the FTC Act should be modified to specify the traditional equitable

standard that's applied. But I do think we should discuss – both FTC and DOJ both seem to think that they were effectively subject to about the same standard and that the public-interest interpretation — the court's interpretation of the public-interest standard, to which the FTC was subject, may be slightly looser than the traditional equitable standard. But, in any case, I guess my tendency now is 8 and 8(b).

Then, italics 5 question, should there continue to be a difference in the procedural aspects, and if they should be harmonized, how should that be done? I am, I think, generally in favor of number 13, which would be a statutory modification of 13(b) that would prohibit FTC from pursuing administrative litigation that fails to obtain a PI in an HSR merger case. The FTC wouldn't be barred from pursuing administrative action post-closing.

And I don't think we should bar the FTC from using administrative litigation in non-HSR cases. That is below-threshold cases as well. I would also be willing to consider, as an alternative, number 11, which is that it simply, as a policy, would say that it would not resort to Part III except in exceptional circumstances. And I think "exceptional" would have to be defined extremely exceptionally.

MR. HEIMERT: I see some Commissioners shuffling papers. We added a fourth option to number 3, the clearance

review process. So, there should be 3, 4, 5, and 6 under that. We'll pass out the corrected version. It's essentially the same as 4 but adds a recommendation that we speak to the relevant Congressional committees to encourage them to go along with the clearance process in some way. And, as Commissioner Valentine was noting, how best to do that might be useful to discuss.

CHAIRPERSON GARZA: Debra, did you say on 13 and 11, or —

COMMISSIONER VALENTINE: I said that, right now, I'm tending towards 13, but 11 might well be acceptable.

I would also amend 13 to allow — or to sort of add to it — the FTC to use administrative proceedings in non-merger cases and non-HSR cases, things like that.

CHAIRPERSON GARZA: Thank you.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I would favor 1, with the statement that I've already made that I find having two agencies on its face ludicrous, but we live in the real world. So 1, and some combination of 4, 5, and 6, 8(b), 10, and 13 with the addition about non-merger cases that Debra mentioned.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I favor a no on 1, yes on 2, and if so, I would be no on (a) and yes on (b). I am no on 3, yes on 4 — well, 4, 5, or 6. I think what I hear the

other Commissioners saying, and I join them if I hear them correctly, is that I don't care which of those three is done, whichever is most effective - in working. In other words, if the Congress were to say, gee, we hate 6 and love 4, then I would hate 6 and love 4, and vice versa. In other words, whatever is most effective in accomplishing the common target of 4, 5, and 6 is what I favor, and I read my prior Commissioners as basically having said that, so I join them in favoring 4, 5, or 6, or some variant of it, whichever is most effective.

On big item 4, you know, I have tried a lot of these cases, and I was never sure that whether it was DOJ or FTC case made any difference. But a number of the witnesses who testified said that they perceived that it made a difference. So, that being the case, I think while I would be content with 7, I would vote for 8, and I would probably go with 8(a) rather than 8(b).

Finally, on question 5, I would vote yes on 9, yes on 10, yes on 11, no on 12, and no on 13.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: On question 1, I would not change the two merger enforcement federal agencies. On the next set of questions, I too am in the 4, 5, and 6 camp. I believe some legislative change is required. I wouldn't make it seven days. I would be all for encouraging in the strongest possible way a clearance agreement that would

result in clearance within five to seven days max. It would have a statute to the effect of, if it hasn't been done in 18 days, then there's either a jump ball, or the transaction clears. I think the transaction clearing is probably too strong a stick, but there needs to be something legislative, I believe, because the inertia factor, I think, will take over.

On the preliminary injunction standard, I vote for 7. If my arm were twisted, I would vote for 8(a). On large category 5, I'm torn between 11 and 12. I would tend to think that a statutory modification to the FTC Act would be useful, but I'm also one of two people who have tried a new case at the FTC, and I may be biased as a result.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: On dual enforcement, 1. On clearance, like everyone else, I was looking at a combination of 4, 5, and 6, although I do think that 6 bears some further discussion, because there's a difference between getting Congressional committees on board with a clearance agreement and having legislation that requires the agencies to clear within a certain period of time or else. And the "or else," I think, is important. So hopefully, we will discuss that further.

On preliminary injunctions, 8(b). On administrative litigation, 10 and 13.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: I also favor 1. On number 3, 4, or 5 — I am very worried about 6, in the sense that if Congress starts trying to legislate, it could move in different directions that we don't envision yet. I also am worried about any kind of penalty, as Commissioner Jacobson said, about just saying, look, if you didn't do it in nine days, we're clearing the transaction, because let's remember, we're talking about procedure now that is very important. But if the transaction poses anticompetitive threats, I'm not sure that's the answer, to elevate procedure over the nature of the transaction. So, 4 and 5 seem about right to me.

On question 4, I am torn between no statutory change and 8(b), where we would adjust that standard or clarify it's the same. The only thing I worry about to the FTC, but I will defer to Commissioner Valentine, who lived there, is that the general thrust that I took away from the hearing was that there is probably no practical difference. There may be, but what I wouldn't want to do if we would advocate the change that, let's say, is embodied in 8(b), is create the impression in the courts that suddenly the FTC has a higher burden than what it has had heretofore. I would like some kind of statement to make clear that if we do this it's not because we think the FTC had a lighter burden. It's just that we want to semantically converge the two because that makes sense.

And then finally on number 5, I am going between 11

and 13 at this point.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I'm at 2(b), recognizing, as Commissioner Shenefield said, that it's not happening. That's where I would be, nonetheless. I'm in favor of 4, 5, and 6, and I would change seven calendar days to three business days. And I agree that there shouldn't be an automatic clearance if this doesn't happen, but there ought to be a provision that some other official makes decision. I don't particularly care who - the Secretary of Commerce or something.

[Laughter.]

COMMISSIONER WARDEN: But then within the 24 hours — Secretary of Treasury, take your pick. This is just the kind of silliness that I — and the idea that two enforcement agencies would disobey a statutory mandate I find incomprehensible. I agree with the proposition that question 4 is not a burning issue, because it doesn't appear to be a whole lot of difference, but I still favor 8(b), subject to the comment that John just made, that it should be clear that this isn't intended to change, because we think it's the same. I just feel that all injunctions should be subject to the same standard in the federal courts.

I'm in favor of 10 and 11. I think that 10, in fact, if adopted, would require statutory change so that the FTC could litigate the case on the merits, as well as the

preliminary injunction. So in that sense, maybe I favor 13, but it's not just 13; they have to have the power to have a trial in the federal courts, and I do favor that. You know, I suppose they could have the alternative, that 11 would preserve them if they don't seek a preliminary injunction, but that doesn't seem to be the usual case, anymore.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: Well, I suppose like Commissioner Warden and others, mindful of Commissioner Shenefield's reality check I would still vote my conscience and go for 2, recognizing someone said it isn't happening. And if so, it would be 2(b).

On clearance, I would go for 4 or 5. I think Jonathan Yarowsky's points about the suggestion that a legislative approach here probably runs the risk of potentially getting out of hand – I just can't believe we can't — the agencies have worked it out; they can work it out, and I think with some help from us that can happen.

As to 7 and 8, I guess I share, although I come out differently, Commissioner Kempf's view that, in my experience, there really is no difference. And the fact that others perceive a difference doesn't lead me to vote for it. Since I don't perceive a difference, I don't think we should change anything; just leave it the way it is.

As to 5, I was for, and am for, I suppose, 11 and 13. As to 10, the reason I do not favor it, although I don't

oppose it either – two reasons. First of all, as Commissioner Warden said, the FTC can't do it. They're not allowed to be in court for those purposes. So, I'm not sure how they'd consolidate it with a trial on the merits. Unless I'm wrong —

COMMISSIONER KEMPF: You are wrong.

MR. HEIMERT: Commissioner Kempf?

COMMISSIONER KEMPF: Yes. Let me correct that.

COMMISSIONER LITVACK: Okay. Good.

COMMISSIONER KEMPF: What the statute provides is the FTC may seek permanent injunctive relief, but in FTC proceedings the defendant may not say to the court, gee, why don't we do what the DOJ does, roll the two together? If the FTC agrees to that, then it can happen. If the FTC says, no, we don't want to do that; we want to reserve the right to proceed with our own section three matter, or whatever they call it, they can't do that and the Court cannot force them into it, but the statute expressly provides that they can voluntarily seek it. I would make it so that, you know, if we're going to take it —

COMMISSIONER LITVACK: Okay. I appreciate that. And I would agree with you, if they're going to do it, you'd have to have it work both ways. If it's going to be consolidated, it's going to be consolidated. And the only reason, as I said, that I didn't say I favored it was that, as a practical matter, this is generally left up to the

parties. I don't know why we necessarily should be saying they do that.

When I say it's left up to the parties, the parties ask the Court. It's up to the court ultimately, under 65(a), to either do or it not. So I'm not really sure why — I don't oppose it. I'm just not sure why we're particularly endorsing.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I'm inclined toward position number 1. Let me try to state my position and then try to shoehorn it into one of the options. I agree with Vice Chair Yarowsky that a legislative solution here probably isn't necessary or appropriate. I especially don't think giving a mandate to a federal agency to do something within a period of days has proved effective in this town. If pressed, I could probably give a number of examples where those sorts of deadlines are either routinely ignored or have fallen into utter disuse. So, I don't think that sort of deadline will ultimately help solve the problem.

What I heard Chairman Majoras and General Barnett say was that they thought the Commission weighing in on this issue was sufficient with its delegated authority. It would be of immense help to them in trying to get a deal that Congress would not step on. And I think that's what we ought to do. So, I think that devolves down into a position of 4 and 5, but ultimately what I think this Commission ought to

do is state in strong, no uncertain terms, that we support a resolution of the type worked out between the agencies earlier.

With regard to the injunction issue in category 4, I believe my answer is number 7. The Supreme Court has been pushing the lower courts for decades to a unified injunction standard, regardless of the statutes. The exception to that is *TVA v. Hill* case, the snail darter case. But the Supreme Court has retreated from that decision, most recently last week in *eBay*, making clear that unless the statute expressly provides a different standard the courts should apply traditional standards of equity. I've litigated cases in this area a number of times, and at least the Supreme Court gets the joke that the standards that were developed back in the day of Blackstone are the ones that should be governing here. So I think 7 is the right outcome, but I could be persuaded that the courts need to be nudged in the direction of 8(b).

On category 5, I am inclined toward answer number 10, assuming, as Commissioner Kempf has noted, that the FTC does have the power to do that. I would reserve judgment on whether there should be a requirement for preliminary and permanent relief to be sought in all occasions. It seems to me, at least hypothetically, there might be situations in which the public interest would be benefited by a more expeditious resolution of the preliminary injunction issue,

but I'm persuadable on that. So, at least at this point, I'm on number 10. And I will reserve on the part three, administrative litigation point.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: Dual enforcement I would leave as it is. 4 and 5, obviously I would agree with that. I think the more we can do and the more we can emphasize that the better off we'll all be.

On legislation, I'd simply say that this is precisely the kind of legislation that Congress could do. It's pretty easy. It's straightforward. For anyone wanted to make sure that it got done that way and that nothing else happened, that would be the challenge. But in terms of antitrust legislation, this is in the category of doable, it seems like to me. And I think it would be much appreciated all around.

And I agree with Commissioner Burchfield; I would say no change on the preliminary injunction standard for exactly the reasons that he articulated. And for category 5, I would go with option 13.

MR. HEIMERT: Commissioner Carlton.

COMMISIONER CARLTON: I'd vote yes on item 1. I'd also support items 4, 5, and 6. I agree with Commissioner Cannon that it seems like legislation as contemplated in 6 would be relatively straightforward. I'd be in favor of number 8. As between (a) and (b) under 8, I'm less certain.

I don't have strong feelings. I'm currently inclined to 8(a), but could be persuaded otherwise.

I would support number 10, and I'm mildly positive to both 12 and 13, but for 12 I'd really want to know what "exceptional circumstances" mean before I supported it.

MR. HEIMERT: All right. Commissioner Jacobson's flag.

COMMISSIONER JACOBSON: I want to talk about a couple of the items under 3 and 5. Under item 3, the concern I have is that no matter how good the paper, and no matter the exhortation by Congress or others, there may be a tendency just to let things slide and let the clearance run its 30-day course. I am aware of a very recent deal just in the last 45 days where whichever agency – well, both agencies got the deal because it hadn't cleared – Neither of them, apparently, read the 4(c) documents.

On the 28th day a customer complained. On the 29th day a phone call was made. On the 30th day it was cleared to one agency, which then issued a second request because it didn't know enough about the deal not to do otherwise. And this was not ill intended; it was just the natural consequence of the way the setup is worked.

So, I think statutory change here is appropriate. I think having the repercussion be that the deal can go forward is not a valid sanction, but I think one that would say that, if the case gets an odd number when it's filed it

goes to the FTC, and if it gets an even number when it's filed it goes to the DOJ would be simple, workable, and will achieve rough justice. It can be drafted in a statutory way that would not attract, you know, hideous amendments. So that's why I would push statutory change.

On consolidation I think that the intention of encouraging consolidation of preliminary and permanent proceedings — no one doubts that's a good think in the abstract, but every deal is different. Some deals really need to be done on an expedited basis. There is a value both to the government and to the parties of at least having the ability there to go in a week later just on the papers with an expert on both sides and try the case on an expedited basis, knowing that it's a preliminary injunction, not a permanent injunction. I don't think we should be forcing deals that need a quick answer into a necessarily slower answer if you are going to consolidate it for trial on the merits.

MR. HEIMERT: Commissioner Kempf?

COMMISSIONER KEMPF: A couple of things. On the first issue, if we were to make a change — the first issue, should we eliminate the dual jurisdiction over certain things — I suppose I'm with Commissioner Litvack on that. The three of us at least have said we should do that. Several others have said we should do that and would do it in an ideal world, but politically, the FTC is a favored stepchild of

some, and that may be politically not viable. I'm not so sure of that, because this is not a wholesale recommendation that says we should scrap the agency. What it's saying is, you have overlapping jurisdiction now, and to jump ahead to the clearance process - many of the complaints about the clearance process would disappear immediately if we didn't have a sorting-out process, if all of them were in one agency to start with. So that's maybe the easiest and best cure to that. So I would urge some of those who said, I'm going to vote for 1 rather than 2, even though in my heart of hearts I favor 2, to reflect on that, particularly in light of some of the things that follow.

The only other one I wanted to comment on is the preliminary injunction standard. As between (a) and (b), let me tell you why I picked (a). 13(b) has an established body of case law that is specific to injunctions involving merger cases. If you say, let's go with 13(b), you're buying into the general jurisprudence of preliminary injunctions in all cases and all jurisdictions. The problem with that is that it gets differences that are probably wider than 13(a).

For example, in some jurisdictions you have to have a likelihood of success. In other jurisdictions the test is whether you have raised issues that are so serious that they warrant scrutiny before letting whatever it is proceed. So, depending on what circuit you're in you'll have more differences than you would under a 13(b) standard. So, if

what we're looking for — what's driving this is a desire to have sort of a uniform standard here. It is my view that a body of case law that exists and would be expanded warrants going 13(b) rather than the general equity test, because the general equity test is less specific than initially meets the eye when you go from circuit to circuit on these things.

Let me just say a word about question 5. I have been in several proceedings where they continued on with a Part III procedure after a merger/preliminary injunction proceeding, *FTC vs. Great Lakes Chemical* being one. *FTC v. Weyerhaeuser* being another. And in non-merger litigation between civil litigants there is a recognition that, in a preliminary injunction hearing, you don't always have as robust and full a record as you'd like, and you'd be missing stuff that could be outcome determinative. And that is why sometimes it may be, as Commissioner Jacobson pointed out, desirable to get a quick look. In a merger case that would, for example, let a transaction close, but the government may, on turning over rocks, find out that there are good and sufficient reasons why it should be undone subsequently –

And as discomforting as that may be to the parties, I'm not sure the government should be precluded from that option. So that is why I would have no change as spelled out in 9, but would also have wise counsel encouraging them to do it when practical, *et cetera*, *et cetera*. End of comments.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: Don, you may have addressed this and I missed it, but the question I have on the injunction standards is whether or not DOJ currently believes that it's subject to what we've called the traditional equity standard, whether it thinks it's operating under a different standard than is the FTC. I was really unsure about the consequences of going with 13(b).

COMMISSIONER KEMPF: I've done a lot of those cases, and they always think they're operating under the preliminary injunction tests in the particular circuit where they bring the case. Those are pretty much the same nationwide, but they're not always the same nationwide. And so, to the extent there are cases they can find in one circuit or another that vary slightly, they'll seek to take advantage of it, as will the defendant. They will both say we're under the prevailing preliminary injunction standard in this district court if there are differences among the districts in a circuit.

CHAIRPERSON GARZA: And has DOJ enjoyed any kind of presumption because of the public interest representation?

COMMISSIONER KEMPF: That usually manifests itself in these things like "issues so serious and substantial that there should be a hearing before doing it." That is something short of a likelihood of success.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I would be happy, quite

frankly, to go with 8(a). I think the real issue here is that they both be subject to the same standard. And I do believe that Commissioner Kempf is correct, that the jurisprudence under 13(b) may be much stronger and more consistent than the various circuit standards for 8(b). One other comment on the consolidation, which I guess is number 10. I think I'm pretty much where Sandy and John are, which is, yes, it's great when it's appropriate and desirable, but this is really something that the parties and the agencies should be agreeing to together.

It is interesting that, while the statute itself specifies that "in proper cases the Commission may seek proof, and the court may issue a permanent injunction," the court in *Arch Coal* held that 13(b) allows for preliminary injunctive relief only in places — the resolution of the FTC's antitrust case on the merits is outside the scope of this court's jurisdiction.

Now, maybe the court was totally stupid in reading against the plain language of the statute, but it would probably be at least helpful, no matter how we wanted to address these issues, to make it clear that our intent would be – to the extent that we're placing both agencies on the same footing, and that they both be able, when appropriate, to consolidate – that, you know, either we would read the statute to do so, or the statute should be modified to make that clear, or the FTC should change its internal rules or

whatever.

COMMISSIONER KEMPF: Yes. Rather than have the enforcers the option, I would have the court decide. Because typically, in DOJ cases, it's a matter that parties discuss with the court. Sometimes they agree; sometimes they don't. And then the court decides whether it wants to roll it into one proceeding or not.

And it usually does, but not always. Here, I would not have it as it currently is, just the FTC can decide, but the court can, in appropriate circumstances, roll the two together.

COMMISSIONER VALENTINE: And then just one last question as we do all of this, which is that 13(b) does apply to all of the FTC's consumer protection cases. So, as we recommend legislation for Congress, we need to be very careful that we don't throw the baby out with the bathwater.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I just have a question for Commissioner Kempf. Have there been cases in which mergers have been enjoined that you're aware of, based on the "serious questions going to the merits" standard as opposed to the likelihood of success standard?

COMMISSIONER KEMPF: Yes. I believe there have been.

Also, just to round out the article three proceeding and the preliminary versus permanent injunction

question, there have been a number of cases where the preliminary injunction went one way, and the final outcome went the other way. In both directions where a transaction was enjoined preliminarily, upon closer review it was found not to be illegal, and while permitted initially, it was subsequently found to be improper. So it's gone both ways.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Yes. Don, I want to thank you for helping us see the points you made, because I also would probably, based on your and others' discussion, change it to 8(a).

Thank you, Debra, for making sure we bear in mind the caveats of not, perhaps, applying whatever we recommend to non-merger and consumer protection cases. Be careful about that.

On the legislative front, on question 3 – and I would never disagree with brother Cannon on anything about legislation, so I would just sketch another scenario. And here's my concern, Steve and everyone: we saw what happened when Congress sunk their teeth into the type of allocation that they heard about. And I don't really care about the allocation; what I care about is the procedure so things move forward. I don't have a vested interest in how this is allocated.

The problem is part of the environment, from what I remember. There was a great concern about media

concentration at that moment. You had Senators, ranging from Senator Trent Lott to Byron Dorgan who, off and on, are on the same side sharing the same views on that. And eventually it just brought everybody into the process and slowed things down. I'm worried that it could be some other issue where someone would particularly want the FTC to have it so that the Commerce Committee or the Judiciary Committee could have it or not have it.

That could be a problem. And if it would really halt — the failure to get legislation then might be construed as something that would discourage this from ever being resolved again for another two or three years. So if there's a way we can do this short of that — it may not happen; it's just a scenario — then I would prefer to try to avoid that bullet.

The other thing is, what if there were a statute? What if they didn't comply? Would we get a writ of mandamus? What would one do? I mean, sure, there could be some penalties, but I haven't heard of a penalty yet that makes sense.

COMMISSIONER JACOBSON: If it's based on an odd or even, you don't need a penalty. It's self-enforcing.

VICE CHAIR YAROWSKY: I personally don't want to be involved in designating the allocation, but I think the experts at the FTC and DOJ would be experienced. I would like to defer to them if they could sue in peace and work out

something. If we do it odd and even —

COMMISSIONER KEMPF: That's a default position.

COMMISSIONER JACOBSON: Yes. Congress says clear it in seven days, damn it. But if you don't clear it in 14 days, even goes one way, and odd goes the other.

VICE CHAIR YAROWSKY: What about an impartial neutral arbitrator?

COMMISSIONER JACOBSON: You're just adding time to an already lengthy process.

VICE CHAIR YAROWSKY: Well, but if you have what we heard in the testimony is something like, what, six days, another two days so that the top officials can resolve it, and then another 48 hours — I mean, it still gets involved.

COMMISSIONER JACOBSON: You have that under what I'm suggesting.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: Well, you know, I would like to hear from folks and, in particular, our legislative experts on how best to be effective here. I think we all are of the mind that we want to make a strong statement about the desirability of avoiding clearance disputes and getting an agency looking at a matter substantively as soon as possible. And we heard the agencies, I think, tell us that they welcome our support. The question I have is, basically, how best can we do that? Do you go to the oversight committee and direct them to do it and see what happens on the Hill, or do you try

a legislative solution that says, however you do it, agencies, there shall be clearance within a specified number of days, without getting into any details at all and letting the agency work it out, or are neither of those things likely to work?

COMMISSIONER KEMPF: I would suggest that that's something for the Chairman and the Vice Chairman to explore on background and come back to us with a recommendation.

CHAIRPERSON GARZA: Yes. I think that we've not talked to any committees other than the Judiciary Committees. It would be interesting to hear what the Commerce Committee's staffs have to say.

VICE CHAIR YAROWSKY: I think it's useful to do it quietly and, now that we've announced that we're going to —

[Laughter.]

VICE CHAIR YAROWSKY: We'll do that.

CHAIRPERSON GARZA: We'll just sneak up on them now.

VICE CHAIR YAROWSKY: We should actually talk to the Commerce Committee, because they are very much involved in these decisions.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: To follow up on this discussion, I have three concerns about pursuing the legislative remedy. It may be heretical to say this, but my sense is that is that legislation here isn't necessary, and

for the Commission to recommend legislation is an implicit suggestion that it is.

Second, we will see a time delay, even assuming that legislation is ultimately passed, we will see a time delay between the time that we actually make our recommendation and the time that legislation is passed. And third, I see an advantage for the agencies – for this Commission to recommend supporting the agencies in working out the issue among themselves, because there may be, down the road, the need to do ad hoc adjustments to whatever resolution they may come to as they see how well it works.

So, I'd like to think that this is something that the Commission could bring its weight to with sufficient success to get it done without the need for legislation. But I'm very eager to hear what the more experienced legislative experts have to say about it.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: You know, this is just precisely the situation that it will only matter when it matters to the parties in a transaction at any given point in time. And then, once that goes away, it won't matter to them anymore, and it may matter to another group of parties. I don't think it's mutually exclusive to say that, by suggesting the idea of legislation, it doesn't necessarily mean that we're saying, implicitly, we don't think the agencies can accomplish it. I see this as trying to kind of

build the case in two different directions for this. You know, in terms of the legislation — it's the same sort of thing where some were saying, gee, dual enforcement is bad, so I'm going to say we should end it. This is the sort of thing where I'd say that legislation is not a bad idea in theory, and who knows what it would look like at the end.

But when all this was happening a few years ago this was, primarily one member of the Congress or the Senate who was so exercised about it - and, as far as I know, that circumstance isn't obviously there today, and who knows? In the middle of all of this, some other big issue raises its head, and then you're in the soup again.

It's the sort of thing that, if we don't recommend it, then I think we may lose an opportunity to at least help the agencies in one form or another get this accomplished, which I'd really be in favor of. We all are in favor of it, I believe.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: For those who have concerns about legislation, the question I have is, we already have the Hart-Scott-Rodino Act that says certain things should happen within 30-day periods. The agencies are already complying with deadlines, although, obviously, they've found administrative workarounds to extend those guidelines. But what would be so horrible about saying, you have the initial 30-day period, and you have to decide clearance within

whatever the days – whether it's seven working days — whatever the time period? Why is that necessarily significantly more mischievous than a 30-day waiting period?

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Ditto the Chair's remarks, and Steve Cannon's. I think we can approach it through legislation. I'd like to see the staff draft something up, because it's easier to talk about legislation if you have something in front of you, and you may see problems that turn out to be insoluble, and then you decide a legislative solution is not the way to go.

If we decide not to go the legislative route, I would urge a similar, though, exhortation by the Congress, whether it has a command or not, that the agencies truly use best efforts to clear within X days and that if they have not cleared within Y days, that there be some sort of automatic clearance to one agency or the other. That will at least have the effect of, if there's a dispute among the agencies about clearance, providing the agencies some certainty on where it's going to go if they can't agree. And it inevitably has to shorten the length of time involved in the clearance debates.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: I have what I think is essentially a question for the Chair, because I don't recall the answer. If legislation is not necessary to do this, and

if the prior effort really failed at the behest of one particular Senator, why haven't the agencies just done it?

CHAIRPERSON GARZA: Chairman Majoras essentially had to commit, I think, to the Congress and to the White House that she wouldn't pursue it.

COMMISSIONER LITVACK: Well then, doesn't that suggest that there is in fact, or will in fact be, Congressional opposition to it? And so, Steve, with all due deference, it would sound like it's not going to sail through. And I come back to Commissioner Burchfield's point, which is why start pounding this path? Why not just recommend it?

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: That's my concern. I mean, it depends on the political winds. I'm not sure they're clear. Remember the person – and I think he, perhaps, received a little undue criticism as the sole force behind it – he sat on two committees: one was the Commerce Committee, and one was the Appropriations Committee that could fund the operations of the FTC and the Department of Justice. That was a powerful little subcommittee and still is. There is that same intersection in a number of areas still. And so it's not a matter of trying to perfectly gauge whether it's possible.

Here's the worst-case scenario, in my view: they try to get legislation, and they fail. At that point, this

issue would — it's not like Congress is the backstop if the agencies don't get their act together. It's that if they failed, then, boy, I'd be really frightened. If I were in the agency, to try to put something together after a train wreck —

Maybe what one can do is exhort strongly, in a very clear way, about what we all seem to say here and then say, if that is not done within a certain period of time then maybe legislation is necessary.

I would just hate to lead with legislation, not succeed, and then scare off the agencies. Is that a possible two-part plan, Steven?

COMMISSIONER CANNON: It just shows the principle that, in Washington, there are never any permanent victories or defeats. You'd agree to that?

Okay. Just checking.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: This is a question for the group. Assuming you don't have an objection in principle to a deadline, what kind of tiebreakers or automatic clearances are there that can't be gamed by one Agency or another? And that's really directed to Jonathan Jacobson.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: What I perceive in my own experience is that, absent some command, there will be a number of cases where it just drags on, and I mentioned the

recent experience. I think we've all seen cases that have gone towards the end of the period without being cleared. We spoke to a former Assistant Attorney General about one —

COMMISSIONER SHENEFIELD: My question accepts that there should be a limit. The question is, if they don't resolve it by the limit, what kind of tiebreaker is there that can't be gamed by the agencies?

COMMISSIONER JACOBSON: The filing is the one that I would —

COMMISSIONER SHENEFIELD: But everybody knows what the filing number is, so if you want the case, then you never concede on the clearance, and you eventually get it.

COMMISSIONER JACOBSON: And then it comes back on you when the number turns out to be odd versus even. It's inequitable given a particular merger, but over the course of the series of deals over a longer period of time statistics say it should even out.

COMMISSIONER SHENEFIELD: What about a coin toss?

COMMISSIONER JACOBSON: I think a coin toss would have equal effect, but if you do with odd and even numbers than you don't have to go through an additional process. It's just known *ex ante*. I think knowing *ex ante* which side it's going to go to if there is a dispute is a plus, not a minus.

COMMISSIONER SHENEFIELD: I'm too skeptical about the motives of agencies. If they're not going to get it done

within the deadline, then they're doing that for a reason that isn't just being obstructive, they're trying to achieve a result. If they know which way it's going at the end —

COMMISSIONER JACOBSON: Then the debate is ended, and the next deal will go to the other agency. This is one of those, like Brandeis said, where having it be settled is more important than having it be settled right. That's the *Burnet* case.

COMMISSIONER KEMPF: I think what Commissioner Shenefield is raising is the possibility that, if there's a particular deal that one Agency wants and it was filed on the odd day and they're the odd agency, they will be obstreperous, knowing that will insure that it comes to them.

Now, as you correctly pointed out, Commissioner Jacobson, that carries with it the certainty that the next one, which they don't know about at this time, will go to the other, but they may say, well, this is a pretty big deal; we want this one. We'll take our chances on the next one. But there is also a benefit to the parties knowing who will get it if they don't work it out, too.

So, I think I'm inclined — I agree with Commissioner Shenefield, that there is that problem of possible gaming, but I still think it may be the best default position.

MR. HEIMERT: Chair Garza.

COMMISSIONER SHENEFIELD: The odd-even one?

COMMISSIONER KEMPF: Yes.

COMMISSIONER SHENEFIELD: As opposed to a coin toss?

COMMISSIONER KEMPF: I think so because, among other things, the parties to the transaction would have the benefit of knowing for a longer period where, absent it working out, it will go. But I'll tell you this: I think both Commissioner Jacobson and I, if there were a sentiment — and he can speak for himself, obviously — if there were a sentiment that said, gee, we'll only go along with this if there's a coin toss would quickly gravitate towards the coin toss solution.

COMMISSIONER JACOBSON: That's certainly true. I again think there's a value to having it decided in advance rather than only upon impasse, which is what the coin toss would be.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: I had another issue to raise, but to your point, John, I think you can potentially game it. To me, I worry more about the gaming when there's no hard deadline. When they game up until the 30th day — but if they're gaming up until the 7th or the 9th day, to me, it's more important that, at that 7th or 9th day, whoever gets it is going to get it. And knowing it *ex ante* has maybe potentially some benefit to the parties.

The other point I was going to make —

COMMISSIONER VALENTINE: How about the party gets to pick?

CHAIRPERSON GARZA: That would be good.

The other thing, Sandy – one of the reasons I think people have perceived it as being politically impossible to resort to one agency is precisely the turf issues up on the Hill. So, you're willing to say, even though we think it's politically infeasible, that there should be one agency. I would hope that would perhaps move you to say that there should be approval of a clearance process as well.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I'm not going to prolong the gaming thing, and I think we can probably come back to that later.

One other alternative that I guess I would like to think about and have the staff consider in the drafting is that may be that we don't need legislation to get the actual clearance agreement – That we could recommend that the agencies reach a clearance agreement, that Congress support that, but that Congress, in any event, require that when clearance does not occur within X days, then whatever coin toss, party pick, or odd-even numbers — So the legislative burden would only go to an absolute deadline, and it would in fact be agency discretion, how the clearance agreement gets worked.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: There is a well considered view here that we need not only a clearance process but some sort of deadline and potential resolution mechanism in the event that the clearance is not granted within a certain period of time. But focusing, for now, on what sort of legislation or whether legislation would be needed, I would just ask Commissioner Cannon if he has a view on whether this is the sort of issue that might be effectively dealt with by Congress by way of resolution rather than statute. In other words, a resolution that would endorse a clearance agreement between the two agencies.

COMMISSIONER CANNON: But a resolution wouldn't be really binding, would it?

COMMISSIONER BURCHFIELD: That is correct, although it would serve the following purposes. First, it would recognize the ability of the agencies to continue working these things out without necessary legislative intervention. And second, it would serve as a marker to the agencies that Congress was not going to step in and preclude it.

COMMISSIONER CANNON: Hard to say. I think it's a practical matter. If legislation were introduced, and we don't even know who would do it, but if they did, how this may go or may not go would depend on the time. If there's some deal out there that somebody needs to have approved, and there's a fight somewhere between the FTC and the Justice Department - I mean, all these things are kind of living with

the times in which you offer them.

So, I think we've probably really over-discussed this at this point, to say the least. I'd kind of say, let's vote and move on. I don't know the answer, Bobby. My preference is you'd want it to be in statutory form as opposed to a resolution, but —

CHAIRPERSON GARZA: Would there be a benefit to having the staff draft something?

COMMISSIONER CANNON: That's probably the final report, isn't it? I mean, in the end, we'll probably have a lot more than that that we'll ask the staff —

CHAIRPERSON GARZA: Yes. So, by the time we come back, our meetings at the back end, hopefully we'll have something written. So, right now we've got, by my count, a majority of Commissioners that favor 6 to some degree, either hotly or lukewarmly. So it may help to, as somebody said, put something in writing by the time we direct the staff to write something. If John or I can do it, we'll try to get some insights from folks on the Hill that we can share as well the next time that we raise this.

COMMISSIONER JACOBSON: It may be useful to get Steve and Makan involved in that.

CHAIRPERSON GARZA: Oh. That's right. The other thing is Makan isn't here today, so we'll also get his input.

VICE CHAIR YAROWSKY: Possible new thought. Maybe here's where we could legislate. Here's a compound proposal:

one, we advocate that this allocation get and put the force of our recommendation behind that, as Bobby has described it; second, as a possible fallback, we suggest that legislation is always possible.

One area where we could require legislation and really want it is that these statistics be published quarterly by the agencies about how many impasses were reached beyond a certain point in time.

Part of the problem, as Steve said, is that there's no continuous constituency that pushes for this. It is very transaction specific. Sometimes the groups, the Chamber and others, raise this as part of their issues, and that's good, but it doesn't happen a lot. If we had some statistics always out there, this could be at least one start to gauge. And so I would just add that — it's a small proposal — but I think there I wouldn't have any hesitation about requiring that kind of disclosure.

COMMISSIONER KEMPF: Let me give you my reaction to that. It's just that this would be very misleading and would undermine the objective, in my judgment, because most transactions, they really don't care who gets it. And so you'll get these statistics to show that it's not really a problem because they'll marry the ten transactions where it's very important to the 100 transactions where nobody cares, and they clear it in a day. So you'll get a statistic — it will accelerate the determination of cases that don't take —

they may take four days now, they'll take one day in the future. And the ones that take 30 days in the past and will still take 30 in future, but it won't look like a problem because it's buried in the averaging of the statistics.

VICE CHAIR YAROWSKY: Commissioner Kempf, can I just ask you about that? Forget the ones that go through rapidly. Why don't we just get the number of those transactions in a quarter, or any period of time, for which clearance is not achieved after a certain amount of time? Then you'd have an absolute number, not a relative number or a comparative number, and people can judge over time whether progress being made on that or not.

COMMISSIONER KEMPF: I can make it as certain as this. There are probably — I'll make up the numbers — there are 1,000 mergers, and there were only a dozen or so where it makes any difference. So, however you collect those statistics will arm those who want to contend that there is no problem and we don't need to address this. And I'm concerned that publishing those kinds of statistics will undermine the effort rather than advance it.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: There are — I agree with Commissioner Kempf with somewhat less cynicism about the process. There are lots of deals that just go through the 30 days because people don't ask for ET and because they're not very interesting deals, and the agencies just don't get

around to them. So, I question the value of the statistic at the end of the day.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: I was just wondering if we could wrap it up now.

MR. HEIMERT: Of course. And on all the topics: we've covered preliminary injunctions and administrative litigations sufficiently.

COMMISIONER CARLTON: I had a question on another topic that's related, but not to the legislation. Here's my question. It really is directed to Commissioner Kempf; I was interested in his views.

You initially started out by saying that a lot of people may have a sentiment to have only one agency for mergers. And if we were maybe starting from scratch that makes sense. We aren't. We have two agencies. If we're going to have two agencies, would the asymmetry between the two be greatest if they have different administrative responsibilities, that one can run the merger hearing at the FTC — the FTC can, but the DOJ has to use the federal courts —

COMMISSIONER KEMPF: It's a non-problem, because it's not dissimilar. The Justice Department does not have to roll the two together. It can file a case and say, we are here seeking a preliminary injunction, but if we don't get that we are going to persist in our other case as well. The

difficulty for them becomes — and would also become at the FTC — the judge says, I don't want to have two cases. I've got a lot of criminal cases on my docket; I've got a whole bunch of other things. I hear what you're saying, but if you go that way, I'm going to schedule you for your hearing on the merits six years from now. And then the Justice Department says, well, okay, we'll roll them into one. But they have the option of their own proceeding under the current law. People always can —

COMMISIONER CARLTON: But it's a proceeding in courts rather than any administrative Agency.

COMMISSIONER KEMPF: Correct.

COMMISIONER CARLTON: And that has always troubled me that there is that asymmetry. Does that not trouble anyone? Maybe it doesn't trouble anyone else here, but it seems to me —

COMMISSIONER SHENEFIELD: Troubles a lot of people.

COMMISSIONER VALENTINE: It troubles all of us.

COMMISSIONER KEMPF: Or, as we used to say in the private bar, it's in a kangaroo court.

COMMISSIONER JACOBSON: It bothers me for different reasons. I think the FTC, at the end of the day, is fair, but what is troubling is that there is a completely different process depending on whether your deal has cleared the DOJ or the FTC. It's a problem, but I don't think it's one that's productive, in my own view, to resolve at this stage.

COMMISSIONER KEMPF: And, as someone who's done that, I'm not sure it's a big problem. Let me put it this way: if you're in federal court, a judge who was appointed by Ronald Reagan may not be identical to a judge who was appointed by Bill Clinton. And the way that proceeding unfolds may have differences. Everybody brings his or her own background to the table.

So, it's a different forum. The rules are different. But, then again, one district court will have a 25-page limit on these kinds of filings and another one will have a 10-page limit on it. So, even in court proceedings, which go from jurisdiction to jurisdiction, there are different kinds of procedural things that unfold.

So, I don't view that as something that is troubling. Would I prefer that they were in the same jurisdiction? Yes. But it's not an earth-shattering thing to me.

MR. HEIMERT: All right. Should we go around and sort of indicate more final conclusion on each of these questions, and then we'll take a break for lunch?

CHAIRPERSON GARZA: Well, the question is, I think, whether or not we need to. I think, particularly with regard to preliminary injunctions and administrative litigations, some people who had given tentative views — I don't know if anybody has changed his or her view on any of those things.

No?

MR. HEIMERT: All right. Then we'll stick with what we had the first time around.

COMMISSIONER VALENTINE: If you get it wrong, we'll tell you.

COMMISSIONER KEMPF: Well, some of the people gravitated from one thing to another during the course of the discussion.

CHAIRPERSON GARZA: I think on 8(a) and 8(b) there was some movement, and on administrative litigation as well, which we were just talking about. There was some movement with respect to 11, 12, and 13, so it may be worthwhile —

COMMISSIONER KEMPF: But I think the staff would, between the transcript and the notes, have a good sense of that.

CHAIRPERSON GARZA: I think we do. Of course, that's why I ask if anyone has changed his or her position. If no one has, I think we're clear on where we are, and if we're not — the staff will - obviously, there will be minutes of the meeting; draft minutes will be circulated. If they don't accurately reflect the view of any Commissioner, that can be corrected.

COMMISSIONER JACOBSON: Were there minutes from the last meeting?

CHAIRPERSON GARZA: There are draft minutes, but they haven't been circulated.

MR. HEIMERT: All right. So, we'll take a break

for lunch and we'll resume —

COMMISSIONER KEMPF: Just one procedural question: I would view the draft minutes as a convenience for the Commissioners, but not a substitute for the transcript.

CHAIRPERSON GARZA: Oh, no. They're not a substitute for the transcript. I think they are, as you said, a convenience for us, because a transcript would be a little hard to plow through.

COMMISSIONER KEMPF: In other words, I view that there might possibly be mistakes in the minutes, but I don't view that as a big deal if we have the transcript to fall back on.

CHAIRPERSON GARZA: Right. But we'll have minutes of every meeting. So, we'll have minutes and we'll make sure that they're accurate.

MR. HEIMERT: All right. The Commission will adjourn for lunch. We'll resume at 1:30 with state enforcement institutions.

[Whereupon, at 12:56 p.m., the meeting was adjourned for lunch.]

**State Enforcement Institutions**

CHAIRPERSON GARZA: All right. We'll resume deliberations with enforcement institutions, States.

MR. HEIMERT: All right. We'll begin with preliminary views and go around.

Commissioner Warden, would you begin, please?

COMMISSIONER WARDEN: I am in favor 2(b) and/or (c). As an alternative to that, which would be my preference, I'm in favor of 3(a) and little 2 under (a), (b), and (c). I have some question about (d). NAAG seems a bit like a compact that hasn't been consented to by Congress already, to me, and I think that would make those concerns more serious. I'm in favor of 5(a). Within that, it wasn't entirely clear to me, but I would continue the statutory *parens* authority, to the extent that private parties are able to seek damages. For example, under my proposal number one they wouldn't be able to. And I'm content with the equity *parens* standing as I understand it to exist under the Supreme Court cases, which is a fairly narrow area and requires particularized local harm.

As an alternative to localization in general, I would favor 6(a), which is a subset of localization. And again, as an alternative to a localization requirement, I would favor 7(b), where, it seems to me, the issue really is injunctive relief, not damages.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: I believe that no change is appropriate in the current role of states and federal enforcement agencies in both merger enforcement and non-merger enforcement.

I would vote for number 1, number 4, and would consider putting in the text of our report recommendations

for continued coordination among the various enforcement bodies, which is something of a rewrite of 3.

So 1, a rewrite of 3, and 4.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: I concur with Commissioner Jacobson on 1, in terms of no change in mergers, although I do think that it's a good idea to think about consistent data requests for a lot of different reasons. And also, this model comes down with a confidentiality statute. I think that's also a good idea, and I'm looking forward to the debate, but right now, my initial reaction is, I would favor no change in the non-merger civil antitrust enforcement as well. So that would be 4.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Okay. I come out, at least preliminarily, where both the previous Commissioners have come out. I do want to work in number 3 with trying to see if there's a way to improve harmonization and coordination without coming in here saying they should absolutely be harmonized. But I do think there's some room for improvement at both the federal and state level to have a smoother process. So I would like to work on that. So 1, work on 3, and 4.

MR. HEIMERT: Commissioner Carlton.

COMMISIONER CARLTON: I would vote in favor of 2(b) and 2(c). On 2(c) I'd like a little clarification, because

the second sentence says no state would be permitted to investigate a merger if a federal enforcer is already doing so. I think I would add, "is or has already done so." I would vote for 3(a), and under 3(a), I'd vote for 3(a)2. I'd vote for 3(b) and (c). I'd vote for number 5(a) and 6(a).

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I am currently inclined to 1, 3, and 4, largely because I think the difficulty of getting any sort of measure crafted and passed would be insurmountable, but I am persuadable on that proposition. I will await further discussion.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I would support 2(b). I would support 5(a) and 6(a) as of this moment.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: 2(a), although I might be persuaded to vote for 2(b), coordination 3, and, right now, I think I'm at 4 on civil non-merger enforcement, only because I'm having trouble convincing myself that the State AG should have less authority to enforce the antitrust laws than private litigants, although I can certainly see the value of having them concentrate on more localized harm.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: Right now where I am is 2, and probably (b) or (c). 3, I agree with the recommendation to harmonize the efforts, with respect to both data and

application of the guidelines – 4, and that's it.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I would be supportive of 1 – so yes on 1 and yes on 4. I would do the points under 3 in the form as I understand some of the Commissioners to have said, as guidance rather than mandate. But I would also do that under 5, 6, and 7. I again would make no change, but I would use our report to speak to those things and suggest that, as a matter of sound discretion, they by and large follow those precepts as a matter of wise policy rather than statutory mandate.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I would vote for 3. I'm not sure about 3(d). I would vote for 4, but would rephrase 5 to say that, 4 is my governing principle, but recommend that state civil non-merger enforcement be primarily focused on matters involving local conduct or effects.

COMMISSIONER KEMPF: If I could go back for just a minute. While I would give guidance along the lines of 3, I would concur with Commissioner Valentine that I would not include item 3(d).

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I agree with the prior statements with regard to 3, which I would classify as supporting. It should be a recommendation, not mandatory.

MR. HEIMERT: We've gone through. Are they any

Commissioners that want to open up the discussion?

Commissioner Kempf.

COMMISSIONER KEMPF: Yes. I think that, were we to adopt some of the things in 2, 3, 5, 6, and 7 as legislative recommendations, that would insure a massive attack on our work by many elements of Congress, and I think we could better achieve our objective by having no change, but having a report that speaks to many of these things and has the gist of what are put here as statutory enforcement changes, but rather have it as wise counsel, to the extent that we have any wisdom – of things that make sense, that they should do as matters of sound enforcement discretion and wise policy rather than as something that they have to do.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I read number 3 as not proposing any statutory change, but strictly being a recommendation of the kind Commissioner Kempf is referring to. I take his point with respect to the political realities here, but that does not persuade me as to 2 and 5. I'm not sure how much of a problem in reality exists with respect to 5, or for that matter, 2, but I'm convinced that on a principle basis those should be the rules.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: I just wanted to clarify, then. With respect to 3, I agree with those Commissioners who did not support (d). I don't either. And I liked Don Kempf's

notion of recommending that the states, while they don't have – well, without recommending any jurisdictional change with respect to the States that it would be beneficial for us to say that we think that it would be worthwhile for them to concentrate their enforcement actions on more localized matters, which I think, by and large, they do in any event.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON:. Following on to a number of the remarks I made this morning, I continue to believe that plurality of antitrust enforcement is important because enforcement of these laws is important. And I believe the states, although it's been 30 years as opposed to 106, nevertheless can play an important role and have, in some instances, played an important role. That's number one.

Number two, notwithstanding ample opportunity, and putting aside the episode that Commissioner Shenefield – during the hearings, which I view as aberrational – I certainly hope is aberrational – there has not been any demonstration of any kind of systematic or even significant episodic mis-enforcement of antitrust by the states. I think, by and large, the states have been very responsible. They've had different decisions from time to time than the federal enforcers have, but I do not think a case has been close to made for a systematic revision of the methodology and procedures and cases in which states enforce the antitrust laws.

I'm one of those who views the states' role in the *Microsoft* case somewhat differently than Judge Posner did, but as a check against what some, at least, perceived, at the end of the day, to be under-enforcement by the United States Justice Department. At the end of the day the states' views were rejected by the district court, but nevertheless, I think the role they played in that case and in others where I've observed them participate was appropriate.

So, I certainly don't think there is anything close to a case made for any significant statutory change in the states' enforcement authority and the *parens patriae* of the HSR Act.

Turning to 3, I believe the states and the Justice Department and the FTC believe that coordination is very important. And I think all three of them strive to coordinate their enforcement efforts under the existing regime to the maximum extent possible. That's why I said in 3 I would recommend continuation of that. If it can be improved that would be fine, but I honestly haven't seen, certainly in recent history, any instances of, you know, truly poor coordination.

Would it be useful to have the states apply similar Section 7 principles as do the federal agencies? It would be useful, but it has to happen as a matter of course anyway. If the state sued a blocking injunction under Section 7 of the Clayton Act, the federal district judge is going to apply

the law as she or he sees it. It's the same law that is faced by the Justice Department and the FTC.

So, I certainly don't object to 3(a), but I don't see any need for it. 3(b), that data requests be consistent against enforcement, absolutely we should recommend that. No question about it. There may be geographic differences that are appropriate that should be noted in our report, but fundamentally, we shouldn't have the ability of any litigant, state or otherwise, to complicate the process by throwing in an inconsistent data request.

Similar on confidentiality. This should just be a basic form that is in use for the federal agencies and the States. In terms of 3(d), I think it would improve state enforcement to have a permanent staff of lawyers and economists who are employed by NAAG as opposed to any individual state, and I think that would improve the quality of state enforcement. So I guess I'm the only one in the group who thinks that recommendation is something that we should do. But my bottom line is that there's no evidence that I've been presented with that suggests that any statutory change is appropriate, and encouraging better enforcement practice falls under the category of obvious, and we should certainly not ignore the obvious.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I just wanted to make clear that in voting only for 3, I also like Commissioner

Warden, and I'm assuming that I reflect the continuation of the status quo, with respect to statutory authority. I don't want to just say, 1, no change is appropriate, because I do think that there can be improved coordination. But I don't want my vote to also look like I think the states' merger enforcement should be cut back.

Does that make sense?

MR. HEIMERT: Yes.

COMMISSIONER VALENTINE: Okay.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: Like Judge Posner, I was there.

[Laughter.]

COMMISSIONER WARDEN: And I find Judge Posner's views to be a mild statement of what was evidenced beyond a reasonable doubt, to impose an even higher burden of proof. I think *Microsoft* is exactly the kind of case the states have no business whatsoever in. The effect is no different in Kansas, which was one of the leading jurisdictions in the case, than in Burma, and the whole thing is nonsensical. I think that kind of state coordinated action is de facto, if permitted, the creation of a second repository of Article 2 powers, and I think it's wrong as a matter of fundamental law, and I think it's also wrong as a matter of policy.

We should have a single competition policy in this country. A very, very, very, very important part of

enforcement of competition policy is the Justice Department's or the Commission's decision as to what kinds of actions to bring and what relief to seek and how to negotiate, at the end of the day, what the result will be, as opposed to district court adjudication, which is probably more the exception than the norm.

I also point out that I find the argument of balancing out under-enforcement to be wholly misguided because it's a one-way street. Nobody has proposed that the States be allowed to stop over-enforcement by the Antitrust Division of the Federal Trade Commission. We have an Executive Branch; we have a Federal Trade Commission. They should make a national competition policy. I have no problem the Attorneys General proceeding against local bread and milk conspiracies.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Just a few brief comments.

Jonathan, I guess I am in the company of a lot of people who don't think we should be recommending to NAAG what to do. I don't think we should be doing that to the ABA or to NAAG or to any other association. I think our charter was to Congress, or to the rest of the government. That's the only reason I don't support that idea. On the localized effects, I think the Chairperson is correct. I think that's mainly what we see the State Attorneys Generals focused on right now, but I think we should look at that.

I've just learned in the last three or four years that whenever you do look at something that is phrased "localized effects," it's trickier than you might think. I've watched that in Congress the last few years with diversity jurisdiction. It tends to be shrinking, shrinking, shrinking as to what is considered local or intrastate, and the federalization of many things has occurred in those contexts.

So, yes, I think it's a worthy thing we should look at, but I'm going into it very carefully, given that experience.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: I wanted to clarify on going with 3. What gives me pause about the current authority of the State Attorneys General is precisely this notion that they need to retain the authority because they need to be able to act if Justice is under-enforcing. Of course, under-enforcing is in the eye of the beholder, but I agree with Commissioner Warden that our economy is so interlinked that it doesn't make sense to have more than a single enforcement policy. There's an election every four years. The administration that's in control should be able to determine policy. Congress does what it does. But I don't think it makes sense to have, potentially, 50 different views on what should occur that affects the national economy.

Again, my only reservation is the difficulties that

you mentioned, John, about defining what's localized, the concern that the State Attorneys General would have less authority, potentially, than do private plaintiffs and then the political concerns. But I don't want voting for "coordination where appropriate" to be misconstrued as meaning every time the federal government goes in, it should have to coordinate with all of the states either, because that may have been a problem in *Microsoft* and other cases. I think the federal government should be making policy, in general bringing the enforcement actions, and then letting the courts decide what's appropriate. And I don't necessarily think that, in each case, the federal government should be burdened, if you will, by having to coordinate with 50 states on an action.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I first John Warden in a courtroom. I was bringing on behalf of some of the states. He was on behalf of *Microsoft*. I believe the United States was correct to bring the case. I believe the settlement was too weak, but I also agree with John Warden and the Chair that there should be a single authority that has the responsibility for antitrust policy on a national basis. And if there was any case that had national implications, *Microsoft* was it.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: I respect that view. The

reason I disagree with it, notwithstanding that respect, is that there is a single institution that, at the end of the day, enforces the antitrust laws, and that's the United States Judiciary. Let's look at mergers for a second: a state has no HSR hold. The only way a state can block, delay, or impede a merger is to get a federal judge to say the law warrants that result. That is a heavy burden for a state to meet. The states don't go into court with the same presumption of correctness that you have typically – well, maybe not recently – when the Justice Department and FTC go in. The states really have to prove their case.

And if they do prove their case, and if the merger does run afoul of Section 7 of the Clayton Act, why shouldn't it be enjoined? The reality today is that the *Cargill* decision, following on *Brunswick* and followed up by the *ARCO* decision, which are perfectly sound rules of antitrust enforcement policy, have effectively eliminated the private right of action to seek equitable relief in merger cases.

So, unless we're prepared to say that merger enforcement will turn entirely on the ballot box in November every four years and be an aspect of the elected federal government's decision, then we need some other enforcement mechanism, and in the real world, the states are it. And I think it would be a disservice to antitrust enforcement to eliminate that ability, which again can only be effective if a federal district judge, appointed by the President and

confirmed by the Senate, agrees that there is an antitrust concern that needs to be remedied.

MR. HEIMERT: Commissioner Carlton.

COMMISIONER CARLTON: If I were going to be concerned with political motivations, I'm much more concerned at the state level than at the federal level. I think there have been a number of statements, and I think some articles, showing that merger policy has been relatively consistent over different administrations, which would suggest that it's relatively immune to political pressures. I'm not convinced that the same would be true about state actions, and I think that there could be political motivations that create stronger incentives at the state level to do something than at the national level.

So, for that reason, I'm in favor of making sure that the states have, to the extent that they have any role in antitrust, have a role that stresses their comparative advantage. And their comparative advantage is they may have access to local information that the federal government simply may not be aware of. And that's why I'm in favor of making sure that their role is a more limited one.

It's also the case that the amount of resources that the states devote – say, antitrust lawyers and economists – as far as I can tell, is much lower, percentage-wise, than, say, the Justice Department has. And that also should tell you something about who has a comparative

advantage in bringing antitrust suits.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Just a point; it's not going to disagree with you, Dennis. What's interesting to me is that often, mergers are stopped or delayed by state officials other than the State Attorneys General. And they can't be consummated until they get other approvals. What I've observed occasionally is that if a State AG gets involved and works with the federal authorities and, having done that, gets his or her approval, it's not that these other approvals become automatic, but often, they can facilitate a quicker consummation.

So, it's not making an argument pro or con. I just want to throw that in the record, that sometimes, state AGs can help facilitate transactions if they work with the federal authorities.

MR. HEIMERT: Any other Commissioners care to speak?

COMMISSIONER JACOBSON: Let me just – I hate to be the only one talking on this side – but let me respond in two seconds to Dennis.

I have absolutely no doubt that State Attorneys General are motivated in a number of instances by purely political considerations that are different from, although they may be related, to the merits of a particular transaction. I accept that as a given. I think all of us

who have been in antitrust for any length of time have observed that. But I go back to the position that it doesn't matter if a federal district judge doesn't think that they haven't proved their case. If their political motivations are good, bad, or indifferent, they will get an injunction blocking a merger only if they prove that the merger is likely to lessen competition substantially in a relevant market. And that, to me, is an ample check on political abuse by the states, or by anyone else, for that matter.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I just have to say that I think that's a very narrow view of what making federal policy is all about. Sometimes it depends only on what the antitrust laws say. Sometimes there are lots of other considerations that need to be brought to bear. And to remit all of the federal policy making to a federal judge who's working with only what he has before him and the text of the statute is simply too narrow. And that's why, it seems to me, you have to have the full sort of federal, executive approach. That's why I'm not terribly happy with the Federal Trade Commission having authority here.

But you have to have the federal Executive Branch approach to making economic policy, and whether or not there's a nationwide merger or there's a monopolization case against *Microsoft* entails much more than just simply what the statute does as applied to that particular case in my view.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I have just a question, and it is for those who are recommending one or more of the options under numbers 2, 5, or 6. Is the recommendation that the federal laws be amended to effectively preempt the state authority in those areas, or is the intent of those paragraphs merely to make a precatory rather than mandatory recommendation?

COMMISSIONER SHENEFIELD: It says, "recommend statutory change."

COMMISSIONER VALENTINE: No, it doesn't.

COMMISSIONER BURCHFIELD: And the statutory change would be federal.

COMMISSIONER WARDEN: I think it would be authority to sue under federal law and preemption; otherwise, it makes no sense. I would have some question about even under the dormant commerce clause whether you could get an injunction against a worldwide merger under a state antitrust law, but maybe you could.

COMMISSIONER KEMPF: There have been cases that have sought that.

COMMISSIONER WARDEN: Have there?

COMMISSIONER KEMPF: Sure. The case against Phillip Morris and the acquisition of the Ralston Cereal business tried in front of Judge Wood in your District Court. They sought to enjoin that merger. The government had

cleared it, and then the state sued under Section 7. The states bought it, is what I'm thinking.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER KEMPF: I would think that they would have bought it. Many times they'll bring it under Section 7 and state laws, just as most Section 7 cases also are brought under Section 1.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: Yes. I was just going to respond to Commissioner Burchfield's question.

As to 2, which is where I favor basically having jurisdiction reside either totally with the federal government or at least limiting the states to local matters. That would be not just precatory; that would be a flat recommendation.

As to other enforcement issues, which are 4 and 5, I personally favor 4, which is leaving things the way they are and letting the states participate or bring such actions, if any, as they wish under the antitrust laws generally. I just think that when it comes to mergers, it is appropriate to have a federal policy, and that's why I also favor one federal agency – same reason.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: Yes. I was going to respond to Bobby's question.

For me, with respect to mergers, I've been thinking

that the statute – well, it would have to be more than the Clayton Act – but I think the statute would be revised to make clear that only the federal agencies would have a right to act and that there would be preemption with respect to non-merger civil enforcement. I had also gone with 4, but I would be interested to know from those who would like to restrict the state jurisdiction how you would propose to revise current legislation. How would you word it?

COMMISSIONER VALENTINE: Well, 5 and 6 don't specifically say "statutory change," so I think that's why Bobby's question is an absolutely appropriate one.

CHAIRPERSON GARZA: I got the impression that Commissioner Warden and some others were thinking of it in terms of a statutory change, though.

Dennis, were you thinking of it as statutory, as opposed to a –

COMMISIONER CARLTON: Recommendation.

CHAIRPERSON GARZA: My own position had been a recommendation, but not a statutory revision. I thought that everyone else had been talking about a statutory revision.

COMMISIONER CARLTON: I wasn't thinking of a statutory revision, but if you asked me – it's a little bit out of my area of expertise, the difference between a recommendation and a statutory revision – but my own view is that I would favor preemption and, with the exception of local on mergers, and that may be hard to define, the word

"local," which gives me some pause – In which case, just having a recommendation may make more sense if the statute couldn't be passed because of ambiguity.

But, in general, in this discussion, I think that the states' ability to bring antitrust cases in large part, when I was talking, should be preempted. I don't know whether it's a recommendation or a statute. It depends on whether the statute can be phrased in an unambiguous way.

Let me just raise one other point. A lot of the discussion has talked about the states bringing actions under the federal antitrust laws. I can't tell if our proposals are also going to go to the recommendation about what the state antitrust laws should say. There are some state antitrust laws, if I'm not mistaken, that have to do with mergers in which the merger can be enjoined if it has an adverse effect, for example, on employment. And I don't know if that's covered by any of these proposals, but to the extent it is, I would want to make clear that I think that the state antitrust laws in general should be preempted by the federal laws, especially in the merger case.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: Well, when I was speaking of 2, which is express about statutory change, and 5 and 6, I was speaking of law, not exhortation. But let me be clear that these questions: I don't think you could write a statute from how you check the boxes on these questions. For

example, 5, as I read the Supreme Court decisions, states cannot bring *parens* equity actions in the federal courts unless they show particularized local effects. That is not the same effect throughout the United States, or a great part thereof.

As to damages, Congress has said that the states can bring damages for one specific set of constituents, if you will, right now. That's the consumers, not national-person-type consumers, if my memory is right, in their own states and, of course, in their proprietary capacity like any other injured party.

So, in a sense, 5 more or less is the existing law, except the damage cases don't have to be for localized conduct or effects, but they're sort of a government led class action, if you will, which may have advantages over the other kind of class action.

And 6 is, you know, sort of a variation on 5 with just different approaches to 5. However, I would nonetheless favor a statute that would make everything clear if there were any prospect of getting one, and that would make it also clear that what the states can't do under federal law they can't do under state law.

As to the localized conspiracies, as I said in my piece that was handed around this morning, if it's localized it doesn't have to be just a conspiracy. But a localized manner – I'm indifferent as to whether the State Attorney

General proceeds under state law or federal law. I'm happy to give him his choice in that circumstance.

I do think, in response to something that Chairman Garza has said several times about private parties, states purport to sue, not – even though their standing is equivalent to that of a private party under the federal law – they purport to sue as law enforcement agencies. Therefore, purporting that they wear a different mantle than that of self-interest by a private party. And it's that mantle, I think, that they're not entitled to in these circumstances. If they want to assume their proprietary capacity they don't have any less rights than any other private party.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Yes. I think that my position has shifted. I initially signed on to number 1, no change. As I've listened to the discussion and tallied up the votes, at least five Commissioners, by my count, have signed on to 2. Now, some have signed on to 2(a), some to 2(b), and some to 2(c), but those all seem to me to reflect a common theme, which is that, at the end, this is really a federal policy that ought to be handled by the feds, absent either an abdication of responsibility, which is (c), or a wholly local thing, which is (b). And given the amount of interest among the Commissioners in trying to fashion something that does a more sensible allocation, I am now open to moving from change, 1, down to 2.

And what I'm searching for in 2 is not (a), (b), or (c), but something that seeks to use (a),(b), and (c) and come up with something that perhaps we could get a majority of the Commissioners to rally around. The one by my nose count that seemed to have the most support was (b), but I'm equally amenable to (a) or (c) or new (d), which I don't know what is, but would be something else that sought to take the felt need by what may well be the majority of the Commissioners if we had Commissioner Delrahim here and do a search for something that would seek a more optimal allocation of merger enforcement between the state and federal agencies.

COMMISSIONER CANNON: What is the tally at this point?

MR. HEIMERT: Between options 1 and 2, which seem to be the ones which Commissioner Kempf was speaking to – In the option 1 column, I have Commissioners Burchfield, Cannon, Jacobson, Valentine, and Yarowsky. I moved Commissioner Kempf to column 2, along with Commissioners Carlton, Garza, Litvack, Shenefield, and Warden, and Commissioner Delrahim is not present.

On option 4, under the civil non-merger, Commissioners Burchfield, Cannon, Garza, Jacobson, Kempf, Litvack, Valentine, and Yarowsky were all in favor, which is essentially the no change option. Commissioners Carlton and Warden were in favor of option 5 – and Commissioner

Shenefield –

COMMISSIONER SHENEFIELD: I was in favor of doing it through the report as opposed to –

COMMISSIONER KEMPF: I was of the strong view that we should have 4, but I also thought that there was much wisdom in parts of 5, 6, and 7, and that our report should speak to that as a discretionary and not mandatory.

COMMISSIONER CANNON: Between 2(a), (b), and (c), how does that break down?

MR. HEIMERT: I have Chair Garza for option (a). Commissioners Carlton, Litvack, Shenefield, and Warden like option (b), and Chair Garza is also somewhat interested in that. And Commissioners Carlton, Litvack, and Warden were interested in option (c), as well.

COMMISSIONER KEMPF: I had Commissioner Litvack on (a) also.

COMMISSIONER LITVACK: Yes, I was just going to say –

MR. HEIMERT: Commissioner Litvack, you're on (a), as well?

COMMISSIONER LITVACK: Correct.

COMMISSIONER WARDEN: I have no objection to (a), by the way.

COMMISSIONER CANNON: So there's no such thing as a vote for 2? It has to be 2(a), (b), or (c), instead of –

MR. HEIMERT: Well, obviously there could an option

(d), as Commissioner Kempf proposed that would be either something entirely different from, or an amalgam of, (a), (b), and (c).

COMMISSIONER KEMPF: In other words, as I move from 1 down to 2, if I said, fine, if that's what it takes to get a consensus, I would go with 2(b). That would give us six Commissioners right there. And Commissioner Delrahim is still out.

COMMISSIONER JACOBSON: How is division of that nature a consensus?

COMMISSIONER KEMPF: Division of what nature?

COMMISSIONER JACOBSON: Six to four, six to five, six to six; how is that a consensus?

COMMISSIONER KEMPF: I didn't say it was a consensus.

COMMISSIONER SHENEFIELD: It's the beginning of a consensus.

COMMISSIONER KEMPF: Yes. As I listen to the discussion about reasons to do some variation of 2, and the fact that there was, perhaps, a majority of Commissioners who were prepared to do something in that area, I say, well, if we can come up with something that makes sense, I'm willing to do that.

I do not think that the current system is optimal, but I didn't think we wanted to go do something that, as I said in my additional remarks, would irritate the heck out of

the states, but I would strive to see if we can't do something that would be something that they could live with. That may not be achievable, but I would strive for it.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: The only thing I would say is that (b) and (c), in my view, are probably preferable to where we are, but they invite more litigation, more issues, what have you. I think trying to ascertain what is local and whether or not the State Attorney General, therefore, has a legitimate or definable interest may create a bigger problem than we are solving. Maybe not.

Therefore, I really think, the more I have heard from the discussion, that (a) is the answer. You either take them out and preempt them, or you don't. All the rest is compromising just to get a consensus, which is nice, but I don't think makes any sense in this regard.

COMMISSIONER BURCHFIELD: We could create another clearance problem.

[Laughter.]

COMMISSIONER JACOBSON: What if it's a hospital in northern Manhattan and a hospital in midtown Manhattan? Is that something we would oust the states from suing on, if the merger were perceived to lessen competition?

COMMISSIONER LITVACK: I think the answer is yes. I would oust them from that. It's just that simple.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Yes. I just want to make a comment. I still am going to stand to number 1, but I think Sandy's right about one thing. If you're going to do a change, you can only do a change that is structural, because these other are dynamic changes that are uncertain.

The other thing I would ask to separate out is this: if you believe in a structural change, you should go where Sandy's going, but what I hope we can get out of the equation is a more topical element. And that is that there were really powerful feelings on both sides of the *Microsoft* case. We've talked about maybe some other cases in the last few years. And that shouldn't enter, I don't think, to our thinking, whether there was some tension between the different enforcement levels.

The same thing happened in the 80's with vertical price fixing – very wild debates; very ideological feelings about that. In 20 years, that has all calmed down. So, I guess my only pitch is that if you feel that there should be a structural change, you should do that. If you can separate out all the other atmospherics that have surrounded this issue of federal and state enforcement, I think that would be a wise thing to do, and then make your decision.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: Let me just make one more effort at perhaps getting at consensus the other way around, which is that I think if we think of this as merger policy on

the one hand, and non-merger policy on the other, that would be helpful.

In the merger arena, maybe some of those who think that they don't want the states involved would be content to say that states should focus on local issues, like, now that you mention the hospital – there were one or two hospitals in San Francisco, which the feds decided not to prosecute but the state did.

I think in the non-merger area, we really have no evidence – I think all the evidence that we had was that – set *Microsoft* aside – the states really do tend to focus on local matters in the non-merger area so that a hortatory or precatory or advisory thing that they do – precisely what they seem to be doing most of time might well be an acceptable way to think about it.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: So, Debra, on the merger part of that, your position is that there shouldn't be any kind of division of jurisdiction between the federal and state enforcement levels?

COMMISSIONER VALENTINE: I don't know how you'd do it, really. I mean, I have no problem saying I would prefer always that they focus on local things and prefer the feds to get the matters of nationwide impact. And I do think – I think it was Phil Proger's testimony in this area – that with mergers you have less judicial review than you do in the non-

merger area. So the potential for inconsistencies may be greater, which is why I think focusing on the improved coordination and harmonization helps a lot. But I don't know how you define "local." I'm with Dennis on that.

CHAIRPERSON GARZA: But what about if you did 2(a), which is, essentially, only the federal enforcers are involved in merger enforcement, which would still leave the ability of a State AG to go to the FTC or the DOJ – which is almost what they do now, because they don't have any sort of authority like the HSR Act – and say either, with respect to this transaction you're looking at, here are some localized effects we wish you'd pay attention to, or even, conceivably, here's a merger that falls below the HSR threshold or otherwise is not what you're looking at, but it has these peculiar effects on the state; can you look at it?

And then presumably, if there's some merit to it, the federal enforcers would look at it. You're not buying that?

COMMISSIONER VALENTINE: I think that if the states actually had the ability to act themselves the feds would listen more carefully.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: I worry about the route that we seem to be headed towards, which is either a sharp division down the middle on this or some recommendation for legislative change in state authority. I think this

Commission has the potential to do a huge amount of good for the country in terms of recommendations of legislative reform for *Illinois Brick*. We'll get to Robinson-Patman. In areas like federal enforcement, in contribution among tortfeasors – there are a number of legislative things that we are going to recommend, I believe, where we have the opportunity to do a lot of good.

I am concerned that, by including a recommendation of the sort that we've been discussing, we hold out at least the possibility of putting our entire report in a different light and putting our entire report in a position where it will get a good deal less traction on the Hill and a good deal less support and significantly greater opposition that will leak over not just from the state issues, which, I think, are going to be very hotly contested legislatively – but will inevitably have some negative spillover impact into our other areas. So, I am, I think all of you know, a firm believer in voting where you believe the law should be and not pulling any punches. But I have to tell you, on this particular area, I am worried that the route – which I'm surprised to hear that we're either split on or careening towards – I think it could be very damaging to this Commission's ultimate mission, and I hope that is not the case.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: I'm not sure that we're that

split, in the sense that – I mean, I agree with Sandy and John Yarowsky. Either you're really for preemption, or you aren't. The rest of these are kind of – you want to edge over there, or you don't think the status quo is quite right. But if I'm counting the votes correctly, you have two votes for 2(a), so that's two out of twelve who say preempt. So, to me, that doesn't sound like we're headed towards preemption.

COMMISSIONER KEMPF: But you also, I think, had two other Commissioners, Warden and Kempf, who said that they would be prepared to go ahead with 2(a).

COMMISSIONER KEMPF: Yes.

COMMISSIONER CANNON: Okay. We're closer to careening then.

[Laughter.]

CHAIRPERSON GARZA: Steve, I would like to thank you for that help.

[Simultaneous conversation.]

COMMISIONER CARLTON: If it were (c) or (a), I would vote (a).

CHAIRPERSON GARZA: Then we've got five. Thank you.

COMMISSIONER KEMPF: Now we have five.

[Simultaneous conversation.]

MR. HEIMERT: Vice Chair Yarowsky.

COMMISSIONER SHENEFIELD: You're very persuasive,

Steve.

[Laughter.]

COMMISSIONER CANNON: Well, it's good to know this if we're going to debate this. It's good to know where everybody stands on it.

VICE CHAIR YAROWSKY: What's interesting is, if you try to count votes on this scorecard, if you look at number 3, there are a lot of exes, and there's a lot of belief that we should promote coordination, if possible, harmonization, and a lot of other procedural things.

The other thing that is not there, interestingly, is, if you look at 2(b), which has some attraction in terms of concepts, localized/local, even with all the problems of trying to define that – if you move 2(b) down into a more hortatory mode, as we have with the harmonization, the sharing of data, procedural convergence that may help make a good nest of suggestions.

COMMISSIONER CANNON: But in the end, I think you can vote for 1 and any combination in 3. It's pretty hard if you vote for 2(a) to say that 3 is necessary.

VICE CHAIR YAROWSKY: I'm just trying to get 2(b) to join its brethren and sisters –

COMMISSIONER CANNON: In 3?

VICE CHAIR YAROWSKY: Yes.

COMMISSIONER CANNON: As an alternative?

VICE CHAIR YAROWSKY: Yes.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I just want to be clear that I prefer 2(b) or (c) and I don't see the great difficulty of determining whether something is predominantly local. I think some things like that come up in the law all the time, but if I'm told that's a difficulty that cant be surmounted and we have to have what has been called structural change than I'm for 2(a) over the status quo.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I view federalism as a very important principle, but it isn't, to me, a religion. And I do take it seriously in this context, but what I see as a significant problem with 2(a) is that it only takes the states out of the picture, if I'm reading it correctly, until consummation of the merger. If the states consider a merger to be likely to produce anticompetitive effects or anti-consumer effects, I'm not sure that you gain a whole lot in terms of competition policy because they're going to be in there challenging the conduct of the consummated merger.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: But that's a much different burden. I mean, it's a heck of a lot harder, isn't it Bobby, to go in before a merger has been consummated and throw a wrench into it than it is to go in afterwards and convince a court that you have enough evidence of actual anticompetitive effect to get a divestiture. I mean, you're dealing with

incipiency on the one hand versus proven effects on the other. It seems to me a much more difficult thing to do to challenge it after the fact based on conduct.

COMMISSIONER BURCHFIELD: I'm not necessarily talking about suits for divestiture; I'm talking about suits for injunctions against particular conduct or even for damages under state competition and consumer protection statutes.

If a State Attorney General is persuaded enough that a merger is bad for the citizens of his state to buck the federal antitrust authorities, to challenge it in court today, I must say it takes a leap of faith to think that same Attorney General is not going to find some post-consummation challenge to that merger. And I'm not persuaded that that's going to happen. If the goal is to get mergers on a path toward quicker consummation, then 2(a) makes sense. If the goal is to rationalize national competitive policy with regard to corporate merger activity, I'm not sure it does make sense.

CHAIRPERSON GARZA: Well, to me, after the fact, the State Attorney General would have to go and either show, presumably, price fixing – not oligopolistic behavior, but probably some agreement that violates the Sherman Act, some price-fixing or other kind of agreement, or they'd have to show some monopolistic type of behavior. And so, it seems to me, it would be a bit different and a different burden, but I

–

COMMISSIONER BURCHFIELD: Or challenge it under a consumer protection statute, of which there are many varieties.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: I think the case is *Phillipsburg* that imports an incipiency standard into post-consummation review of mergers under the Sherman Act. And it is not at all – I haven't thought of the issue that Bobby raised – but it is not at all inconceivable that a state could go in with a Sherman Act post-consummation case seeking divestiture if they felt strongly enough about it.

I could see that, among other things, as just a political reaction to this kind of report and legislation by the Congress.

CHAIRPERSON GARZA: But if they can't enforce Section 7, how can –

COMMISSIONER JACOBSON: I believe the case was *Phillipsburg* – Sandy, *Phillipsburg*? – Gordon would've known off the top of his head.

COMMISSIONER LITVACK: He would have known, but Sandy doesn't.

COMMISSIONER JACOBSON: I believe it was *Phillipsburg*. It was a case brought under the Sherman Act, because there was a serious question until the bank cases of the early 60's whether the Clayton Act or only the Sherman

Act applied to bank mergers. And the Supreme Court held pretty squarely that there is an ability to challenge a merger under the Sherman Act, which had always been true since *Northern Securities*, but also that an incipiency standard would apply. Not exactly the same incipiency standard –

CHAIRPERSON GARZA: That sounds like another issue for the Commission to take up.

COMMISSIONER JACOBSON: But I think Bobby's larger point is that, if they don't like the deal, they're going to find some way to scuttle it, so why not –

CHAIRPERSON GARZA: Let them scuttle it in the beginning.

COMMISSIONER JACOBSON: Let them proceed in a way that is better for the parties, honestly, to know before consummation whether the deal is going to be in trouble or not. And again, it's up to a federal judge. I'm surprised that we're this divided on this subject, honestly.

MR. HEIMERT: Commissioner Carlton.

COMMISIONER CARLTON: This certainly follows up on something Commissioner Jacobson was just saying, that it's up to a federal judge. I think it's more than just up to a federal judge because there's prosecutorial discretion, and presumably, when the Justice Department, for example, is deciding whether to prosecute it's weighing the overall benefits of going forward.

In particular, if there's harm in one state but a benefit in another state, it's weighing that in its decisions. And it should be. And a state, in its decision of prosecutorial discretion, will not do that weigh. When people advance arguments about federalism, that states are 50 independent laboratories – and we heard a lot of discussion about that at the hearings – that's only when the effects are completely localized. If they're not completely localized, you have improper decision-making.

And that's what bothers me about allowing the states to have a role in something like merger policy when there are national facts. It seemed to me that 2(c) solves the problem somewhat by having preemption. If the federal government steps in, the states can't. I voted 2(b) because I might allow the states, under the principle of federalism, if they want to be an independent laboratory, fine, but they have to prove it's an independent laboratory. That is, the effects have to be localized. But it's too hard to define the word "localized." If I had to decide, do I want a local effect or a national effect, where am I more worried of the states making an error, I'd go with Sandy's proposal of 2(a), because I am worried that the states, in their prosecutorial decision-making, don't weigh these externalities they have on other states.

I thought Bobby raised an issue I hadn't really thought about, and it's a complication. And it seems to me

that if, after a merger is consummated, a particular state wanted to bring an action, say, consumer-protection harm, or something, that would likely be more localized in adverse effects on its own members of the state than elsewhere if it can't blow up the merger. In other words, it could say there's fraud involved, or something violated some state consumer-protection statute. It's not obvious that that would necessarily blow the whole deal up.

So, actually, even as I was thinking through your scenario, which I think is a good one to have to think through, even in that case I'd come down that I'd want the feds to be in charge and not the states. And then if the states want to get involved when it is something that's just a local law, they can do it.

But the whole issue of federalism goes beyond antitrust, and I don't have the background all of you have in defining localized effects or when there should be externalities across states. But it does seem to me that, in the scheme of things, defining the word "localized" is a relatively minor problem, to me, anyway. And if it's not, I still would stay with 2.

And just one more point: the issue of whether we want to have many people having the right to bring suit to the courts does seem to be something we have to sort out. We shouldn't just rely on the notion that, it's one court; who cares? There has to be, it seems to me, a recognition that

this uses up real resources when multiple people can sue, or can perhaps sue. And we want to make sure that those people have the right to sue and make as correct a decision as possible, trading off benefits to consumers in one state versus others.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: First, I agree with, I think, everything Commissioner Carlton just said. If not everything, then virtually everything.

Second, Commissioner Burchfield's concerns are something I'd like to think about. I'm not sure they hit me one way or the other on this issue.

And third, I think Commissioner Jacobson has mistaken 2(a) in that I don't think 2(a) is limited only to the Clayton Act. I don't think 2(a) is limited only to pre-consummation merger enforcement; I think 2(a) covers the waterfront and includes divestiture, dissolution, state law, federal law, or whatever. It's exclusive federal jurisdiction as to law enforcement against mergers, period.

COMMISSIONER JACOBSON: Then I like it even less.

[Laughter.]

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: I think we finally want to wrap up. Just one point to Dennis. I do agree with virtually everything you said, except on 2(c). As I read 2(c), if the federal government decided not to challenge a merger under

2(c), then a state could step in, and it's not clear to me that that's what you really intended.

COMMISIONER CARLTON: Right. I would only allow them to step in if it were localized. That's why I kind of went in for both (b) and (c).

COMMISSIONER WARDEN: Well, I read (c) as being, if the feds conduct an investigation – and I would say they have conducted, are conducting, or in the future say, we're going to conduct – it's not a race. Their decision as to whether or not to enforce is exclusive, period.

CHAIRPERSON GARZA: So, any merger that's reported under the HSR Act, regardless of what the DOJ or FTC did, would be preclusive.

COMMISSIONER WARDEN: Well, I don't know that I'd call that an investigation.

CHAIRPERSON GARZA: Well, that's – it may need to be clarified with (c) then, because I'm –

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: Yes. I would agree. (c), it seems to me, only says that if the federal government is investigating or has investigated it, the state can't investigate. It doesn't say they can't sue. It doesn't say that, after the federal government has investigated, it can't sue. So, I think it's kind of flawed if that's the goal.

MR. HEIMERT: I think it was meant to provoke discussion on the points and result in some clarification

from Commissioners.

COMMISSIONER KEMPF: I certainly read it as saying that, if the federal government chooses to look at it, the states are out.

COMMISSIONER LITVACK: It's quite clear that it says first refusal; that's not preclusion. There's a difference.

COMMISSIONER KEMPF: No. No. But if the government exercises the right of first refusal then they're out. That may not define what it means, but that's what I took it to mean.

COMMISSIONER LITVACK: Okay. Thank you.

COMMISSIONER VALENTINE: If we end up choosing 2(c), then we can decide what it means.

CHAIRPERSON GARZA: All right. I think, unless anyone else has anything to say, we can wrap it up for now. Obviously, we don't have full consensus, but that's not necessarily our objective at this stage.

So, staff will do what they're doing with every issue, which is writing things up.

MR. HEIMERT: Perhaps we could go through the options under 3 again, and who was inclined toward those, because I think that got a bit murky at times. I think we're clear on 1 and 2, but the different possible recommendations to the states –

CHAIRPERSON GARZA: Do you think maybe you could

just write it up and do what we talked about before? Circulate it and if there are any errors, people can correct it?

MR. HEIMERT: I can try. Why don't we take a 10-minute break. We'll resume at ten past 3:00.

[Whereupon, at 2:58 p.m., the meeting on state Enforcement Issues was adjourned.]

**Robinson-Patman Act Issues**

MR. HEIMERT: Why don't we begin?

Commissioner Litvack, would you like to give your views on the Robinson-Patman Act? Your initial views.

COMMISSIONER LITVACK: This one where, harkening to something John Jacobson said, where probably the ultimate result is preordained. But I am going to, nonetheless, take what I think is the right and better position.

I'll work backwards by saying I would favor repealing the Robinson-Patman Act. So we'll just start there. At a minimum, I would recommend repealing Section 3 of the Robinson-Patman Act.

And as far as the – what else – I guess I should start with, the purpose of the Robinson-Patman Act ought to be to promote consumer welfare and competition. I don't think that we have received any evidence that suggests that the Robinson-Patman Act really serves any purpose that's not already served by Sections 1 and 2. And I don't think that we can make any specific finding with respect to the cost of

benefits of the Robinson-Patman Act based on the record.

Anecdotally, and personally, the costs are enormous for most companies. I've experienced it and I think others have, too. I'm not familiar with any details that would support that, but I can tell you it's real. I would eschew the notion of fiddling with the Robinson-Patman Act in any other way for fear that we would suggest that it can be improved or that minor tinkering will somehow address the problem.

And so, I would just sort of leave it where it is and say that it should be repealed. And I wouldn't try to touch any of the subparts, 2(a), (b), (c), and so on.

MR. HEIMERT: Commissioner Carlton.

COMMISIONER CARLTON: I agree with virtually everything Sandy said. I'm in favor of 1. I'm in favor of 4, 5, and 9.

Given that I want to repeal the Robinson-Patman Act in its entirety, I'm not sure what I should do about 13, 14, 15, 16, and 17, other than saying that if we don't achieve repeal, I'd like to repeal as much as possible of it, since I don't think it serves any useful purpose nor have I ever seen a study to suggest that it does.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: Let me say, first of all, that I am not going to recommend that enforcement of the Robinson-Patman Act be delegated to the states.

[Laughter.]

COMMISSIONER BURCHFIELD: I agree with everything that Sandy and Dennis have said. It seems to me that maybe it's because I do tend to be optimistic, but I believe a consensus has now formed about the purposes of the antitrust laws and their purpose of promoting consumer welfare that I am less pessimistic about the prospects for the repeal of the statute than I would have been 10 years ago.

So, I would agree with proposition number 1, proposition number 4, proposition number 5, and proposition number 9. With regard to proposition number 10, I would not accept it in its current form, but I would accept it as a much less preferred alternative to 9 if the clause beginning with but were deleted, for reasons that –

COMMISSIONER KEMPF: Let me ask for a clarification, and it goes to several of the Commissioners. What I thought I understood this first Commissioner, Commissioner Litvack, who spoke, was on 1, saying that the antitrust laws should promote consumer welfare, total welfare and competition –

COMMISSIONER VALENTINE: You're wondering how you can vote for 1 and 4 as well.

COMMISSIONER KEMPF: Yes. And since the Robinson-Patman Act does none of that, he voted for 4, 5, *et cetera*. No, I didn't – Commissioner Litvack as saying that the Robinson-Patman Act should promote those things. I took him

as saying that the antitrust laws should, and that the Robinson-Patman Act does exactly opposite. And therefore, he was voting for 4 and 5.

COMMISSIONER CANNON: I think it should, but it does not.

COMMISSIONER LITVACK: Yes. That's the better way to put it.

COMMISSIONER KEMPF: Well, except there's no way it can. So, you know, I'm sort of saying –

[Simultaneous conversation.]

COMMISSIONER CANNON: I would accept that amendment. The point being that the purpose that any antitrust law should serve is to promote consumer welfare, total welfare, and competition, whereas the Robinson-Patman Act –

COMMISSIONER LITVACK: Does not.

COMMISSIONER CANNON: Does not. And so I accept that. I was going to conclude by reiterating the point already made, with apologies to everyone, but I think this is a very important point, and that is, a consensus or a recommendation by this Commission to make modifications to the Robinson-Patman Act I think would suggest that the statute could be saved, and I don't think that it can be.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: I agree with the Commissioners who've already spoken. I would say 1, with the modification

we just made – 1 and 4, I guess, as companions. And benefits and costs, I don't think that we have a record that we've developed that says anything about the cost but I think that, you know, there have been studies ad nauseam for many years that have pointed out the costs and benefits.

And then I would say, although I don't think it's likely to happen, that we should recommend repeal. And if not repeal, no tinkering, except for potentially repealing the criminal provision and hope that the courts continue to bring some rationality to Robinson-Patman Act enforcement..

MR. HEIMERT: Commissioner Valentine..

COMMISSIONER VALENTINE: I would vote for 4, 5, and 9. And I think I'm in the same position as – who started us off? I can't remember anymore. Sandy, perhaps or whoever was – you know, with respect to anything beyond 15, 16, 17, all those sorts of things, you know, if we don't end up with 9, then we'll worry about cutting back other parts. I guess would be true of 10, but why don't I just stick with 9, for now.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Me, too, with one added wrinkle. In other words, I go for 4, 5, and 9 and the no tinkering – but I would probably do the following. On the ones that we are not going to tinker with, in the staff report, I would discuss those under particularly pernicious as the Robinson-Patman Act's criminal thing, especially awful

is the – I would use those as examples of why we're repealing, just so no one loses sight of them.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: I have to say that part of my job, sometimes, is to say what goes without saying, which is about as far from a Robinson-Patman Act expert as you can get. But I did run up against it in my last life as General Counsel of Circuit City, and I did enough of it to know that – I just don't think there's any really significant case to be made for retaining it, at this point.

As far as I can tell, I may be wrong, but we may be driving towards a unanimous recommendation, here, which I think might be the first one that we have done that on, unless I'm – in terms of any major recommendation. So, I'm happy to see that. I think, frankly, that a unanimous Commission will send a good signal to the folks on the Hill and elsewhere that the time has come to do this. So, I vote for repeal.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Sorry to destroy –

COMMISSIONER CANNON: Oh, no.

[Laughter.]

CHAIRPERSON GARZA: Steve, you did it again.

COMMISSIONER CANNON: I can't believe it.

COMMISSIONER SHENEFIELD: The illusion of unanimity is an expensive one. I am currently minded to vote in favor

of 7, 10, and 14 through 17.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: 4, 5, and 9, for reasons already stated by others. I would reword 4, that we find that the Act doesn't serve any public purposes not already served. It clearly serves certain people's narrow private purposes.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: I'm leaning to follow the lead of John Shenefield, and I want to explain why, briefly. I also think that, conceptually, the Act should be repealed. At the same time, I think this is not a recommendation that will be received with any credibility or interest by the Hill. And I need to think about that, because it could undermine our credibility in a larger way. That doesn't mean that you just say it's wonderful and hope that the Hill and Congress appreciate.

But this is not going to happen. And here's why it's not going to happen, not just because of the political interest that would probably go up immediately and talk to some leading lights on the relevant committees, but because economic discrimination is coming up increasingly in two areas that really rivet the attention of people who understand antitrust and who don't. That's in the media area and that's in the telecommunications area.

One thing that has happened since the early 90's,

is that, because the Robinson-Patman Act doesn't really work – because discrimination under the competition statutes, for some reason, can't be applied in the way that we felt comfortable with – there have been other areas of the law, and other agencies that have seized upon that vacuum to create their own quasi-antitrust laws to deal with discrimination.

This is where the program access rules came about. As buyers of content, smaller and larger, had to deal with the fact that the content owners could bundle packages of content together and sell them, maybe, to cable at a much-reduced rate, probably because of volume discounts. That basically discouraged the development of other distributors like satellite, which would, in the overall picture, be very good for the American consumer to have some choice in multi-channel video programming, which is what we live for when we go home.

That led to Congress creating something called the program access rules and then the FCC stepping in to try to clothe them as best they could under some kind of, you know, communications/public-interest test.

This same trend is going on today, as we speak. Probably the most decisive vote of this trillion-dollar telecommunications debate that has been brewing and is now coming to a head in the next few months, and it's certainly coming to a head on the House side this week, is all about

discrimination, or alleged discrimination. This time, it's about internet-service providers who want people to have as much access to the Internet as possible and are worried that – whether your cable line, or phone line, or any kind of line that runs into the household – If you have certain relationships or limit your relationships, preferred or otherwise, you will deny people access to the Internet.

So, in a few days there's going to be a vote about what I can only call an antitrust discrimination provision. If the Robinson-Patman Act applied to services, which, of course – there was no service economy in 1936, I think, with all the problems that many of us see in the application of this flawed statute. I think people would hunger to be able to say there is some kind of antitrust discrimination statute. And that would probably resolve the issue in this huge debate, at least initially. Not politically, Steve, but at least there people saying, what do we do.

So, instead, people are writing their own antitrust discrimination statutes. That's why I feel we're in a difficult position, intellectually, because I do not believe the Robinson-Patman Act has worked; it is not a good model of enforcement, where enforcers do not enforce this law on the books. On the other hand, if there's a way to at least say, let's repeal this much of it but maybe we can make the rest of it work and maybe we can make the rest of it work both for products and services –

I, at least, want to stay open to that as we move forward. Maybe then I will fall back to where I think the general consensus and just flat repeal. But, for now, I'm going to be staking my chariot to John Shenefield's path as we try to at least start this discussion.

COMMISSIONER CANNON: Clarification. So you would be in favor to apply it to services.

COMMISSIONER VALENTINE: Are you voting for number 12, then? The second 12 that's really –

COMMISSIONER CANNON: I'm going to vote for 7. I will vote for 10. Yes. I will vote for 12, and 14 through 17. 12 extends the Robinson-Patman Act to services; that's at the bottom of page one.

COMMISSIONER KEMPF: You want to make a bad law worse. Is that what you're saying?

CHAIRPERSON GARZA: Okay. So 11 is recommend that the FTC increase its enforcement of the Robinson-Patman Act and 12, recommend that Congress amend the Robinson-Patman Act to make it cover sales and services.

MR. HEIMERT: Correct. Well, if Commissioners could mark the outline so that 11 is recommend the FTC increase its enforcement. 12, recommend to Congress amend it to cover services.

COMMISSIONER JACOBSON: I want to ditto what Bobby Burchfield said in pretty much *hite verba*. I want to comment a bit on what John Yarowsky said. There's probably no one in

this city who knows more about the political process than Vice Chair Yarowsky. There's probably no one in this city today who knows less about the political process in this city than me.

Having said that, it strikes me that what Bobby said is logical for reasons that I'll explain. It is not a political dead letter to suggest repeal of the Robinson-Patman Act. I think one of the things that we found in trying to set up the hearings for this statute, and that I found in my own research, is that getting people to come out of the woodwork and defend the statute was unusually difficult.

And you did not have the same coalition that you had back in the 70's and in other periods of time to support the statute. Now, I would vote for repeal of the Robinson-Patman Act because I believe enforcement of the antitrust. I believe the most pro-enforcement thing with the Robinson-Patman Act that we can do is to recommend repeal of the Robinson-Patman Act.

But even if I thought the political issues were difficult, I would still make that recommendation. But I question whether they are, and I think we should be honest and vote our consciences on this one and let the political process work its way. And I assume we'll be educated during the process. I will be, anyway.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: Jon, I don't really fully understand the bills that you were talking about – I know something about them, but I haven't worked on them as you have – but as I was listening to you, I was thinking that maybe the answer really isn't to broaden the Robinson-Patman Act or seemingly endorse it, but maybe if there's going to be legislation in respect to these network industries, it's better to have Congress focusing specifically on those issues. And hearing the back-and-forth and really making a decision directed specifically to those industries, rather than having it come in through the backdoor – further development of the RPA Act in the courts.

And the other thing I just wanted to ask is, is this going to be sort of an *Illinois Brick* situation? Let's just imagine that, somehow or other, this went through, and there was a repeal of the Robinson-Patman Act; would we then see 30+ states essentially finding a new purpose in life? And what Bobby has said – initially, basically, we would be ceding Robinson-Patman Act enforcement, in essence, to the states.

VICE CHAIR YAROWSKY: Well, as to the first – and, really, Deb, if there had been a choice, I would have taken the choice of saying that maybe Congress should substitute freestanding statutes – And that's what we're watching now. We're watching freestanding amendments to the Clayton Act very specifically drawn. Whether it's to the oil industry,

to the telecommunications industry, or to very specific situations, we're seeing a lot of freestanding statutes.

I would certainly favor opening up that venue and recommending that to Congress if they feel they have to deal with discriminatory impact. Then, expanding or trying to keep resuscitating the Robinson-Patman Act is not a choice; maybe we can add that as a possibility.

If that would be at least a recognition of what's going on on the Hill, it would show some political reality. And I think I would seriously consider that, as opposed to just saying, do away with the one anti-discrimination tool that seems to exist and that people seem to think exists.

Back to the other issue, whether states will jump into this, they may. I had not heard that. And most of the jurisdiction we're talking about is exclusively federal jurisdiction because of telecommunications. So there're certain things states can do, but generally, that is interstate commerce, and we're seeing federal statutes.

Your question is actually is a suggestion or recommendation that I would ask that people bear in mind as we move forward today –

CHAIRPERSON GARZA: Just one follow-up. Other than committees on the Hill that are looking at the telecom and media issues, are there other constituencies or committees that would likely – is there a small-business side?

VICE CHAIR YAROWSKY: Yes. There's a small

business, but they have other issues. I mean, this is part of the folklore – and I don't mean that in a pejorative way – of small business and the Small Business Committee jurisdiction. It's not like they have a lot of hearings on Robinson-Patman and kind of defer to Judiciary on it. It's part of the makeup of the history of those committees. Quite honestly, there is not a lot of political agitation. It's just that, to get affirmative legislation to repeal it, politically, it would be a very uphill climb.

COMMISSIONER VALENTINE: I guess I would say that, perhaps in contrast to that, the other thing that I found striking about the hearings and about the testimony that's been submitted is the decline in the number of Robinson-Patman Act cases that are being brought in the courts, which is a fact that was commented on by several people who testified.

And the other fact is that, if this really was meant to address buyer power, it is absolutely the wrong remedy for that problem. I would be happy to somehow be briefed or get some background on what John is talking about. I don't understand what he's talking about at all; I don't know anything about – and, quite frankly, discrimination in access in networks is going to be a very different thing than pricing discrimination.

But if anything, I would think the political concern today, to the extent that the Chairperson's comments

are going to that, would be a Wal-Mart issue. And whether one should or could say something about how to address buyer-power problems through monopsony laws, and Section 1, Section 2 provisions might help, but I really don't see evidence that this Act has the same passion and hue and cry today that it did decades ago.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: While I'm not familiar with the statutes that Jonathan referred to, I tend to believe that must carry, and things like that are not in the public interest, but be that as it may, I agree with the Chairman that if those things are going to be dealt with, they ought to be dealt with explicitly and directly and on their own merits.

And what I'd like to know is what John Shenefield's reasons are for the position he articulated.

COMMISSIONER SHENEFIELD: I'm waiting to hear the others.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: In responding to Jonathan Yarowsky's points, which I listened to carefully and respect, it seems to me that there is a strong consensus, if not unanimous, that the Robinson-Patman Act recommendation should be accompanied by a strong statement that the Robinson-Patman Act hasn't worked, that it's been harmful to the economy, and that it's disliked by businesses, economists, courts, and

other thinking constituencies.

The benefit of having a strong statement like that, I would hope, would be good persuasive ammunition for those people on Capitol Hill who are trying to oppose the extension of these concepts into other areas of the economy, such as telecommunications or service industries. So, I can see even if the recommendation to repeal the Robinson-Patman Act isn't acted upon favorably, I could see much benefit in this Commission reaffirming what other commissions have said over the years, that the Robinson-Patman Act doesn't serve the purposes of the antitrust laws and should be repealed with fully stated, compelling reasons for that conclusion, which can be used, at least to try to tamp down the spread of these concepts to other areas of the economy.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: I want to talk about a couple of things. One, in terms of state enforcement, there are a number – it's certainly not a majority of the states – but there are a number of states that do have little Robinson-Patman Act provisions, including California, which is not a trivial state. You know, over ten percent of the economy –

What I would propose to do, since I don't think we have – I would argue vigorously against advocating preemption by the federal government of state RP laws, but I would recommend including in the report language suggesting that

state courts interpret their Robinson-Patman Act cases consistent with the antitrust injury provisions of the *Brunswick* cases, suggested, I guess, in item 13 I think it is. And I think that would be a useful add on to our report and a useful way of addressing the problem of the state cases.

There's a separate question that Commissioner Valentine raised about buyer power. Now, true monopsony power – that is, the power to depress purchase prices by reducing purchases – is extremely rare in our economy today. It can only exist in certain types of industries with upward-sloping supply curves that knock out most manufacturing right off the bat. So, the true sort of monopsony dead-weight loss problem is a relatively minor one.

What is not well understood, as I read the economic literature, and what I think needs to be better understood, is the consequences of great buyer power achieved by economies of scope rather than of scale. And there are a number of firms, one in particular, that have relatively small market shares and properly defined markets, but, nevertheless, because of their economies of scope, are able to exercise significant buyer power, not necessarily monopoly power.

There's not been a good economic analysis, maybe Dennis can speak to it, that I've seen. I would also like to see in our report a suggestion that the Federal Trade

Commission, through its investigation and report responsibilities, specifically focus on buyer power in the economy to determine its extent, to determine whether it has positive or negative effects on consumer welfare and make a report and recommendation about whether there's anything to be done other than to admire the companies who are able to bargain for lower prices.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Several things.

I thought that one of the most powerful, or among the most powerful, pieces of support for repealing the Robinson-Patman Act was the testimony that we received from those who advocated that we not do that. I though that their testimony was a powerful case for doing so.

Secondly, there aren't many cases, as some of the Commissioners pointed out, but there are too many. And the Supreme court over the last 20 years has taken something like six or seven Robinson-Patman Act cases and no merger cases and one or two monopoly cases. So they are squandering the precious time they have that could be used in important areas of the law to bail out all of the bad decision that emanate in the Robinson-Patman Act area. So, just for the broad, continued enhancement of antitrust, if they were using their time on antitrust cases for more worthwhile things, that would be good.

There may be state mini-RP Acts, and if you abolish

the federal one, there may be more of them, but I think that's a bridge I would cross when we got to it. That's not a reason not to repeal this. And I also agree with Commissioner Jacobson that we ought to use the report to try to influence that.

As far as the specific statutes, you know, for almost all statutes, one of the key things is what you call it. If you have a "death tax," who can be opposed to getting rid of the death tax? Similarly, the legislation John Yarowsky referred to is often called "Net Neutrality." And those who are championing the right of the small guy to have access to the net, it turns out, are principally Microsoft and Google and people like that. So, you tend to be suspicious as to whether they are really concerned with the lack of access to the Internet that the small have, or whether they are more concerned with other interests that, perhaps, are their own. In the history of telecomm legislation since the 1982 breakup of AT&T, the overriding theme is that everybody's position seems to be driven almost entirely by what is in his or her own particular interest.

As far as the Robinson-Patman Act history is, it was, you know, largely the grocery industry's response to the Great Atlantic and Pacific Tea Company. And you can't find an A&P store anymore, nor can you find a small grocer anymore. So, it neither saved the small grocer, nor did it save A&P. A&P lost out to much bigger outfits, like Publics

and Safeway, and the like. And I wouldn't be worried about the need for it to protect us against Wal-Mart, either. Competition will serve that fine.

In terms of monopsony power, there is this case out of the 9th Circuit, the nutty *Weyerhaeuser* case, and I think there may be a certain petition pending on that. I'm not sure what the current status is on that.

COMMISSIONER JACOBSON: The court has asked the Justice Department to file a brief.

COMMISSIONER KEMPF: Okay. But that is the first monopsony decision I've seen in quite a while and is clearly, in my judgment, way off base.

In any event, I'm pleased to see that we have nine Commissioners already prepared to vote to repeal, no ifs, no ands, no buts. My instinct is that Commissioner Delrahim, were he here, would make that ten. And this is an area that I am confident that in our final report we will be unanimous.

[Laughter.]

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: I actually thought about small grocers. They have their own trade association, it's called the National Grocers Association.

COMMISSIONER KEMPF: I think they spoke, didn't they?

COMMISSIONER CANNON: I missed that hearing that day. I had a headache.

[Laughter.]

COMMISSIONER CANNON: But they are terrific. I happen to know them pretty well. They are a terrific organization, and there are many, many more small grocers in the United States than you can think about. So, let me put in a plug for the NGA, there.

COMMISSIONER KEMPF: Very good.

COMMISSIONER CANNON: Thank you.

And secondly, I've got to you, John, I think that if services were included from years ago, all these revisions you talk about, they'd still be there, because it's a concentrated area. Here's the solution: they lay it in the lap of the right jurisdiction. And for somebody to say, Robinson-Patman Act covers services, why don't you do that? Not a chance. Not a chance.

So, I truly think that it would exist regardless of that. But for years I used to kind of be in your camp on this, which was either politically impossible or not a lot of harm. Just not a lot of those cases; nobody ever goes to jail, so don't worry about it.

But after ten or 11 years in the consumer electronics business I will tell you, there is a lot of harm that is visited by this statute that people never see and never think about. But on a day-to-day basis in running a business, there is significant harm. So, I really have come the whole way. And I'm willing to stake out and say let's

repeal it. And I just think, gosh, saying we amend it to services – I agree with Don; I think that's really kind of making not a very good statute that needs to go away even worse.

Other than that, I'm crazy about it.

[Laughter.]

MR. HEIMERT: Commissioner Carlton.

COMMISIONER CARLTON: I was thinking about what John was saying and my reaction is that, initially, as I was listening, I was thinking, oh, maybe I was too strong, but then the more I thought about it, I think it actually reinforces the case for asking for repeal.

And the reason is this. The Robinson-Patman Act is clear and simple special-interest legislation that helps one group at the expense of everyone else, of U.S. consumers. It's exactly the type of special-interest legislation in which a small group is benefited and a large group is harmed. It appeals to politicians. Politicians benefit by acceding to the political pressure because they can get concentrated supported from an interest group. And the people they're harming, they're harming so little they don't really notice it.

So, to the extent that there are these other bills that may allow for Robinson-Patman-like discrimination, I think I would like to see it go through Congress so that it's transparent in a way that the press, hopefully, will pick it

up and say, someone's trying to pass another special-interest piece of legislation and this politician is caving. Let's have it on the front page of *The New York Times* and maybe they won't do it.

So, actually, the more I think about it, my view is that we should be strong in asking for repeal of the Robinson-Patman Act, and explain why. It's particularly because it appeals so much to politicians that I think we should be tough on it.

I wanted to agree, in part, and then disagree with, something that Jon Jacobson said. I think his suggestion of including a statement that, to the extent that the states pass Robinson-Patman-like legislation, we – I guess it's not a question whether we can preempt them. I might go that route. But if we don't go that route, I think it is important to include a statement like you suggested, that it should be interpreted not as special-interest legislation to harm consumers but in light of the goals of the antitrust laws. I think that's excellent.

Regarding this issue of buying power, I think it's exactly right. There's confusion between monopsony power and buying power. And oftentimes, when there are discussions of Robinson-Patman and they're talking about buying power, they really mean some buyer is able to get a different price than some other buyer, which isn't really monopsony power, at all.

But that's no different than price discrimination;

the flip side of buying at different prices is selling at different prices. So, there's a lot of price discrimination in our economy. I'm not sure I would call for the FTC to study it. My sense is that how I think the proposals lay out, it's going to create an antitrust – on Section 1 and 2, and the antitrust laws are adequate to deal with it.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I'll do my best to answer John Warden's question.

It seems to me that this is a subject that is a much more complicated subject than you all are giving it credit for being. The question is not whether this is an antitrust law or not, and if it is, then various things follow. The question is, to what is this really being responsive? What is the constituency for this? Why is it so powerful in Congress? What are the needs that some people think are being met? And labeling it an antitrust law or not is sort of beside the point.

I took the position I took to underline what I believe to be the truth, which is that the antitrust laws are actuated by purposes greater than pure economic efficiency, that they respond to cultural and historical impulses – forces in our country, which are mostly still there. And the question is, is it worthwhile acknowledging them? Do we make ourselves more or less relevant by facing away them?

And so I'm deeply conflicted about this statute. I

wouldn't venture to suggest that Don Kempf is wrong. That is to say, that this won't be a unanimous recommendation. But I do urge you to think that it's a little more complicated than the discussion so far has reflected.

Dennis puts his finger right on the main point. It is special-interest legislation. There's no doubt about that. So are the civil rights laws, special-interest legislation. And we ask in every case, is the benefit to whatever group is favored outweighed by the detriment to whatever larger group is disfavored?

In this case, it's not at all clear to me what that answer is. Now, I didn't see any evidence presented to this group about the costs and benefits. We all have intuitive views on the subject, borne of our own experience. I venture to say, at least up until I came to Washington, I did as much antitrust work in the Robinson-Patman area as I did in any other area, because that is, as Steve knows, out in the real world, that is a major concern.

So, I'm perfectly aware of the defects and the problems and the shortcomings and the ways in which this is so easily criticized by people in academia and otherwise, but I simply don't think that is the whole story. So, my bottom line view is, if there is evidence that this is out of balance, harmful, I'd like to see it. If there is evidence that there is some better way to be sure that we have small businessmen taken care of, which I take to be the political

objective of this statute, if they can do it in some more efficient way and less harmful to consumers, I'd like to see that.

But I'm not, at this point, prepared to make Don Kempf's prediction come true.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: A couple of observations, and I'll close it with just a factual question.

But I couldn't agree more that the antitrust laws have purposes other than, you know, short-term price effects as disclosed by neoclassical price theory. I couldn't agree more with that. And I think that's a valid point.

What I don't think is that the Robinson-Patman Act, as constructed, is a useful tool to achieve the other goals of antitrust. I think the protection, if you will, of small business is better achieved as Pitofsky's article suggests, through tiebreakers in close cases, by having more robust vertical restraint enforcement, and through means other than the price discrimination law, which, at its heart, really impairs to the ability of firms to compete with each other on price. One of its principle goals is to do that.

The evidence of harm, for anyone who has done work, as I know you have, extensively, in the Robinson-Patman Act, is simply the massive cost of compliance that we all observe. It's difficult to quantify. But think of all the time that you spend on the phone and in conference rooms with in-house

counsel, with pricing managers at companies explaining the ins and outs of the Robinson-Patman Act. If you're anything like me, apologizing to the company for the fact that the statute is that way, helping them draft the meeting-competition form, explaining why cost justification really isn't a defense. The costs of compliance of the statute are just very, very, very high. And I could never quantify or even think of a methodology to attempt to quantify them.

The question I have, and it's just a question, is, was it under your administration that the Justice Department recommended that the statute be repealed, or was that Sandy? Was that before you or after you?

COMMISSIONER SHENEFIELD: It wasn't my administration. It was Don Baker, and it was early 1977, as I recall. I did my best never to mention the subject.

COMMISSIONER JACOBSON: Thank you.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: Yes. Just one more comment and I'll quit.

It always has been, and I believe it always will be the case, that small business is the economic engine of the country. I mean, it's just hard to deny that fact. And I think that a reason that is so is not the Robinson-Patman Act. And I do look on the harm to us all as American consumers and to business as a whole, and that's why I come out for repeal.

But to think that small business, I think, is clinging to this as one of the life buoys for keeping them afloat just isn't the case.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: Yes. I was just probably going to say a lot of what Steve said, but not as well.

The fact is that I understand John Shenefield's point, which is that, yes, this is special interest, we ought to think about the special interest and think about what good it is doing. And my problem is that we really didn't receive, as far as I know, any evidence that suggests that this is really accomplishing anything for anyone.

There are clearly negatives. There is all the cost that John Jacobson mentioned. And if you're General Counsel, as Steve was and I was at one time, you know all the time that is wasted, totally wasted, thinking about this, talking about this, trying to explain this to anyone, trying to figure it out for yourself, trying to figure out 42 ways about why you can say okay, which is what you're really trying to do, anyway. And then you say, whom is it benefiting? And we had a couple of people show up and testify, and I guess I have to agree with Don Kempf. I thought some of the answers to the questions were the best evidence in the world why there was no particular benefit to this, quite to the contrary.

The cost is price rigidity. The cost is the cost

of advising and spending time trying to comply. The benefit – I don't know. I don't see where anyone has come forward in small businesses, as Steve said. And the question is, is it due to the Robinson-Patman Act? I don't think anyone, including John Shenefield, would answer that yes.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Yes. Commissioner Shenefield has said, gee, he'd like to see evidence of the harm, and I would ask the staff to look at our hearing record and our submissions, because it is my recollection that there is considerable evidence in there, and there may be beyond that, as well. So, I would ask that the staff seek to assemble some of that for Commissioner Shenefield's benefit, and for all of our benefit.

I would add to what Commissioner Jacobson said. I think Commissioner Litvack alluded to it when he used the phrase "price rigidity." One of the worst things in terms of the harms is that people, in their desire to comply with the Robinson-Patman Act – and what I mean by this, is to not run afoul of it – is that they find that the easiest way to avoid litigation and otherwise is to decline to lower prices to consumers. That's a hell of a price to pay.

Another thing is small business. Today's small business is tomorrow's big business, and today's big business may well be tomorrow's small business. To go back to the grocery example I gave, the Great Atlantic and Pacific Tea

Company, you can't find an A&P store anymore. They are now a small grocer –

COMMISSIONER WARDEN: There are two within five miles of my house.

[Laughter.]

COMMISSIONER KEMPF: You're rare, then.

And you take a look at almost any industry, and yesterday's giants are often today's pygmies, and startups have now supplanted them. So competition has prevailed through our history and remains robust. I, for one, believe that the Sherman Act is one of the things responsible for that.

But to go to something else Commissioner Shenefield said, there is not, as judge Bork and others of the Chicago School would have us believe, and as I would like to be the case, solely an economic motivation and a consumer-welfare motivation for the antitrust laws.

I am leaving this Saturday to teach at the University of Colorado, and I have, for my various classes, have teasers for the students. And one of the things I have in one class is, passions run strong in antitrust. Fear of the aggregation of "power", conservable, possible, oligopolistic, or monopolistic behavior, the desire to return to a nation of shopkeepers, you name it. Those are strong social things. Most of them have nothing to do with the economics.

But at various times in our history, they have been powerfully influential on shaping the antitrust laws. I think that the 1950's and the time of the Kefauver hearings, there was not a lot of good economic analysis connected with those hearings. There was a great deal of passion or rhetoric having to do with social and other values that were perceived to be served.

So, I don't think we should be unmindful of those. I happen to think that this particular statute does not serve those interests well. I just think that history has shown that it serves all interests badly, and that we ought to strongly and unanimously recommend to Congress that it be repealed.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: It seems to me – it's always seemed to me, since I've been practicing in the antitrust law, that it's difficult to find a legal concept more irrational than the meet-but-don't-beat rule. If someone is willing to compete against a price, why shouldn't they be able to undercut that price? But you take a risk if you do that under the Robinson-Patman Act and you are encouraged not to reduce your price in a clearly competitive marketplace; you are encouraged not to lower your price as low as you might want to lower it, and that just is irrational, and it certainly leads to higher prices in areas where the Robinson-Patman Act would be applicable than we

would have otherwise. And I just think the social cost of that, quite apart from the economic and legal irrationality of it is something that has long since passed its time.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: Well, I was only thinking of a very, very small point, which is that, after our first set of hearings, I went and talked to the local small businesses where I have my farm out in Rapahanna County. We have a Wal-Mart in Culpepper County; it's about a 15-minute drive, and we have a couple of small little grocers in our little town of Sperryville. And I asked one of them questions relating to the Robinson-Patman Act.

I should say that this is one of these small businesses where you go in and he greets you by name, and he keeps *The New York Times* for you, and he put a shelf in for me for my vegetarian natural-food garbage. And I get good service from him. And, notwithstanding the Wal-Mart, he's still in business. And why is it? Because we all like the diversity. We like being greeted, we like having our *New York Times* held, we like the fact that he says, is there anything you'd like to have me stock? And we've basically kept him in business, and I pay him a little bit more.

But I asked him the questions about Wal-Mart and told him some issues that we were thinking of, and his bottom line to me, when I explained to him the rationale of the Robinson-Patman Act and asked him if he thought that it was

wrong that Wal-Mart should be able to demand lower prices based on volume buying and everything, and he told me, the Robinson-Patman Act is absurd.

And so there it is. It's only anecdotal, and it's only my own survey, but it gave me some confidence.

COMMISSIONER JACOBSON: More empirical support than there is for in favor of the Robinson-Patman Act.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I think one of the reasons you like him is because he answers the questions the way you want him to.

[Laughter.]

COMMISSIONER SHENEFIELD: The consumer is always right. I venture to suggest that the price-rigidity argument is pretty much a myth. There's no prohibition against beating a price if you beat it with every customer you have. What the prohibition is, is against discrimination. So, I'm inclined to dismiss it almost out of hand.

So, I would be interested in whatever the staff can find that is concrete, non-anecdotal, and helpful. But, notwithstanding my love of Sperryville, Virginia, and my admiration for the average Virginian, I'm not yet persuaded.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: It depends on the industry, but the effects on price rigidity that Commissioner Burchfield described are not imaginary. The one thing we

know about the Robinson-Patman Act – that we know for sure – is that it does not encourage discounting. If it has any effect on pricing, it's to discourage –

COMMISSIONER SHENEFIELD: How do we know that.

COMMISSIONER JACOBSON: Because the statute says –

COMMISSIONER SHENEFIELD: No. I know what the statute says. How do we know what its effect is?

VICE CHAIR YAROWSKY: Gentlemen, can I add something?

Those are the kind of questions people on the Hill ask. So, it's more than just whether you're right economically, with which I don't necessarily disagree. No one's using the statute. It's very hard to defend a vacant statute, but on the other hand, when people get questions – other than the empirical survey – what are the best references to cite to that will resolve these questions, because that would make it a lot easier. Other than just "take our word," this is absurd.

COMMISSIONER JACOBSON: What I could testify to is what I advise clients to do on a day to day basis, and that is – I think Sandy put it well – there are these 42 ways around the statute to allow you to do what you want to do, but sometimes, and it doesn't happen that often – occasionally, you are faced with a square question of whether the client can discount to a particular customer and not to others. They want to get that customer as a new piece of

business and you say that the Robinson-Patman Act is not actively enforced. It's *malum prohibitum* rather *malum in se*. If we can get around it this way, let's do that, but at the end of the day, there are some cases to say that there's a real risk that, if you do, this you'll be found liable for violating the Robinson-Patman Act. And some percentage of clients are going to say it's just not worth that risk.

Now, that tends to be in retail industry such as bookselling, gasoline – but to pretend that this effect doesn't exist because it's difficult to quantify I don't think is a good policy prescription. It definitely exists. I despair of ever being able to quantify it, other than that I know because I live it every week.

COMMISSIONER WARDEN: I agree with that.

I don't live it every week. It's been years since I've counseled people in the area, but I remember it. And Sandy and Steve have given their experience and so has John. Just having the burden of having to go to a lawyer, or first to the inside lawyer and then to the outside lawyer, and have meetings before you say to the guy, yeah, you can have it at this price. That's a real disincentive to price cutting.

COMMISSIONER SHENEFIELD: Just having a compliance regime is not a very good argument for repealing the statute.

COMMISSIONER JACOBSON: Yes. That's right.

COMMISSIONER SHENEFIELD: So, anything that the staff can find, I'd be interested in.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I would just have a brief comment that it's certainly not hard for me to believe that a businessman faced with the prospect of lowering his price to one customer to get a certain volume of business would be deterred from doing so if he had to lower his price to all of his customers in order to get that business.

So, I do think that businessmen are deterred from beating, as opposed to meeting, a competitive price.

COMMISSIONER SHENEFIELD: But my answer to that is that it isn't price rigidity that's being promoted. Somebody is being given an excuse not to beat across the board.

COMMISSIONER BURCHFIELD: The competitive situation may differ from customer to customer.

COMMISSIONER SHENEFIELD: It certainly does. And here we get back to Dennis's equation.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I guess the one thing that I will counsel Commissioner Shenefield, that if he has not done so so far - on behalf of the ABA, your partner submitted a commentary that tries to argue for retention of the Robinson-Patman Act, and tries to do a valiant job of tweaking and improving it to make it more consistent with goals of competition and consumer welfare.

By the time you get done reading it, if you are not convinced that the Act should be repealed, I would be

surprised.

COMMISSIONER SHENEFIELD: Is it because it's from the ABA, or what?

COMMISSIONER VALENTINE: No, because I think they're struggling like you are. They are really struggling with wanting to recognize that maybe this Act had some value, but, you know, the rationales that they come up with for repealing it are much more coherent and persuasive than the rationales for preserving it.

COMMISSIONER SHENEFIELD: I have gotten into trouble many times in my life by –

COMMISSIONER VALENTINE: Following your partner.

COMMISSIONER SHENEFIELD: – Not following the ABA and being fairly explicit in doing so. I won't be bothered if I have to do it again.

COMMISSIONER VALENTINE: Okay.

COMMISSIONER SHENEFIELD: If I find persuasive reasons to make this unanimous, I will, but so far, I haven't.

MR. HEIMERT: Commissioner Carlton.

COMMISIONER CARLTON: Yes. I just wanted to clarify. I'll keep some questions separate.

One question is, is the effect of the Robinson-Patman Act to impair competition, to cause price rigidity? That's completely separate from the question, is it a special-interest action?

I think you can say from the outset that it has to be a special-interest action, because we know interfering in the competitive system causes distortion. And whatever distortions arise, the tendency is to cut down on price flexibility and competition, because you are, in a sense, forcing uniform action, not selective action, and sometimes selective price-cutting can lead to more competition.

So, we know the direction that goes, and we also know the direction it goes in that it presumably is helping some small businesses. I don't think it's fair to say there's no evidence that it helps small businesses, nor do I think that it's fair to say that we're not convinced that it doesn't harm consumers through price rigidity or elevating the price. I think both of those things should be stated as a given.

And therefore that really puts squarely on the table that it is special-interest legislation; it harms one group at the expense of another. The harm to the group that is being harmed is actually more than the gain to the group that is being benefited. That is the, sort of, characteristic of special-interest legislation in which you intervene in the competitive process and you can show that the reason that occurs, even though it's unhelpful for the entire economy is because of the concentration of special interest.

So really, I think the questions you're asking,

although they're interesting to see what effect it has on price flexibility, price levels, I think, in general – I have a sense that it can only go one way. And the real question, it seems to me, is whether this is the type of special-interest legislation that Congress is interested in.

And if they are interested in it because small businesses are a special-interest group that they can't resist pressure from then, as I said earlier, I think what John Yarowsky said was exactly the way I would go. I want to see that in legislation. Specifically, people saying I want to help this group. I know it's going to harm people overall, but I'm willing to bear the political heat of that. I wish I could avoid that type of legislation, but that type of special legislation does appear to be endemic in our political process.

And it does seem to me that getting rid of RP will better serve our purposes of focusing the special-interest legislation in those areas where we can't prevent the special-interest groups from, in a sense, bulldozing the politicians. Maybe we can get stronger politicians. Maybe that should be one of our recommendations.

COMMISSIONER SHENEFIELD: Sometimes it's good to help special interests. I mean, you can call it a special interest piece of legislation if you want, but that's not an analytical approach. Some special interests people think are worth helping.

COMMISIONER CARLTON: I don't disagree with that, but if you are interested in helping a special-interest group, you should make it explicit.

COMMISSIONER SHENEFIELD: It's very explicit. It's all over the legislative history.

COMMISIONER CARLTON: No. I understand that. What I'm saying is, if you want to tax all consumers of a product to subsidize small businesses, which is what we can think of the Robinson-Patman Act as doing, you could justify the Robinson-Patman Act. I think if it was said that way, you would get much less support for it. Or, better put, along the lines of what Jon was saying, if, every time there is such a desire for special interests, because they're powerful in, say, bookselling, let them go to Congress and ask for a special provision. And then everybody can see, oh my God, the books I buy are going to go up. And maybe that will concentrate attention on the harm that special-interest legislation like this does.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: It seems like a lot of the arguments that we're hearing are, quite honestly, Robinson-Patman seems like an alien provision of the antitrust laws. The fact that it was codified in what we call the antitrust laws has made us have to deal with it here, but it's a very unusual statute. But it was motivated for precisely the reasons John Shenefield has described.

If we recommend repeal because our mandate is to look at the antitrust laws, and this just happens to technically be covered under the antitrust laws, we're just cleaning those laws up now; that's fine. But the vacuum will be felt and perceived. And so, what I would ask you to think about beyond John's request to staff to at least, is, let's look at the evidence one more time. And that's not just a delaying activity.

Then what my hope would be is that we could make some statements that we're repealing it for these reasons and then suggest to Congress that if they want to deal with the factors and motivations that led to the original enactment of the law, then they may want to look at other ways to try to do that, but not use the antitrust statutes. If that's what we want to say, because if not, we may just see the antitrust statutes used over and over again in coming months and coming years to try to reach this bundle of concepts that people feel strongly about.

And I just think if we just simply say, repeal it; it's absurd, with no more commentary, that's not going to give dignity or credence to the strong forces that John has described, or make us look very savvy to what we've just done, at least to some audience on the Hill.

COMMISIONER CARLTON: Follow up on that.

I think one of the points we could mention on that – I agree with you if you say that this is a special-interest

group – we understand what the rationale for the Robinson-Patman Act is – but it also suggests that if you want to help small businesses, there may be other ways. You may want to give them a tax break. You may alter various provisions having nothing to do with the antitrust laws. And you might point out that using the antitrust laws to subsidize small business is, in a sense, taxing the people in the particular industry who would otherwise have gotten the benefit of competition in order to subsidize small businesses in that industry, and is that what you want to do? That may be viewed as a peculiar tax policy. And maybe there are other ways that Congress should think about when politicians succumb to this political pressure, if you're going to succumb, at least succumb in a way that doesn't harm society as badly as this.

COMMISSIONER SHENEFIELD: Madame Chairman, may I suggest that we may have gotten to the end of useful discussion?

CHAIRPERSON GARZA: Yes. We probably have, because I was just writing a note to Andrew that we were reserving all our tax breaks for the oil companies. Unless anyone has anything else, I think we should just wrap it up.

MR. HEIMERT: Any votes changed from earlier? I think people seem to be where they were initially.

CHAIRPERSON GARZA: John hasn't persuaded anyone?

MR. HEIMERT: Nor has anyone persuaded John.

CHAIRPERSON GARZA: All right. Well, it's 4:20, and this allows us to –

CHAIRPERSON GARZA: Okay. Well, let's wrap this up real quickly. The next meeting is on what date?

MR. HEIMERT: June 7th.

CHAIRPERSON GARZA: And what issues are we covering?

MR. HEIMERT: state action doctrine and international, as of now.

CHAIRPERSON GARZA: That's all?

MR. HEIMERT: That's all.

CHAIRPERSON GARZA: We'll have a short day then.

MR. HEIMERT: It's currently scheduled for 9:30 in the morning, and we'll go as long as we go. It'll be at the FTC.

CHAIRPERSON GARZA: Okay. Don, you had a –

COMMISSIONER KEMPF: Three quick things. I had thought, when I came in today and saw this new form, that it would be helpful. I found it much easier to just write on the face on the box.

[Simultaneous conversation.]

CHAIRPERSON GARZA: What Andrew may do is ask you to fill them out, and just to make sure, because he's a little nervous about his count. I mentioned I think it might be more useful if we had them in the order that people talked, because it's a little easier to find it.

COMMISSIONER KEMPF: The second thing is that the staff was good enough to type up the piece I did on the fly seeking to address the treble damages issues, but there is no patent on wisdom as to the language, and I would encourage the staff to take a good look at it. I try to be economic in my use of words and would encourage you to be the same. And if my fellow Commissioners have any suggestions, you can just pass them right on to the staff and I'll take a look at it after the staff tinkers with it, but there's no magic in the language I have there.

And the third and final thing is that I notice we have back-to-back meetings on the 23rd and 24th, and I have discussed previously with the Chair that I thought it would be nice, in that circumstance, to perhaps have a dinner together on Friday night, the evening of the 23rd. I may have a conflict myself.

[Laughter.]

CHAIRPERSON GARZA: We'll work that out.

COMMISSIONER KEMPF: Howard Markey will be in the Arlington National Cemetery that day. I'll miss the noontime portion when I go over to that, and we may have some event that night, but I'll work around it and will be with my fellow Commissioners.

COMMISSIONER VALENTINE: Commissioner Kempf, I do have one question.

The piece of paper that I'm looking at is what I

think you're proposal was. You do not list whether the action was brought by a competitor as one of your factors. I'm not particularly in favor of – I think that is something that a lot of other Commissioners mentioned –

COMMISSIONER KEMPF: No. I would add that; that's an oversight on my part.

COMMISSIONER VALENTINE: And was actually not on the list that the staff circulated, either.

COMMISSIONER KEMPF: Yes. It was a sub-item on something else, but I would add that to those factors. I think that's a good suggestion.

COMMISSIONER VALENTINE: Okay.

COMMISIONER CARLTON: I would add one thing, and I would ask the Chairwoman to figure it out, but if we're tight for time, should we add a topic.

CHAIRPERSON GARZA: We'll discuss that.

COMMISIONER CARLTON: Okay.

COMMISSIONER WARDEN: Madame Chairman.

CHAIRPERSON GARZA: Yes.

COMMISSIONER WARDEN: I'd like to thank John Shenefield for his firm's hospitality today.

[Applause.]

CHAIRPERSON GARZA: Yes. It's very nice.

COMMISSIONER WARDEN: And also to urge Andrew to pursue the possibility of holding additional hearings in these chambers.

[Laughter.]

CHAIRPERSON GARZA: All right. With that, then, we'll end the meeting. Thank you.

[Whereupon, at 4:27 p.m., the meeting was adjourned.]