Separate Statement of Commissioners Burchfield, Delrahim, Jacobson, Kempf, Litvack, Valentine, and Warden

Congress created this Commission in 2002 for the purpose of examining "whether the need exists to modernize the antitrust laws and to identify and study related issues." Although federal commissions to evaluate the functioning of the antitrust laws are not new, this is the first such commission formed by Act of Congress in 65 years, and the first charged with a full scale review of the antitrust laws since the late 1970s.

Much has changed in the intervening decades. For example, international trade is less restricted and more prevalent, economic analysis of markets and marketplace behavior has become more sophisticated, American public policy has tended to be more firmly pro-competitive and anti-regulatory, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission have become more rigorous in analyzing allegations of anticompetitive behavior, state attorneys general have become more active in enforcing both federal antitrust laws and state competition laws, and courts have begun to eschew simplistic rules in favor of careful analysis. Formation of this Commission was timely and appropriate to assess the impact of these events on the administration of the nation's antitrust laws.

Against this background, the Commission came to its task with no set preconceptions. Drawn from varied political and professional backgrounds, the Commission has invited and heard testimony, and received written submissions, from distinguished academicians, practitioners, and government officials representing a variety of viewpoints on a broad array of controversial subjects. We believe that the Commission has heard and read these submissions with an open mind and, with the invaluable assistance of its outstanding staff, has carefully evaluated the diverse viewpoints.

Although the Commission has not been unanimous in all its findings, we believe it has achieved a remarkable degree of consensus, especially considering the difficult issues it has considered. We do not agree with every recommendation in the report, nor do we uniformly agree with each other, but we hope and believe the report, taken as a whole, should serve as an influential text for Congress, the President, judges, antitrust enforcers, and practicing lawyers.

Overall, the Commission's findings indicate that the antitrust laws are working reasonably well. This is due in large measure to the willingness and ability of courts in our common law system and of antitrust enforcers to revisit incumbent approaches to antitrust issues in light of advances in economic thinking and globalization. We applaud this receptiveness to new thinking by both courts and enforcers, and have every reason to believe that it will continue. If it does, the antitrust laws will continue to fit well with the ever-evolving United States and international economies. And the competition laws of the United States will continue to influence those of other nations.

The Commission did find some notable problems in particular aspects of antitrust law, however, and is therefore recommending a number of carefully considered changes. Some of the recommendations in the report, such as repeal of the Robinson-Patman Act, are not new. The Commission heard persuasive testimony and examined literature that convinced it that the Robinson-Patman Act has failed to serve its intended purpose of protecting small retailers from large chains, whereas its effect, if any, is to dampen vigorous price competition. The Justice Department ceased active enforcement of the Robinson-Patman Act decades ago, and the Federal Trade Commission has rarely enforced it in recent years. Even though it has had a formidable political constituency in the past, we believe a consensus against it has formed and the time has come for outright repeal.

In contrast to the frequent examinations of the Robinson-Patman Act, this is the first Commission to examine the practical effects of *Hanover Shoe* and *Illinois Brick*. Unquestionably, the Supreme Court's desire to save federal courts the difficult and complex task of tracing overcharges due to antitrust violations through the chain of distribution was well-intended. Nevertheless, these decisions have failed to achieve that aim and their practical consequences have proved much too costly. To begin with, under *Illinois Brick*, a direct purchaser who has succeeded in passing on all or a large part of the overcharge will realize an unjustifiable windfall. This windfall would be preserved by proposals to preempt state indirect purchaser statutes, proposals we believe are also politically unachievable. Under *Hanover Shoe*, the windfall is preserved even if federal direct purchaser actions are somehow consolidated for trial with state indirect purchaser actions. This result occurs because *Hanover Shoe* prevents a defendant from asserting or benefiting from the pass on defense against direct purchasers even if (hypothetically) the indirect purchasers were in the same courtroom in the same trial, and allowed to prove the same facts regarding pass on that *Hanover Shoe* prevents the defendant from proving.

A further unintended consequence of the *Illinois Brick* rule has been the advent of indirect purchaser lawsuits in state courts. Removal of these cases to federal court pursuant to the Class Action Fairness Act or otherwise has eviscerated the Supreme Court's desire to protect federal courts from the complexities of tracing overcharges through the chain of distribution. Indirect purchaser actions have unquestionably imposed an administrative burden on both state and federal courts. Even in those rare instances in which all state actions can be removed to federal court and then consolidated with all federal actions by the Judicial Panel on Multidistrict Litigation, current law requires that the cases be returned for trial to the federal district courts from which they were transferred.

The time has come, we believe, to overrule both *Illinois Brick* and *Hanover Shoe*, so that victims of antitrust violations receive just compensation, trebled, in a judicial environment that is efficient and fair to all concerned. We believe the Commission's recommendations regarding *Illinois Brick* and *Hanover Shoe*, though perhaps not perfect, would produce a major improvement over the current situation.

The Commission's ability to analyze these and other topics in a dispassionate way, with the benefit of considerable assistance from witnesses, public commenters, and a highly capable staff, will, we hope, contribute to the continuing reasoned evolution of the antitrust laws.

Separate Statement of Commissioner Carlton

I submit this statement in order to elaborate on certain topics covered and not covered in the Report.* I appreciate the difficulty of writing a report reflecting the views of many and compliment the Chair, Vice-Chairman, the other Commissioners, the Executive Director & General Counsel, and the staff for their work. Although differences in wording and tone undoubtedly exist from what I would have chosen, I restrict my comments here to a few select topics. I have tried to keep my comments brief and make reference to some of my articles and textbook for the reader interested in the details of my reasoning.

Tests for Exclusionary Conduct: Exclusionary conduct cases are highly varied and therefore one should not expect that a test that works well in one type of case will necessarily work well in another. Safe harbors for predation have little bearing on safe harbors for exclusive dealing. Developing different safe harbors for different types of conduct should be a priority. Proposed tests (e.g., profit sacrifice or no economic sense) that require one to specify the logic or profit of an act, but for the exclusion, can require a complex calculation subject to error. These proposed short cuts will work in only some exclusionary conduct cases. *See* Carlton (2007b).

Bundling: Although I vote in favor of the suggested safe harbors on bundling, I emphasize that they may fail to protect unobjectionable conduct. The justification for the first of the three pronged test (incremental revenues exceed incremental costs) seems to be based on an analogy to the Areeda-Turner (A-T) predation test that a safe harbor exists if price exceeds marginal cost. The analogy of bundling to price predation is faulty. In the predation model of A-T, there is one price. In the standard competitive model, it is odd for price to be below marginal cost in the absence of a predatory goal and, therefore, if one does observe this peculiar fact, one can go on to ask whether predation is likely by examining the possibility of recoupment. In the context of bundling, it is *not* odd to have the firm fail the first prong of the AMC test in the absence of a predatory goal. The reason is that bundling can be used as a method of price discrimination and it can be optimal for a firm, with no predation motivation, to set prices that fail the first prong. For example, if a razor manufacturer bundles a razor and razor blades together in a package and the bundle price is less than the price of blades plus the cost of the razor, then the pricing fails the first prong, even though this is a profitable strategy when one considers the future sales of razor blades. This type of pricing is well known to economists and not uncommon. *See* Carlton and Perloff (2005, ch.10).

* This statement, as well as my votes and opinions in the report and in deliberations, does not necessarily reflect the views of the Antitrust Division of the Department of Justice where I am currently serving as Deputy Assistant Attorney General for Economic Analysis.

By offering product A separately from the bundle consisting of (A, B), a monopolist can separate consumers into different groups and charge different prices. *See* Carlton and Perloff (2005, pp.324–30). The first prong of the AMC recommendation ignores the revenue benefit from this separation. Moreover, adoption of the first prong could cause some firms to offer only the bundle and therefore make it impossible to apply the first prong of the test. If the first prong is adopted by courts, they must understand that a defense for the pricing based on legitimate business reasons unrelated to predation should be allowed so there should not be a presumption (as there is in the A-T price-marginal cost test) that failing the first prong should suggest that something odd is occurring. Moreover, a defense showing the challenged pricing was used either for many years (so predation is unlikely) or during a time with no possibility of predation should allow a firm to escape liability.

Tying: The laws of tying need clarification. There is no escaping that tying is ubiquitous, can be efficient, yet can also harm competition. Therefore, the per se treatment of tying makes no sense while the rule of reason as articulated in *Microsoft* does. The logic of the leading case on tying, *Jefferson Parish*, is often non-economic. "Forcing" in particular is a peculiar concept. Courts should distinguish between tying that is price discrimination (which may help or harm consumers, but which is generally legal), and tying that can alter the competitive structure even for consumers not interested in buying the tying product. Only the latter should be subject to antitrust liability. *See* Carlton and Waldman (2002, 2005, 2006, forthcoming), Carlton (2001, 2007a).

Indirect Purchasers and* Illinois Brick*: I oppose the recommendation to overrule *Illinois Brick*, a decision that eloquently spells out the difficulties of allowing indirect purchasers to sue. I recognize that in certain cases direct purchasers may not have an incentive to sue. I therefore would allow minor exceptions to a ban on allowing indirect purchasers to sue. I would recognize the exceptions described in *Illinois Brick*. I would also consider allowing an exception when an insufficient percent (by volume of sales) of direct purchasers sue within a certain time period, as can occur when direct purchasers fear suing their major supplier. Further study is needed to determine what is an appropriate time period and to define "insufficient". I would preempt state laws regarding indirect purchasers.

I oppose the AMC recommendation to allow the removal of state claims on behalf of indirect purchasers to federal court. Although I oppose the recommendation, it would be improved if instead of removal, state claims were preempted and replaced by a limited federal right allowing indirect purchasers to sue.

Treble Damages: One purpose of damages is to deter undesirable conduct. A multiple of damages is needed when detection is not certain or when some parties are unable to sue to collect damages. I favor a reduction in the multiple to single damages when the actions are overt (e.g., exclusive dealing), and an increase in the multiple when there are some parties affected by the act who are unable to sue (e.g., foreign consumers in an international price fixing case). *See* Carlton (2007a). There are already limited instances in which only single damages are available (for example in the case of research joint ventures) in recognition of the principle that treble damages can under certain circumstances deter efficient behavior.

Contribution: I do not favor allowing non-settling parties to sue each other for claims for contribution because it involves a use of court resources and I am not convinced that it leads to more efficient deterrence.

Attempts to Conspire: If person A asks person B to fix prices, and person B refuses, it is unclear whether person A faces antitrust liability. I would alter the relevant laws including civil or criminal fine authority to allow antitrust liability and penalties on person A.

Robinson-Patman (RP): If repeal of RP does not occur, I would recommend that courts impose a requirement of antitrust injury in order to trigger antitrust liability under RP.

States' Merger and Non-Merger Authority: I would confine the states' antitrust authority to local matters and to those involving price fixing, boycotts, bid rigging, and market allocation. I would eliminate the states' authority to sue in cases involving mergers or other non-merger matters. I would preserve the right of states to sue in their *parens patriae* capacity for the exceptions I discuss above regarding suits by indirect purchasers. Based on evidence presented to the Commission, I fear that some states are understaffed in the area of antitrust and that there can be differences between the objectives of state antitrust enforcers and federal antitrust enforcers where this difference could lead states to pursue antitrust actions in which there is no antitrust injury. Moreover, because the actions of one state can affect other states when matters are not local, I favor confining states' antitrust activities to those involving only local matters. I would further confine their activities to hardcore antitrust offenses because that is where they already devote a considerable amount of effort and because that is where antitrust doctrine is clearest.

Study of Antitrust: Empirical studies of antitrust policy are needed to ensure that antitrust policy is appropriate. Retrospective studies of past policies can be useful. For example, studies of allowed mergers can confirm whether prices rose or fell after particular mergers. A finding of a systematic increase in price after mergers could indicate that merger policy is too lax. A more difficult, though perhaps more important issue, is the effect of antitrust policy on the economy. For example, a decision to forbid a particular merger may dissuade other firms from merging despite the fact that the merger involving those firms may enhance efficiency. Similarly, a decision such as that in *LePage's* that cast doubt on the legality of common pricing practices could impose costs on the economy as many firms readjust their pricing to conform to the particular decision.

Clearance Disputes: The report discusses the need to assign a merger case quickly to either the FTC or DOJ when a dispute arises between the two agencies as to which agency has the better expertise to handle the merger. Resolution of this issue is related to the much broader issue of how in the long run, industries should be assigned to either the FTC or DOJ. As some industries develop and others decline, there should be some mechanism to make sure that the industries be assigned to agencies with a sense of keeping the agencies in some balance.

Consumer versus Total Surplus: There continues to be a debate as to whether the antitrust laws should focus on only consumers (consumer surplus) or on both consumers and producers (total surplus). Aside from doubting the practical significance for most cases of resolving this issue, I note that I favor total surplus and that total surplus is what is used routinely in cost-benefit analysis, a tool of widespread use in public policy. I also note that there is a gaping logical inconsistency between favoring a consumer only objective and at the same time opposing a cartel to monopsonize. A cartel to monopsonize lowers total surplus but does not affect consumers in the standard models of monopsony. This logical inconsistency is one illustration that the focus on only consumers is undesirable. *See* Carlton (2007a).

Market Definition: The misuse of market definition cases is common especially in Section 2 cases when the analyst attempts to apply the market definition procedures of the Merger Guidelines. The arbitrariness in how markets are defined undoubtedly leads to significant error. I regret that the report is silent on the topic of market definition. *See* Carlton (2007b).

Market Power: The courts and economists are often unclear what the term "market power" means. Pricing above the competitive level, which is often taken to be marginal cost, is one common definition. If the market cannot be competitive, what should be used as "the competitive level"? Should one focus on rates of return and see whether the return is above the competitive levels? What is the difference between "market power" and "monopoly power"? How much market power is significant? How durable should the power be? The AMC is silent on these issues, which are in need of clarification. *See* Carlton (2007b).

Reports on Regulatory and Legislative Actions: The agencies should have a free hand to investigate and report to the American public the consequences on competition and on American consumers of various federal, state, and regulatory actions without fear of retaliation. Once they are aware of the costs their actions impose, the relevant government bodies can then decide whether their interference in the competitive process is justified by non-economic or political goals. Aside from examining various exemptions, the effect of International Trade Commission decisions would be a useful subject to study. By making transparent the costs of interfering in the competitive process, the public might be better informed and better served than they would otherwise be.

Competition Advocacy: The FTC and DOJ have a large concentration of economists and lawyers knowledgeable about the benefits of competition. They should be, but are not always, used effectively as a resource by other federal and local government agencies for structuring regulations in a way so as to not interfere too much with the competitive process.

Foreign Training: A desirable and recent phenomenon is the development of antitrust agencies around the world. An investment in the training of foreign enforcers is a good one for the U.S. Such training should receive high priority.

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Separate Statement of Commissioner Delrahim

It has been a true pleasure and honor for me to have had the opportunity to serve on this Commission with such a distinguished and dedicated group of professionals that despite different political affiliations all recognized the value of competition in advancing the marketplace and ultimately consumer welfare.

As the Commission's work progressed over its three year mandated life, I grew increasingly pleased with the recommendations and the general consensus the Commission was able to reach on most issues. My time serving in the legislative and executive branches in the government taught me that the best way to advance policy is to have as broad consensus on issues as possible. This is often possible if the position advocated is principled and those determining the policy approach the issue in a principled and serious manner. That was the result of the Commission's work and in large part due to the thoughtful approach and process implemented by the Chairman and the Vice-Chairman, Deb Garza and Jon Yarowsky, respectively, who deserve great credit for instilling a sense of unity to the group. In addition, the professionalism and dedication to competition of each of the Commissioners made the implementation of the goals of Commissioners Garza and Yarowsky possible.

Even with the largely consensus recommendations presented here, there were, of course, differences. These differences were generally few, and Commissioners were content to have had their votes recorded accordingly. We all abided by the process whereby the majority view prevailed. In fact, we worked hard where possible, even in those situations where we found ourselves in the minority, to make suggestions so the ultimate recommendation would enjoy as close to consensus support as possible.

Antitrust and Patents:
In all aspects of the Commission's study, except for one, the Chapter on Antitrust and Patents, I believe the consensus process was followed and whether I agreed with the majority or not, I was comfortable that the Commission, through its adopted process, selected an issue for study, sought public input from those involved, fairly deliberated the issues, voted on them, debated the issue after the vote and discussed the recommendations it would make. It is the recommendations contained in the very critical chapter on Antitrust and Patents that, in my view, unfortunately the Commission does not have the benefit of the full and fair record and deliberation they warrant.

It is because of this that I feel compelled to write a separate statement to present a full background of the very complex and important issues presented for the benefit of my fellow Commissioners as well as the public and the policy makers who will consider the recommendation of this report.

In my view, without taking anything away from all of the other critical issues that the Commission studied and I participated in, the most lasting impact of the Commission's work is the effect of its commentary in two areas: (1) international; and (2) antitrust and intellectual property, and particularly as these two areas intersect.[1]

I hold these two areas for several reasons. One is the globalization of antitrust laws, with approximately 90 international trading partners with antitrust regimes without an international agreement or common standard of what the laws should be. Another is the fact that intellectual property-based exports—whether copyrighted music, movies or software, or patent-protected goods such as pharmaceuticals or electronic products—have become this country's number one export. As such, their creation and protection is critical to maintaining a vibrant economy. But, with the rapid pace of globalization, intellectual property rights are increasingly crucial to all sectors of the global economy as well. Moreover, as firms innovate, manufacture and market their products globally, licensing of the intellectual property rights they hold or need often proceeds on a global scale, and differences among nations' licensing rules have the potential to disrupt cross-border commerce. As a result, I think this Commission has an important and justified interest in the choices the U.S. Government and other jurisdictions make about how their antitrust authorities will analyze the restrictions that appear in intellectual property licensing agreements.

My colleagues on the Commission are well familiar with my passion for this area for the creative and innovation community. I am heartened that we now live in an era in which the benefits of intellectual property rights are recognized around the world and the protection of these rights, once they have been recognized in any one country or region, is often made global through a patchwork of bilateral and multilateral agreements. These agreements have played a vitally important role in creating a bundle of rights and obligations that in effect globalize the protections for intellectual property.

That is why I feel so deeply about any issues this Commission studied or recommendations it now suggests. In my view, antitrust law and policy must be careful not to constrain the legitimate exercise of intellectual property rights. The application of antitrust laws must not illegitimately stifle creators or innovation by condemning pro-competitive activities that would maximize incentives for investments or efficiency-maximizing business arrangements. Antitrust enforcers should also strive to eliminate as much as possible the unnecessary

1 As I have disclosed to my fellow Commissioners, over the past year, I have represented many technology companies who may or may not fully support the statements that I make here. My views and passion on the topic here are a matter of public record from my speeches and articles while at the Department of Justice or while I was a staff member of the Senate Judiciary Committee. For the purposes of full disclosure, these companies have included Oracle, Microsoft, Micron, Qualcomm, Intel and Apple. I also represent other companies who might be interested in my comments here, including Johnson and Johnson, sanofi-aventis and the Medical Device Manufacturers Association. I do not and have not represented any of these companies before this Commission. I have represented Qualcomm before the US and foreign antitrust agencies on some of the topics I discuss here.

uncertainties for innovators and creators in their ability to exploit their intellectual property rights, as those uncertainties can also reduce the incentives for innovation. Only when the holders of intellectual property rights go beyond the legitimate exercise of these rights should antitrust law be used to constrain their activities, and only then in a manner that is based on sound economic policies.

There were many issues I wish we had the resources to study, as did a number of my fellow Commissioners. We all recognized early on and respected that to do a thoughtful job, we must restrain our desires and study a limited number of issues in accordance to a process adopted by the Chair and the Vice-Chair at the outset. It was within that process that a subcommittee voted on a set of issues to recommend to the full Commission and the Commission voted on those issues that a majority thought worthy of further full study to include public comment and full deliberation.

Unfortunately, the very important, yet very complex issue of the antitrust treatment of standard-setting was not one of those issues selected for study. As such, this Commission did not receive nor debate in its regular course full testimony on the topic for all Commissioners to be fully informed of all the issues at play and the policies at stake. I therefore do not support the Commission's recommendations in this chapter, nor believe it is worthy of this Commission's support given the amount of thought and deliberations other topics of study rightfully and thoughtfully received. It is in that spirit that I provide the following background so the public and my fellow Commissioners have the benefit of at least this Commissioner's thoughts on this critical issue. Moreover, I withheld my support for a wholesale endorsement of the FTC and NAS patent reform recommendations, not because I disagree with them, but as I stated during the deliberations, I believe that this Commission did not spend nor have the resources to spend to review each of the recommendations for it to put its credibility behind all recommendations the ramifications of which it did not fully consider or deliberate.

I now turn to the issue of standard-setting and antitrust and the Commission's inadequate background and debate behind its recommendations in this area.

This is undoubtedly one of the most interesting and important areas of debate in antitrust and innovation policy today. It is interesting because it challenges some of the basic concepts of intellectual property rights (IPR) and antitrust policy, and because it is an unsettled and evolving area of the law. This issue is critically important because the legal and regulatory framework for standard setting has—and will continue to have—a profound effect on the way innovative ideas get to market and innovators get compensated, and hence affects the whole innovation policy debate.

With true humility and recognition of my lack of economic training, I suggest—and I believe economists have universally recognized—that there are two types of efficiency in the context of this discussion. The first is called static efficiency, and it occurs when two or more companies are competing within a particular technology. The competition among those firms will lead to a streamlining of production and other cost-saving steps in order to reduce manufacturing costs and, ultimately, the price consumers pay. Although the benefits of static efficiency are very important, they are incremental gains. In contrast, the other type of efficiency, dynamic efficiency, results when an entirely new technology is developed and made available to consumers. Dynamic efficiency has much more dramatic effects on consumer wellbeing, and therefore is an appropriate focus of attention for policymakers.

Standard-setting should be viewed as a potential means for bringing about dynamic efficiency. In the words of current Deputy Assistant Attorney General Gerald Masoudi, my friend and successor at the U.S. Department of Justice Antitrust Division, "The goal of standard setting, generally speaking, is to find the best combination of technical success, cost, and time-to-market, while also delivering enough economic surplus that all parties (inventors, producers, and consumers) can share, so that the product is commercially viable."[2]

The setting of industry standards has proven useful and important to many sectors of the economy. By allowing products produced by different firms to function together, the setting of standards has made many products more valuable to consumers and often increased their utility. The setting of a standard for telephone cords and plugs, for example, has enabled the proliferation of devices and components that consumers purchase, knowing that they will plug into the phone or phone jack they have at home. As the global economy is increasingly characterized by information technology and intellectual property, the setting of industry standards has become both more critical and more complicated. Companies in high-technology industries understand the value of interoperability, which produces a strong incentive for companies within an industry to agree on a standard. Most often, standards are set in a reasonable and productive way that benefits both the companies that produce items utilizing that standard, as well as the consumers who buy them.

Standard setting is becoming a more prevalent practice particularly in the new digital marketplace. Standards for data transmission, for digital content protection, and for authentication are all becoming necessary elements for a robust and interconnected digital economy.

Industry standards can be created through de facto consumer preferences won through competition in the marketplace (*e.g.*, Microsoft's Windows Operating System) or through collaboration on *de jure* standards in formal standard setting organizations. The standards, created for the operation of 3G Wireless technology, for example, were a result of a global effort by governments and private industry participants. Another example is the collaboration of industry participants in the DVD Forum to approve a format for high definition digital versatile discs (HD-DVD), using its open standards process. Standards can also be developed through

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[2] Gerald F. Masoudi, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Efficiency in Analysis of Antitrust, Standard Setting, and Intellectual Property*, High-Level Workshop on Standardization, IP Licensing, and Antitrust, Tilburg Law & Economic Center, Tilburg University, Chateau du Lac, Brussels, Belgium (January 18, 2007), at 5.

government-sponsored initiatives (the FCC's V-Chip regulation is one example) or through efforts by smaller groups of private industry participants (such as those efforts by the Blu-ray Disc Association (BDA) to create independently a format for "next generation" optical disk technology).

Standards are often procompetitive because they are designed to curb modern-day problems associated with network markets and interoperability requirements. Standards can also facilitate competition among competitors who are vying to have their technology selected as the "winning" standard. A good example is the "standards war" for the next generation DVD format between members of BDA (led by Sony) and supporters of Toshiba's and NEC's HD-DVD format. Although technical aspects of the Blu-ray and HD-DVD formats differ, next generation optical discs are generally attractive because they promise significantly enhanced piracy protection, more interactive features, and greater storage capacity.

The war between Blu-ray and HD-DVD may remind many of us of the Betamax/VHS struggle to become the standard technology for video cassette recorders. We know that in the end, the market could not sustain the competing formats and VHS prevailed. Perhaps history will repeat itself, and vigorous competition will create a de facto standard, achieved by operation of the market. Or perhaps market forces will drive these competitors to agree on one standard, possibly incorporating the most attractive aspects of each format. In either case, it appears this battle will be fought and won in the marketplace, where it belongs.

De jure standards that are established through collaboration raise different competition concerns, for example, when the standard setting process is used to exclude industry participants from having their technology considered by the group. Collaborative standard setting, some say, can foster collusion on the terms at which the winning intellectual property can be licensed. Some also claim that winning intellectual property owners can hold-up the implementation of the standard by imposing onerous licensing terms. I wish the Commission could have studied this claim. There doesn't seem to be much empirical evidence of this.

Problems further arise when standard setting organizations adopt uncertain disclosure rules, setting the stage for what has become known as "disclosure hold-up," the intentional failure to disclose intellectual property rights that would be infringed by complying with the standard after the standard is adopted.

The answer for the so-called patent holdup suggested by some has been *ex ante* negotiations between the patent holder and the standards participants. This is what the Commission seems to endorse, but the issue is not that simple. My concern is that without more guidance, the Commission's recommendation will have a potential to be misinterpreted and ultimately result in reduced innovation.

Let me provide some background on different approaches for competition policies in standard setting organizations. Standard-setting organizations have tried three main mechanisms to address competitive hold-up issues through their organic policies: reasonable and nondiscriminatory licensing (RAND) commitments; mandatory predisclosure; and *ex ante* licensing.

The first approach, RAND, has succeeded for the most part. Sometimes, it is the "reasonableness" of licensing prices that leads to trouble. Parties to such an agreement understandably see things much differently before a standard is set than afterward, or *ex post*. And the party whose technology is chosen as the standard may very well have a different view of what price is reasonable for the others to pay.

Mandatory disclosure, the second mechanism, relies upon the parties not only to fully disclose all of their relevant technology, but also to fully understand each other's technology prior to standard setting. Both are high burdens, particularly in light of the fact that standard setting can take unpredictable paths and can therefore encroach on technology that parties did not foresee as relevant. Predisclosure thus can suffer unintentional under-disclosure—but also can suffer from intentional under-disclosure and even over-disclosure. Either situation highlights the weakness of predisclosure agreements, even though it is probably the most effective mechanism with appropriate enforcement by private or public authorities for any fraudulent activity by the standards participant.

The third mechanism, *ex ante* licensing, the supposed subject of the recommendation of the Commission, has become the most controversial. The idea behind *ex ante* licensing is that, prior to standard setting discussions, the participants will agree on the prices to be paid for the intellectual property that may govern the selected standard. One theory behind this approach is that it eliminates so-called patent hold-up because the party whose technology is chosen as the standard is bound to license that technology at a pre-bargained or pre-disclosed maximum price.

The problem with *ex ante* licensing, however, is that it could facilitate horizontal price fixing because it is done in a group of potential horizontal competitors who are sharing prices and other terms. In addition, any joint discussions, negotiations, and setting or royalty and other licensing terms may reduce any procompetitive benefits of the standards process and raise risks of collusive exercise of monopsony or oligopoly power. For example, such collective conduct directed at establishing licensing terms may drive the value of IPR contributed for standardization below its optimal prices and toward its marginal cost—that is, zero. The Antitrust Division and Federal Trade Commission recognize the adverse competitive effects of such conduct. The DOJ/FTC *Horizontal Merger Guidelines* explain that "[m]arket power also encompasses the ability of a single buyer (a 'monopsonist'), a coordinating group of buyers, or a single buyer not a monopsonist, to depress the price paid for a product to a level that is below the competitive price and thereby depress output. The exercise of market power by buyers ('monopsony power') has adverse effects comparable to those associated with the exercise of market power by sellers.[3] Agency joint venture policy also includes express recognition of the serious competitive risks associated with the exercise of buyer-side mar-

[3] U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (issued April 2, 1992, revised April 8, 1997), at § 0.1.

ket power. A buyer collaboration—which is what would exist if royalty and other license terms were collectively established in the standards setting context by a group comprised primarily of prospective licensees—can "create or increase market power . . . or facilitate its exercise by increasing the ability or incentive to drive [down] the price of the purchased product, and thereby depress output, below what likely would prevail in the absence of the relevant agreement."[4]

In fact, there are circumstances in which case law would support the continued application of a *per se* rule to ensure that there will not be a collusive buyers' cartels.[5]

Let me now mention two items that underscore the very live and active issue that the Commission, in my view, is addressing without fully appreciating the impact. These two items are the VITA Business Review Letter and the IEEE Request for Business Review Letter.

In October 2006, the Antitrust Division rendered a favorable business review letter to the VMEbus International Trade Association (VITA), a group that develops standards for certain computer bus architecture.[6] The VITA *ex ante* licensing policy included, among other things, these five provisions: (1) Disclosure of all patents or patent applications that believes may become essential to implementation of the future standard. Members must do this before a working group is formed, sixty days after the working group is formed, and then fifteen days after the draft standard is published. (2) Disclosure of maximum royalty rates and terms they will demand for essential rights. These rates and terms are binding. (3) Agreement that the commitments apply only to the particular standard being developed and not to other uses of the technology. (4) Commitment not to negotiate licensing terms among working group members or with third parties. (5) Agreement to arbitrate any disputes over members' compliance with the agreement. The policy lists some consequences for non-compliance, including that the penalty for failure to disclose an essential patent is a free license of patent rights related to the standard.

The DOJ's response letter concludes that this specific VITA policy was not likely to harm competition. It found that the prohibition on joint negotiation of licensing terms protected against unfairly low royalties due to anticompetitive acts. The patent holder is free to nego-

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4 U.S. Department of Justice and the Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors*, April 2000, at § 3.31(a).

5 *See* Mandeville Farms v. American Crystal Sugar, 334 U.S. 219 (1948) (finding *per se* unlawful an agreement among local sugar refiners to set the purchase price for sugar beets); National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965) (finding per se unlawful a trade association rule that fixed the percentage of durum wheat included in macaroni products produced by trade association members in order to depress market demand and price during a crop shortage).

6 Letter from Thomas O. Barnett, Assistant Att'y Gen., U.S. Dep't of Justice, to Robert A. Skitol (Oct. 30, 2006), http://www.usdoj.gov/atr/public/busreview/219380.pdf; *see also* Press Release, U.S. Dep't of Justice, Justice Department Will Not Oppose Proposal by Standard-Setting Organization on Disclosure and Licensing of Patents (Oct. 30, 2006), http://www.usdoj.gov/atr/public/press_releases/2006/219379.pdf.

tiate after the standard is set, but will continue to be bound to the maximum terms it set forth earlier.

One month after the DOJ issued the VITA Business Review Letter, the Institute of Electrical and Electronics Engineers, Inc. (IEEE) and its Standards Association (IEEE-SA), requested a Business Review Letter concerning proposed changes to the IEEE-SA's Patent Policy. That request is still pending. The IEEE-SA request apparently would apply to more than 1300 standards in a wide array of fields. Like the VITA policy, the IEEE-SA policy would compel patent owners to disclose their rates and terms in order to avoid the possibility that their technology will be excluded from consideration in the standard setting. But unlike the VITA policy, the IEEE-SA policy, as I understand it, appears to contemplate that the rates and terms of prospective licenses will be discussed within the organization as part of its consideration of the relative costs of the competing technologies, and outside the organization as well. The IEEE-SA maintains that these provisions are reasonably necessary to prevent the imposition of "unexpected" royalties *ex post*. What are these when we deal with patented technology? The goal of any antitrust policy cannot be that the ultimate price of intellectual property inputs is or should be zero.

The VITA and IEEE-SA policies are not only changing the way standard-setting organizations operate, but also may be tilting of the process in favor of IPR users at the expense of IPR owners, and perhaps to innovation itself. After all, these policies are essentially "reverse auctions" held by a coordinated group of horizontal actors whose goal is to reduce royalties to as low a level as possible. And with the DOJ's favorable letter(s), standard-setters' fears of buy-side antitrust liability based on the district court decisions in *Sony v. Soundview*[7] and *Golden Bridge v. Nokia*[8] will be limited at best. The result could be a classic "buyers' cartel" exercising *per se* unlawful market power with the effect of: (1) reducing the incentive to innovate both in core technologies and complimentary applications; (2) depriving consumers of products based upon superior technology; (3) artificially lowering return on investment to IPR owners below market rates; and (4) ultimately increasing costs to consumers of products resulting from standardization efforts. The reason that all of this could result is that the VITA and IEEE-SA policies drive down the cost too fast. As Deputy Assistant Attorney General Masoudi said:

> The same forces that yield the benefits of static efficiency—conditions that encourage rivals quickly to adopt a new business method and drive their production toward marginal cost—can discourage innovation (and thus dynamic efficiency) if the drive toward marginal cost occurs at such an early stage that it pre-

[7] Sony Elecs., Inc. v. Soundview Techs., Inc., 157 F. Supp. 2d 180 (D. Conn. 2001).

[8] Golden Bridge Tech., Inc . v. Nokia, Inc., 416 F. Supp. 2d 525 (E.D. Tex. 2006).

> vents recoupment of development expenditures, and makes innovation uneconomical.[9]

It would be a tragedy for IPR and antitrust policy if the law were to become a hindrance to innovation rather than an incentive to efficiency.

The legality of joint discussion and negotiation of royalties and whether it is evaluated according to the "rule of reason" rather than the *per se* treatment is under serious debate in the United States and abroad. There still is not enough economic research to support the statements in the Commission report, let alone the statements by the US agencies so far.

In different contexts, the *ex ante* discussion and negotiations could have either pro- or anti-competitive effects. As explained by the Agencies in their *Collaboration Guidelines*:

> Agreements not challenged as *per se* illegal are analyzed under the rule of reason to determine their overall competitive effect. These include agreements of a type that otherwise might be considered *per se* illegal, provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity.[10]

This balancing approach appears to be reasonable and is essentially reflected in FTC Chairman Majoras's remarks at Stanford University in 2005, where she explained that "joint *ex ante* royalty discussions that are *reasonably necessary to avoid hold up* do not warrant per se condemnation. Rather, they merit the balancing undertaken in a rule of reason review."[11] A proper balancing must take into consideration the rights of the IPR owners as well as IPR users, and must comport with the goal of efficiency, both static and dynamic.

I again thank my fellow Commissioners for their work and indulgence and hope they find this more detailed background useful.

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[9] Gerald F. Masoudi, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Efficiency in Analysis of Antitrust, Standard Setting, and Intellectual Property*, High-Level Workshop on Standardization, IP Licensing, and Antitrust, Tilburg Law & Economic Center, Tilburg University, Chateau du Lac, Brussels, Belgium (January 18, 2007), at 3.

[10] U.S. Department of Justice and the Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors*, April 2000, at § 1.2.

[11] Deborah Platt Majoras, Chairman Federal Trade Commission, *Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting*, remarks prepared for Standardization and the Law: Developing the Golden Mean for Global Trade, Stanford University (Sept. 23, 2005), at 7 (emphasis added).

Separate Statement of Commissioner Jacobson, Joined by Commissioners Valentine (Except as to Part III) and Warden (Except as to Parts I.B and II.B)

It is difficult to overstate the importance of the antitrust laws. By pursuing antitrust, we have established competition as the means of determining market outcomes in the United States. This reliance on the free market has enabled us to avoid the far more intrusive governmental control that has characterized (and often stunted) the economies of other nations. As a result, the United States has developed an economy that is universally admired and respected—with levels of output, price, quality, and variety envied across the globe. Our choice of "antitrust" in 1890 and 1914 has thus proven to be among the best political decisions any country has made. It is a choice now being replicated in substantial part by country after country around the world.

Congress created the Antitrust Modernization Commission against this background. Our assignment has been to study, reexamine, and analyze our existing antitrust regime and to determine whether, and if so to what extent, changes are necessary or desirable. The Commission's Report, which I join enthusiastically in major part, correctly reaffirms the fundamental soundness of the antitrust laws themselves and the procedures for enforcing them. The Commission wisely proposes no changes to any of the most important substantive statutory provisions—sections 1 and 2 of the Sherman Act, sections 3 and 7 of the Clayton Act, and section 5 of the FTC Act. The Commission similarly proposes no radical change to the key mechanisms of enforcement—criminal proceedings; civil proceedings by the DOJ or FTC; private actions for treble damages and injunctive relief; and actions by the various state attorneys general. The changes the Commission recommends are instead designed to enhance, not overturn, the existing structure of antitrust enforcement.

The Commission's key reform proposals warrant the most careful attention by the Congress and the enforcement agencies. Adopting them will improve the quality and character of antitrust enforcement. Particular heed should be paid to the following recommendations:

- Repeal of the anti-consumer Robinson-Patman Act;
- Reform of indirect purchaser litigation;
- Repeal of existing judicial rules forbidding claim reduction and contribution among antitrust defendants;
- Reforming merger clearance and the process for issuing "second requests" under the Hart-Scott-Rodino Act; and
- Narrowing the number and scope of antitrust exemptions and immunities.

I write separately for three reasons: *first*, to underscore my endorsement of the Commission's most significant recommendations; *second*, to address a few important opportunities that the Commission missed; and *third*, to express my specific disagreement on one matter—the Commission's recommendation on criminal sentencing. For the most part, where I have parted company with my colleagues, I have simply noted my disagreement in footnotes to the main Report. The issues addressed here are limited to those warranting more extended comment.

I. Important Facets of the Commission Report

a. No change to the key substantive antitrust laws

The antitrust laws generate enormous benefits for U.S. consumers every day. By stopping cartels, preventing mergers that would create or enhance market power, and forbidding significant restraints of trade and exclusionary practices, the antitrust laws provide for an "unrestrained interaction of competitive forces [that] yield[s] the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). That famous statement, by Justice Black speaking for the Court almost fifty years ago, remains equally valid today.

If there is any key message to be distilled from the Commission's Report, it is simply that the antitrust laws—both substantively and procedurally—are working well and need not be displaced, rolled back, or overhauled. The Commission had the opportunity to review every aspect of our antitrust system and, in fact, did review major portions. Yet after three years of hard work and analysis, the Commission's proposals for reform, while quite important, are comparatively modest and incremental. That this is such a strong consensus conclusion of the Commission—a Commission incorrectly feared by some, at the time of the Commissioners' appointments, to be antagonistic to antitrust enforcement—is a point of great significance. The Commission's reaffirmation of the basic principles of the antitrust laws and the basic structure of its institutions may well be the single most important aspect of our Report.

Could the Commission have undertaken to comment on additional issues of substantive antitrust law? Certainly, it *could* have. Notwithstanding the general widespread acceptance of antitrust doctrine as a whole, there are many particular court decisions and other interpretations of the antitrust laws that are at least controversial if not outright wrong. In my personal view, the per se rule for tying is an example of a legal doctrine that has long outlived its usefulness. And, to me, the courts should long ago have stricken from the books the holding of *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981), which held that a patent acquisition could not violate the antitrust laws if made prior to the time the relevant market for the patented product had emerged. Any list of similar examples would be lengthy.

The temptation for this Commission to address these and other perceived errors of substantive law was substantial. Our decision not to do so, however, was the correct one. A key element of what has made antitrust so successful for so long is its flexibility, its ability to adapt to changes in industrial structure and to changes in legal and economic thought. The statutes themselves establish only broad and simple principles—prohibiting "restraints of trade," "monopolization," and acquisitions that "may lessen competition substantially." These principles have gained real meaning only through the many court decisions, agency actions and guidelines, and economic analyses accumulated over a course of 117 years. As experience in antitrust has demonstrated time and again, however, the received wisdom at any given moment often proves to be quite wrong later on.[1] Any effort to change the substance of antitrust in any kind of permanent way is therefore both perilous and futile.

Antitrust tends to correct its mistakes over time. The per se rule for tying, for example, was sent nearly to its demise just last year. *Illinois Tool Works v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006). The doctrine of *SCM v. Xerox* is one that, in merger enforcement at least, the federal agencies ignore. *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 586–88 & n.202 (6th ed. 2007). As this Report is being prepared, the Supreme Court is reexamining one of the most controversial legal rules, the per se rule for resale maintenance. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 763 (2006). In antitrust, there is little to commend any effort to freeze legal precepts in one place. Had the Commission undertaken to devote its attention to the correction of errors in substantive antitrust doctrine, we at best would have provided temporary solutions—and we would have diverted our attention from the many other areas where we have the potential to do real good. Our decision to focus on other matters was the right one.

b. Retention of multiple enforcement

The Commission's recommendations against changing private remedies or the rules that allow federal antitrust suits to be filed by state attorneys general are also important.

The federal antitrust laws are enforced in several ways: (1) proceedings for injunctive relief by the DOJ or FTC; (2) private party actions for injunctive relief and/or damages; (3) actions by state attorneys general for injunctive relief or damages; (4), in appropriate cases, crim-

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[1] *Compare* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) *with* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); *compare* Albrecht v. Herald Co., 390 U.S. 145 (1968) *with* State Oil Co. v. Khan, 522 U.S. 3 (1997); *compare* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) *with* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); *compare* United States v. United States Steel Corp., 251 U.S. 85 (1920) *with* United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945) and LePage's v. 3M, 324 F.3d 141 (3d Cir. 2003); *compare* United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945) *with* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979); *compare* International Salt Co. v. United States, 332 U.S. 392 (1947) *with* Illinois Tool Works v. Independent Ink, Inc., 126 S. Ct. 1281 (2006). This list could be expanded exponentially.

inal proceedings by the Justice Department; and (5), perhaps most importantly, by voluntary counseling. It is a fair question to ask whether a system with so many enforcement mechanisms is necessary. History tells us, however, that multiple enforcers are of great importance to the preservation of antitrust, and the free market, as the means for governing our economy.

Multiple enforcement ensures that the administration of the antitrust laws will be not only vigorous but insulated, to a degree, from the vagaries of the electoral process. If antitrust is a priority of a presidential administration, we can be confident of appointees to the Justice Department and Federal Trade Commission who will pursue robust enforcement. But, as we have seen at times over the past 30 years, antitrust is not always an executive branch priority. In some instances, the executive branch may seek to curtail antitrust significantly or, more commonly, to sit on the sidelines while cases are not brought. Multiple enforcers operate as a critical check and balance on the executive branch. In any given case, the federal enforcement agencies may not elect to proceed, but injured parties and the states have the ability to fill in the gap.

It is important to remember that multiple enforcement itself is subject to a critical check and balance: the federal courts. The Justice Department or FTC, in the limited context of pre-merger notification, can prevent consummation of an acquisition for a while—until the parties have complied with the agency's second request—but every other aspect of antitrust enforcement requires judicial intervention. Neither agency can block a merger; only a court can do so. Similarly, the Justice Department can obtain civil or criminal relief only through the courts. The FTC can proceed through its administrative proceedings, but parties can always appeal to a circuit court of appeals. The states and private parties, of course, can proceed only through the courts. The upshot is that, notwithstanding multiple enforcers of the antitrust laws, only the courts can determine whether a violation of law has been established. Having multiple enforcers simply provides greater assurance that the courts have that chance.

Preservation of multiple enforcement is the principal reason why I join the Commission in urging no curtailment of the ability of the state attorneys general to sue under the antitrust laws. The record before the Commission demonstrates convincingly, in my view, that the states can effectively supplement the federal agencies by bringing cases the agencies do not; can team effectively with the federal agencies in bringing important cases; and, by their very presence, provide an important check against federal under-enforcement. *See* Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673 (2003). The Commission was presented with no evidence demonstrating that state enforcement has resulted in harmful inconsistencies in legal obligations, deterrence of procompetitive conduct, or excessive costs. There was evidence, and I agree, that the *quality* of state enforcement could be improved. But there was simply no case presented to justify curtailing the states' *ability* to enforce the laws.

The Commission's decision to recommend retention of private rights of action for treble damages and injunctive relief is also welcome. There was no serious proposal to eliminate private rights of action entirely, and certainly no evidence to support any such radical change to the basic system of antitrust remedies that has served us well for so long. But a number of thoughtful observers, including some of my fellow Commissioners, have expressed concern about the tripling of damages, at least for non-cartel offenses, in contexts where the defendant's legal obligations are not entirely clear. I remain very sympathetic with those concerns in the abstract. But, nevertheless, I believe that the arguments for change are decisively outweighed by other considerations.

We have had a treble damage remedy for 117 years. It started as section 7 of the Sherman Act; in 1914, it was made section 4 of the Clayton Act. For a statute that has been a cornerstone of antitrust enforcement for that length of time, the burden to show a need for change is a particularly heavy one. The Commission had extensive hearings on the subject. There is extensive literature on the subject, which the Commission reviewed. No commenter identified a single example of a serious injustice occasioned by an actual award of improvident treble damages. That alone is compelling evidence that radical change is unwarranted.

The temptation to limit trebling to particular types of cases is understandable, but ultimately fruitless. To begin with, defining the scope of the limitation is difficult. Limiting trebling to per se (or "hard core") cases is not helpful because the line between per se and rule of reason (or hard core versus non-hard core) is ever-changing and often imperceptible. *See California Dental Ass'n v. FTC*, 526 U.S. 756 (1999). Perhaps more importantly, some of the most serious antitrust violations of all have involved conduct that was neither covert nor per se unlawful. *E.g.*, *MCI Communs. Corp. v. AT&T*, 708 F.2d 1081, 1107 (7th Cir. 1983). Since the only relief available to the government in these cases is prospective, damages remain the only deterrent. Firms will have no incentive to avoid even the most egregious restraints if the maximum penalty is limited to an injunction and single damages. Given the uncertainties within, and the length of time of, litigation, the present expected value of a single damages award will almost always be less than the profits expected to be retained as a result of the violation. Preserving the incentive of injured parties to sue in these cases is therefore of great importance. Moreover, in the litigation process as it exists today, actual recovery of treble damages is something of a myth. With the time lag between injury and recovery, and the general unavailability of prejudgment interest, damage recoveries cannot be expected to exceed the party's actual damages, including cost of capital and associated opportunity costs, even after trebling.

The hurdles today to private recoveries are very steep. The standing and antitrust injury rules have become increasingly strict since *Brunswick* was decided in 1977. *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 817–28 (6th ed. 2007). Defense summary judgment motions are (correctly) granted vastly more frequently in antitrust cases than in other areas of the law. *E.g.*, *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 104 (2d

Cir. 2002) (summary judgment "particularly favored" in antitrust litigation). And the cost of launching an antitrust case can be prohibitive. Expert witness costs are unrecoverable, and considerable capital will be tied up in attorneys' fees for years until any recovery is had. As noted, prejudgment interest is unavailable as a practical matter. Given all those factors, trebling, in my judgment, is essential to induce parties to bring cases with merit.

Importantly, moreover, reversing treble damages today would send a terrible public message. We are in an era of diminished federal enforcement of the antitrust laws. The states too have been relatively inactive over the last few years. The key enforcement mechanism today and at other periods in our history has been the private action. We send a very troubling message about our faith in the antitrust laws as the means for guiding our economy if we say we are going to cut back on the treble damages action, the foundation of private enforcement. The Modernization Commission soundly declines to do so.

c. Robinson-Patman Act repeal

The Commission does well to recommend repeal of the Robinson-Patman Act. This statute imposes significant compliance costs on U.S. businesses and, where applicable, operates as a deterrent to price competition. The harm it inflicts on U.S. consumers is great.

The statute today serves little, if any, of the purposes for which it was intended. Although designed to preserve an equal playing field among resellers, the Act is applicable only to commodities. It does not apply, thankfully, to services, and yet services represent a large and growing portion of the economy. Even as to commodities, the statute is easily avoided in ways that harm its intended constituency. So while it is a violation to charge small customer *S* more than huge customer *H* for the same good, it is not a violation to refuse to sell to *S* altogether. The effect, then, is to cause many sellers to refuse to deal with smaller sellers outright, rather than charge them the potentially higher prices that may result from normal competitive interaction in the marketplace. Most small resellers would be better off by having *some* access to the product, albeit at a higher price, than being cut out altogether.

Given the extremely rare nature of proceedings under the statute by enforcement officials; the serious difficulties of enforcing it in private proceedings; the perverse incentives for suppliers it creates; its tendency to inhibit aggressive price competition; and the significant compliance costs it imposes, the Robinson-Patman Act adds no positive value even to its own constituency. The country will benefit if it is repealed.

d. Endorsement of contribution and claim reduction

That a company with, say, 2% of the sales or 1% of the culpability might be responsible for all or substantially all of the damages in a given antitrust case has never made any sense. Yet it is the law of the land. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). That is not because of any Supreme Court analysis demonstrating that a ban on contribution is the correct policy choice. It is because of the Court's determination (1) that any policy determination should be made by Congress, and (2) that the outcome of congressional silence should be the purported common law rule, developed ages ago for other contexts, barring contribution among intentional wrongdoers. The combination of these determinations has meant that the no contribution rule exists, not by choice or analysis, but by default. I have long opposed the rule against contribution.[2] The Commission's strong recommendation to propose legislation that will eliminate that rule for cases filed in the future is most welcome.

Predictably, the Commission's recommendation has already generated some opposition. The criticism is that a system of contribution and claim reduction will provide a disincentive to plaintiffs to offer attractive settlements to the "first in" and, in that way, make settlement more difficult generally.

The criticism is easily rejected. To begin with, contribution and claim reduction are the norm in American jurisprudence. Virtually every state permits contribution among joint tortfeasors. *See, e.g.*, Uniform Contribution Among Tortfeasors Act (1955); Restatement (Third) Torts: Apportionment of Liability (2000); Annot., *Contribution Between Tortfeasors*, 17 A.L.R.6th 1 (2006). Contribution is available for many federal causes of actions as well. *See* 15 U.S.C. § 78-u4(f) (securities cases); *Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286 (1993) (10b-5 cases); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) (admiralty). The types of cases in which no right of contribution exists are rare. Yet the majority of cases settle, and largely at the same rate of frequency that antitrust cases do. Settlements continue to occur—as they will under the Commission proposal—because claims for contribution against defendants who have settled are precluded. *See, e.g.*, Uniform Act § 5; 15 U.S.C. § 78u4(f)(7).

Under the Commission's proposed statute, the only settlements that may be discouraged are those which *should* be discouraged. The problem is at its most acute in massive class action cases, where the potential exposure is already great. In many of these cases, plaintiffs offer settlements early on to one defendant—sometimes the one most culpable or with the greatest sales—that bear little or no relationship to that defendant's actual responsibility. The plaintiffs lose nothing by doing so; the settling defendant's responsibility becomes the problem of those not offered the sweetheart deal. The non-settling defendants may have little or no actual culpability. But they nevertheless are forced into settling by the effect of the enormous exposure they face because the earlier sweetheart settlement arrangements have effectively multiplied their potential liability. This is the kind of process that is unfair on it face and, at the extremes, even gives antitrust enforcement a bad name. Businesses comply with laws they understand and respect; and they tend not to respect laws that appear to be fundamentally unfair. Counseling compliance in the context of a regime that endors-

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[2] *See* Jonathan M. Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. Fla. L. Rev. 217 (1980).

es this kind of process can therefore be quite difficult. There is no reason that plaintiffs cannot settle early on with defendants for amounts more closely approximating the defendant's portion of the total liability. That is what the Commission proposal will encourage, and it will generate broader respect for (and compliance with) the law.

The reality is that, as has happened in all the many other areas of the law in which contribution and claim reduction have been adopted, plaintiffs and defendants will adapt quickly to the new system and cases will settle as frequently as they did before. The only difference will be that settlements will more closely reflect the responsibility of the settling defendants. That can only be a good thing.

e. Indirect purchaser reform

The burdens imposed by the inconsistency between federal and most states' laws relating to indirect purchaser litigation are considerable. But, as the Commission's Report demonstrates, there is no simple fix to the problems.

The Commission's recommended solution is not perfect. None is. But the Commission solution is one that gives due regard to all of the many constituencies affected. It allows indirect purchasers to sue, but directs them to a forum where the opportunities for inconsistent determinations and excessive or duplicative damages awards are minimized. It avoids preemption of state laws. It maintains consistency with current practice in terms of class certification. It does all this while preventing, as effectively as anyone can, the costly multiplication of proceedings that has characterized indirect purchaser practice over the past twenty years.

The Commission's suggested *Illinois Brick* reform will undoubtedly attract opposition from those with vested interests in the current regime. Indeed, one opposition, by the American Antitrust Institute, has already been posted. The attack is premised on the idea that the Commission proposal would (a) decrease incentives for both direct and indirect purchaser plaintiffs, by reducing overall recoveries to "substantially less than treble," and (b) make class certification more difficult. The first of these criticisms is unfounded. The second is frivolous.[3]

Incentives. Combining direct and indirect purchaser recoveries into a single, consolidated proceeding should not, by itself, reduce incentives for anyone to sue. Nor will consolidation reduce aggregate recoveries. Instead of reducing overall recoveries, the only effect of the Commission proposal should be to *increase* them. There are two reasons why. First, the Commission proposal will expand the universe of potential plaintiffs. Several states today

[3] American Antitrust Institute, Public Comments Submitted to AMC Regarding Indirect Purchaser Recommendation (Mar. 2, 2007). AAI goes so far as to claim that the proposed *Illinois Brick* reform "would in all likelihood eviscerate . . . private enforcement of the antitrust laws." *Id.* at 3. This, and similar statements made throughout, drain the comments of whatever credibility they might otherwise have had.

prohibit any indirect purchaser recovery. The Commission proposal will make recovery available for indirect purchasers throughout the country. Second, many state laws do not provide for trebling or make trebling discretionary. By applying section 4 of the Clayton Act, the Commission proposal, however, will make trebling mandatory.[4]

Increasing recoveries, as a general matter, should equally increase incentives to sue. The concern articulated by AAI, however, seems to be that the lack of certainty as to the amount of pass through would create a disincentive for direct purchasers to sue. I agree that this possibility exists theoretically, but it seems clear that, in the real world, the degree of reduced incentive will be trivial. If direct purchasers are overcharged, the well-organized plaintiffs' bar can still file in every case they do today. Competition to get the "lead counsel" or "executive committee" roles will be as persistent as ever and will encourage cases to be filed. I cannot imagine a single case under the current regime that would not be filed under the Commission's proposed system.

Conversely, the incentives for plaintiffs' lawyers representing indirect purchasers to sue—and to compete for lead counsel and executive committee positions—will only increase. As mentioned, indirect purchaser recoveries will be available throughout the country, rather than state by state, and will be trebled automatically. To the extent there is any diminution of the incentives affecting direct purchaser lawyers, the increase on the indirect purchaser side will more than offset it.

So what will change? Procedurally, of course, there would be a major change in that all proceedings would be consolidated before a single court—reducing litigation costs, and reducing in particular the incentives for some plaintiffs' lawyers to use procedural cost and complexity as a device for inducing settlements that would otherwise be unavailable. In addition, if the Commission's solution is adopted, then, in most cases, the proceedings that do not settle quickly should resemble an interpleader case; the aggregate overcharge would be determined first, with the allocation between direct and indirect purchasers to follow. That would allow the plaintiffs' groups to work together in the first phase of the case to maximize the total recovery. If they are as successful as I suspect they will be, then total damages recovered should be roughly the same as they are today. However, the ability of plaintiffs' lawyers to use the uncertainty in some states' laws to suggest that duplicative damages can be achieved will be eliminated. And the system we see today, with a different

[4] AAI seems to be under the impression that the system today permits multiple and duplicative recoveries, and that these would be eliminated under the Commission proposal. Apart from the basic point that duplicative recoveries are something to be avoided, not encouraged, even the underlying premise appears to be wrong. Those states to address the issue have concluded—some by express statutory provision—that multiple recoveries should be avoided, thus limiting damages overall to the specified multiple of the overcharge in issue. *See In re Vitamins Antitrust Litigation*, 259 F. Supp. 2d. 1, 3 & n.1 (D.D.C. 2003) ("First, of the twenty repealer jurisdictions, the majority (twelve) either allow a pass through defense or prohibit double recovery . . . . Of the [remaining] eight jurisdictions . . . no jurisdiction *expressly prohibits* a pass through defense.") (emphasis added).

set of plaintiffs' lawyers in each indirect purchaser state tacking their name onto a pleading and then seeking fees, will disappear. Direct plaintiffs' lawyers will have to reach settlements on the basis of their clients' actual treble damages, and indirect plaintiffs' lawyers will have to do the same. If their assessments vary enough from the defendants', the cases may have to be tried—something that never happens today because of the undue leverage that the procedural complexity provides. Outcomes based on the merits of a case are ones the law should encourage.

Class certification. The class certification objection to the Commission's proposal is nonsense. The proposal clearly states that class certification standards and procedures will remain as they are today, and that the introduction of pass-on—already an issue today in indirect purchaser class certification—will have *no effect* on the certification of direct purchaser classes.

Summary. Direct and indirect purchaser litigation today all too closely resembles both a roulette wheel and a "protection" scheme. The criticisms the AAI levels at the Commission proposal would perpetuate that impropriety. Reform is essential to place purchaser litigation on a footing where the merits count.

If enacted by Congress, the Commission's indirect purchaser recommendation will stand as a major accomplishment. There will undoubtedly be some sincere opposition to parts of the recommendation as the legislative process moves forward. I strongly urge Congress to view the recommendation as a whole, and to weigh it against the many alternatives—including the option of doing nothing. With careful review and consideration, I believe the Congress will see that this is a most elegant and practical solution to a very difficult problem.

II. Missed Opportunities

There are some opportunities for improvement in the law that the Commission unfortunately missed. The most important of these from my perspective are (1) our failure to advance recommendations for the immediate repeal of specific exemptions, and (2) our failure to endorse consumer (versus total) welfare as the touchstone for analysis of efficiency claims.

a. Exemptions

Our economy has moved significantly away from regulation and towards competition over the past 30 years, and consumers have reaped substantial benefits. Yet the economy remains riddled with exemptions allowing cartel behavior in many markets without any corresponding economic justification. The Commission's Report explains this point effectively.

The Commission, however, does not make any specific recommendations for the repeal of particular exemptions. This is in large part attributable to lack of time. The Commission elected to review 30 separate issues of law and policy (see Commission Memorandum, *Issues Selected for Study* (Jan. 2005), *available at* www.amc.gov/pdf/meetings/study_issues.pdf), many of which standing alone were extraordinarily broad. I believed then, and believe now, that we could and should have selected a much narrower set of issues than we did. Had we done so, we could have focused more time and energy on discrete and identifiable problems warranting legislative correction—including specific exemptions—than we in fact were able to do.

The Commission did hold some specific hearings on exemptions, addressing the McCarran-Ferguson insurance exemption, the Shipping Act, the Export Trading Act, and the Webb-Pomerene Act. Sufficient evidence was presented at those hearings, in my view, and sufficient independent analysis strongly confirms, that these exemptions have outlived any utility they may have had and should be repealed. At each hearing, the Commission was presented with substantial evidence of anticompetitive activities the exemptions do or can permit. And, in each case, the response was basically the same—that "our industry does many good things, does not restrain competition, and needs the exemption to avoid potential treble damage litigation." This litany provides no basis for an exemption. Virtually *every* industry does good things. Conduct that does not restrain competition is *not* prohibited, with or without an exemption. And freedom from private litigation is something, again, that *every* industry would like. If these were valid bases for an exemption, there would be immunities from the antitrust laws everywhere. The real question in each case is whether the application of normal antitrust rules will impair some important public goal, and whether an exemption is truly necessary to ensure that this goal is served. None of the industries we examined came close to meeting that standard of proof.

In my view, the Commission would have better served the country through a more focused review of these four and other widely applicable exemptions (such as the Capper-Volstead Act) than by relying purely on the generalist overview reflected in our official recommendations.

b. Consumer versus total welfare

The history of antitrust law demonstrates a longstanding commitment to a legal standard that promotes the welfare of consumers as antitrust law's primary goal. The Supreme Court's antitrust jurisprudence of the modern era has been consistent with the consumer welfare approach.[5]

The Commission correctly chose not to revisit the settled primacy of the consumer welfare standard generally. We did, however, by a divided vote, choose to evaluate the standard in the narrow context of merger efficiencies. Specifically, we asked, should efficiencies that benefit only the parties, with no prospect of being passed along to consumers, be counted

[5] *See* Robert H. Lande, *Proving the Obvious: the Antitrust Laws Were Passed to Protect Consumers (not Just to Increase Efficiency)*, 50 Hastings L.J. 959 (1999) (citing authorities); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust*, 34 Hastings L.J. 65 (1982).

in favor of a merger? Or, as the *Merger Guidelines* say, should efficiencies matter only in circumstances where consumers are likely to benefit from the cost savings the parties achieve? *See* U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, REVISION TO SECTION 4 OF HORIZONTAL MERGER GUIDELINES (Apr. 10, 1997); *see also* Steven C. Salop, *What is the Real and Proper Antitrust Welfare Standard?*, Comments Submitted to AMC, Nov. 4, 2005, at 1.[6]

The Commission, surprisingly, was unable to reach a consensus on this issue. Although several Commissioners supported the consumer welfare standard reflected in the *Guidelines*, a majority to support that view in the Report could not be mustered. That is another missed opportunity. Any doubts that a consumer welfare standard better reflects the goals of the antitrust laws than a standard based on total welfare will serve only to undermine antitrust enforcement in the future.

The fundamental problem with the total welfare standard is that, by definition, it gives equal weight to the impacts of the conduct on all constituencies, including producers and competitors. By declining to focus on the effects on consumers, as the consumer welfare approach does, the total welfare standard encourages practices that transfer wealth from consumers to producers, as well as practices that benefit competitors at consumers' expense. Application of the total welfare standard, for example, would permit "a merger to monopoly that permits the merged firm to reduce costs significantly but also endows the selling firm with the ability and incentive to raise its price above the pre-merger level." *Id.* at 2. The gains to the merging firms would have to be balanced against the losses to consumers from post-merger monopoly prices and, if the benefits to the merging firms are larger, the merger would have to be allowed. Worse, because the total welfare standard protects the interests of competitors with equal vigor as the interests of consumers, a faithful application of the standard would forbid a merger that yielded cost savings that were passed onto consumers but that also harmed rivals of the merging firms by some greater amount. The net total welfare effect of such a merger would be negative because of the harm to the rivals, and a merger beneficial to consumers would have to be condemned.

Proponents of the total welfare standard do so either by ignoring these points or by making ad hoc exceptions to avoid the perverse results the standard generates. But a standard that is applied with exceptions to its basic structure is no standard at all. It is the equivalent of allowing decisions to be based on little more than the decisionmaker's whim.

The concern of at least some of the Commissioners who declined to support the consumer welfare standard appears to have been that a consumer welfare standard does not

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[6] As Professor Salop explains: "The aggregate economic welfare standard would condemn conduct if it decreases the aggregate welfare of consumers (i.e., buyers) plus producers (i.e., sellers plus competitors), without regard to any wealth transfers. In contrast, the true consumer welfare standard would condemn conduct if it actually reduces the welfare of buyers, irrespective of its impact on sellers. Efficiency benefits count under the true consumer welfare standard, but only if there is evidence that enough of the efficiency benefits would be passed-through to consumers so that consumers (i.e., the buyers) would benefit from the conduct."

credit fixed cost savings that do not immediately reduce marginal or variable costs. That is a valid concern but, in this case, misdirected. The agencies have made clear that fixed cost savings will be considered under appropriate circumstances:

> [U]nder certain market or sales circumstances, fixed-cost savings may result in lower prices in the short term. Selling prices that are determined on a "cost-plus basis" (e.g., cost-based contracts) can be influenced by changes in fixed costs. Contractual arrangements also may allow fixed-cost savings to be passed through.
>
> The Agencies consider merger-specific, cognizable reductions in fixed costs, even if they cannot be expected to result in direct, short-term, procompetitive price effects because consumers may benefit from them over the longer term even if not immediately.

U.S. Dep't of Justice and Federal Trade Commission, Commentary on the Horizontal Merger Guidelines 57–59 (2006). Thus, if a market is competitive, fixed cost savings will reduce the merged firm's total costs and will tend to be passed along to consumers. If the savings are likely to be passed along within a reasonable period of time, sound application of the consumer welfare standard will count them. If, however, it will take years for consumers to see any benefit from particular fixed cost savings, or if the merger makes the market significantly less competitive, it is fair to conclude that the claimed benefit is sufficiently speculative and doubtful to warrant exclusion or minimization in the final analysis. The enforcement agencies recognize this point and, in practice, are applying a standard that accommodates legitimate efficiency concerns.

The total welfare standard has nothing to commend it. No sound antitrust policy would forbid a merger that benefits consumers because it also harms rivals. Nor would any sound policy permit a merger to monopoly that yields benefits only to the merging parties. Having undertaken to address this issue, the Commission should have endorsed the consumer welfare standard for evaluating efficiency claims in clear and unmistakable terms.

III. One Unfortunate Error: The Continued Use of § 3571(d) for Corporate Fines

The Commission has erred, I believe, in failing to recommend changes to our regime of corporate fines in criminal cases.

Few would disagree with the basic proposition that effective criminal enforcement is central to the administration of the antitrust laws, and that a system of formidable corporate fines is essential to the accomplishment of that objective. And few would disagree that the Justice Department has assembled a marvelous track record in criminal enforcement over the last several decades, especially in recent years following the Antitrust Division's revision of its corporate and individual leniency policies. Dozens of individuals have served time in prison for their crimes, and dozens of cartels, including several significant international cartels, have been shut down through the Division's efforts.

One of the most reported measures of the Division's success has been the level of corporate fines. In fiscal 2004 through fiscal 2006, the Division obtained in fines, respectively, $350 million, $338 million, and $473 million. *See* Criminal Antitrust Fines, *available at* www.usdoj.gov/atr/public/press_releases/2006/220465a.pdf. Over the past dozen years, corporate fines exceeding $100 million to single companies have been obtained in at least seven instances, including the $500 million fine assessed against Hoffmann-LaRoche in the *Vitamins* case. *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 785 & n.332 (6th ed. 2007). This is a particularly impressive record given that the applicable maximum fine in each of these cases under section 1 of the Sherman Act was just $10 million. (The 2004 amendment increasing the fine to $100 million was inapplicable in these cases; it applies only to conduct occurring after its effective date.) These fines have been assessed through guilty pleas, reached by applying *Sentencing Guidelines* methodology using the alternative fines statute, 18 U.S.C. § 3571(d), which allows for fines up to double the gain or loss from a given offense.

The difficulty with the current regime is that it violates the Due Process Clause of the Fifth Amendment. Due process requires that all elements of a crime that affect the level of sentence be proven beyond a reasonable doubt. *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Any fine greater than $100 million (formerly $10 million) must therefore be supported by proof, beyond a reasonable doubt, of a gain or loss sufficient to justify the fine. But proof of the amount of gain or loss—in most cases, the amount of overcharge—is extremely difficult in *any* antitrust case. Typically, the proof involves dueling experts reaching reasoned but diametrically opposite conclusions. That is problem enough in civil cases, where damages must be proven by a preponderance of the evidence. In criminal cases—absent the most extraordinary circumstances—proving gain or loss *beyond a reasonable doubt* is essentially impossible, at least without reducing the fine sought to an extremely low number.

So how is the Justice Department routinely getting companies willing to pay fines in excess of $10 million (now $100 million) without apparent difficulty? The answer is that companies have no real choice but to agree. The Antitrust Division has made very clear that it "will not engage in plea negotiations with a defendant that desires to litigate gain or loss." Scott D. Hammond, *Antitrust Sentencing in the Post-*Booker *Era* 10 (Mar. 30, 2005). The Division says: "If a defendant wants to contest gain or loss, it "will have to wait until the end of the investigation for its day in court. . . . Not only will the company go to the end of the line, but so will its executives, unless they desire to approach the Division on their own and negotiate separately with the Division, which will obviously strengthen the Division's case against the company." *Id.* The Division recognizes the impact of this policy in actual practice: "[M]any companies are likely to continue to forgo the litigation of gain or loss because of the many positive consequences resulting from early cooperation, such as fine reductions, non-prosecution coverage for some executives and favorable plea agreements for others, and possible limitations in the scope of the charged offense or attributable commerce." *Id.*[7]

It appears, in fact, that every company faced with a Justice Department demand for a fine in excess of the Sherman Act § 1 amount based on the double the gain or loss provision of section 3571(d) has given up and paid the fine. Given the leverage that the Justice Department wields in these matters, a litigated legal challenge to a 3571(d) antitrust fine by anyone could be many years away. The issue, therefore, is not one that the Commission should wait for the courts to resolve. If there is a problem—and there is—it should be addressed now. The Commission may be the only practical forum to recommend correction.

There can be little doubt that the continued routine insistence of fines based on double the gain or loss violates the Due Process Clause. In the vast majority of the past cases, perhaps all, there was no plausible expectation that gain or loss at any level close to the relevant fine amount could be proven beyond a reasonable doubt. To continue to support a regime of this sort is to express contempt for Due Process or, just as bad, knowingly to look the other way.

The fix, moreover, is easy. Fines calculated by a judge under the *Sentencing Guidelines* (on an advisory basis) are entirely constitutional provided that the fine amount is within the range established by the underlying statute. The problem, therefore, can be solved simply by raising the maximum fine under Sherman Act § 1 substantially, say to $500 million. The only objection advanced for not making that recommendation is that Congress just raised the amount in 2004 and it is therefore "too soon" to ask again. Nonsense. The current fines administration routinely violates the Constitution. Placing it on a footing that assure compliance with the Due Process Clause will only breed greater respect for the law—and is well worthy of congressional time.

We should recommend repeal of section 3571(d) insofar as it relates to antitrust crimes and, simultaneously, seek to amend section 1 of the Sherman Act to permit fines of up to $500 million.

Conclusion

The Antitrust Modernization Commission has now responded, in this Report, to the congressional request for counsel on the administration of the antitrust laws. The overwhelming majority of the Report expresses recommendations and conclusions with which I agree wholeheartedly.

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[7] Others put it more starkly, saying that "the Division's enforcement approach appears to be a willingness to trade people (particularly senior executives) for money." Tefft W. Smith, Statement at AMC Criminal Remedies Hearing, at 5 (Nov. 3, 2005). I personally doubt that the Division is intentionally trading senior executive jail time for companies' concessions to a higher fine, but it is indisputable that any company faced with a large and likely unconstitutional fine amount must weigh the negative of agreeing to that fine against the positive of keeping key executives out of jail.

It has been a great personal honor to have participated in the Commission's work over the past three years and to have done so with such an impressive array of distinguished fellow Commissioners. Considerable thanks go to our Chair, Deborah Garza, for her tireless efforts in leading the Commission's efforts.

I also want to thank our staff: Andrew Heimert, Susan DeSanti, Bill Adkinson, Nadine Jones, Marni Karlin, and former staffer Todd Anderson; advisors Andy Gavil, Michael Klass, and Alan Meese, and former advisor (now FTC Commissioner) Bill Kovacic; and Hiram Andrews, Kristen Gorzelany, Christopher Bryan, and Sylvia Boone. You have been a wonderful team.

Separate Statement of Commissioner Kempf

I join—enthusiastically—in the vast majority of the Commission's recommendations. I write this separate statement to discuss those few areas where I do not join in recommendations and to expand on my views as to a few other matters. In so commenting, I do not wish to distract from or diminish the significance of the Commission's principal recommendations. They were fashioned on the anvil of rigorous discussion and debate—a process in which all of the Commissioners fully participated. In my view, a number of the recommendations are quite exciting and truly momentous. These include, for example, (1) repeal of the Robinson-Patman Act that is so harmful to consumers, (2) a rational and sensible approach to direct and indirect purchaser claims in price-fixing cases, and (3) some excellent suggestions to the agencies as to steps they should consider—both domestically and around the globe—to simplify the merger reporting process and to speed up coming to a decision on whether to clear or challenge a proposed merger.

Before turning to a discussion of the Commission's recommendations and report, I want to emphasize at the outset that serving on the Commission turned out to be a genuine pleasure for me. Before we began to meet, I wasn't so sure that that would be the case. I was concerned that, with six Republican appointees and six Democrat appointees, the Commission's proceedings might mirror the partisanship that Americans have come to see on TV regularly in certain other government activities. That never happened. Quite the contrary, the Commissioners—all of them—worked together cooperatively and collegially to try to do the best individual and collective jobs they could. Thus, I was able to work to fashion sensible consensus positions on difficult issues not only with Commissioners Garza, Burchfield and other fellow Republican appointees, but also with Commissioners Jacobson, Yarowsky and other Democrat appointees.

There were substantive differences among members of the Commission from time to time, to be sure, and some of those are discussed in what follows. During our three years working together, however, all of our proceedings took place in a spirit of good fellowship. At every turn, Commissioners listened to each other carefully and respectfully in an effort to come up with the best possible recommendations to the President and Congress that we possibly could. I came away from the experience with the greatest respect possible for my fellow Commissioners.

Below, after first addressing the two areas where my views may vary significantly from those of some of my fellow Commissioners (mergers and exemptions/immunities), I will discuss briefly several other matters on which I want to comment beyond what appears with respect to my individual views in the footnotes to the recommendations.

Mergers. I agree with and join most of the Commission's recommendations in the merger field—both substantive and procedural. Nonetheless, it is in the merger area that I depart the most and the most seriously from my fellow Commissioners. According to them, when it comes to antitrust and mergers, almost everything is hunky dory. As they see it, for example, "the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound." I don't think so—at least as to the agencies.

The Merger Guidelines. To me, the "basic framework" used by the agencies—as articulated by them in their *Merger Guidelines*—is fundamentally flawed. Forty years after their initial appearance in 1968, the *Merger Guidelines* remain bottomed on a "basic framework" that is analytically bankrupt. They lack intellectual respectability, and they have for a long time. *See, for example*, H. Goldschmid, et al., eds., INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Little Brown & Co. 1974).

The bedrock for today's version of the *Merger Guidelines*, as it was for the original version back in 1968, is concentration data. From the outset—and today—the *Merger Guidelines* have rested on the erroneous notion that increasing concentration leads to decreasing competition. That may be true when two firms merge to monopoly. Short of that, however, most increases in concentration lead to an increase in competition, not a decrease. The reason for that, of course, is that the concentration-increasing mergers result in cost-saving efficiencies that enable the combined firms to lower prices, increase quality and improve service. That is why opposition to such mergers usually comes from the combining firms' competitors, not from their customers.

When all this was discussed at Commission hearings and meetings, my colleagues on the Commission didn't disagree with me so much as they said, in effect, that the agencies don't really follow their *Guidelines* and that experienced legal and economic practitioners in the merger area know this and can so advise their clients. Those "in the know," for example, can tell their clients that a merger that increases the HHI by 150 points and results in an industry HHI of 2000, far from being likely to create or enhance market power or facilitate its exercise, is likely in a safe harbor with no real prospect of attack. And so on.

Maybe I'm just too old fashioned, but I've always thought that *Guidelines* should give guidance, not disinformation. In any field. For anyone who is not a schooled aficionado of antitrust, the *Merger Guidelines* are a misleading trap for the unwary. Were plain old business people to read them and take them at face value, they would be deterred from pursuing pro-competitive transactions that would benefit consumers. That is a sad state of affairs. The mitigating circumstance is that, in fact, most business people, instead of looking to the *Guidelines* for guidance, are forced to hire an army of advisors (a regiment of lawyers, a battalion of economists, a squad of psychics and so forth) who can tell them that the *Merger Guidelines* are not to be taken seriously when it comes to concentration data. These advisors will comfort their clients by telling them of combinations that resulted in astronomical increases in concentration and yet were accomplished without antitrust challenge—as was true, for example, in the case of Whirlpool's acquisition of Maytag (where some said post-merger HHIs were close to 6000 and jumped by more than 2000 points as a result of the merger—*see* D. Moss, *Antitrust Analysis of the Whirlpool's Proposed Acquisition of Maytag* (January 17, 2006); http://www.antitrustinstitute.org/archives/files/477.pdf). They will tell their clients that a host of "other factors" that relate to the real world will always trump the concentration data benchmarks set forth in the *Guidelines*, if those factors demonstrate that the transaction will increase rather that decrease competition (as they did in the case of Whirlpool-Maytag—*see* DOJ Press Release, "Statement on the Closing of Its Investigation of Whirlpool's Acquisition of Maytag" (March 29, 2006); http://www.usdoj.gov/atr/public/press_releases/2006/215326.htm.).

The development of sound merger policy, in my view, has not been led by the agencies, but rather by the courts. The Supreme Court's landmark decision in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), completely recast the "basic framework" for analyzing mergers—despite opposition from the agencies. *See generally*, D. Kempf, *Merger Litigation: From the Birth of General Dynamics to the Death of Section 7*, 65 Antitrust L.J. 564 (1997). Before that, at the urging of the agencies, efficiencies were ignored (or worse) and wrong-headed concentration data ruled the day. Since then, the courts have been in the vanguard of constructive further development of the law—mainly in court decisions rejecting agency challenges to competitively beneficial (or benign) mergers. As a result, there has been continual and substantial progress toward an ever more sound merger policy. One thing that has helped in this regard is that the courts, early on, recognized that the *Merger Guidelines* aren't law and aren't binding on the courts. So the courts ignore the *Guidelines* when they are at odds with the court's own analysis or cite the *Guidelines* when they support it. Thanks to the courts, merger policy today is better than it has been in 100 years. In this context, to paraphrase the line from *The Treasure of the Sierra Madre*, "We don't need no stinking *Guidelines*."

For one thing, as discussed above, the *Merger Guidelines* decidedly do not provide useful guidance. No one really disputes this. Instead, antitrust practitioners say things like "Well, maybe not, but the *Guidelines*, taken together with speeches by agency personnel, enforcement actions, economic studies and the advice of economic experts and experienced antitrust practitioners does provide useful guidance." That may be true, but it is no real answer to the deficiencies of the *Guidelines* themselves when it comes to giving guidance. It does not reflect well on the agencies when the first thing an experienced practitioner will tell his client is that the client *should not* look to the *Guidelines* for guidance. The *Merger Guidelines* should be withdrawn or substantially revised. I favor the former—in part because I fear further efforts to tinker with the *Guidelines* are more likely to make them worse than better. And the army of advisors that is now *de rigueur* doesn't need them.

Efficiencies. Even though there has already been a genuine sea-change in the role efficiencies play in merger analysis, much room remains for further improvement. In the "bad old days," efficiencies were viewed as a reason to attack a merger under Section 7. Indeed, the then-prevailing view was that the greater the efficiencies the greater the need to attack the merger. The merged firms, with their increased efficiencies, could charge lower prices that other competitors could not meet and, because of that, the other competitors would be driven out of business. This approach elevates the façade of competition over the reality of competition. It preserves the "appearance" of vigorous competition that purportedly results from having a whole bunch of small competitors scurrying about in the marketplace. Never mind that they are inefficient and can survive only by charging high prices to consumers. This is the mind-set of those who equate the number of competitors (and, thus, level of concentration) with the intensity of competition. It is the thinking behind the original merger guidelines published in 1968: more competitors equals more competition. That's the *façade of competition. Real competition*—and increased competition—results from this: mergers that lead to fewer, but more efficient, competitors that charge consumers lower prices. You need a sufficient number of competitors, of course, to ensure there won't be monopoly pricing. But that number is not very large.

The good news is that the agencies no longer view efficiencies negatively. But embracing efficiencies as a positive rather than negative competitive factor has come slowly—and begrudgingly at times. And agency analysis is still not totally sound. The agencies, for example, require that the gains from efficiencies be "passed on" to consumers before the agencies will "count" them as a positive factor. That sounds noble and egalitarian, of course: "Why should the fat-cats get to keep the gains; pass them on to the little guy." But it makes no sense. Efficiency gains eliminate dead-weight loss and are always a plus for society—whatever is done with them. And the management of the merged firm will know far better than a bunch of bureaucrats what best to do with the efficiency gains. Management could decide that, instead of passing them on in the form of lower prices in the short run, it will invest the gains in de-bottlenecking production facilities or perhaps even building a completely new, more efficient plant—in either case leading to even lower prices in the long run than would result from a pass-on. Or they might decide to go into a new line of products, resulting in increased competition there as well. Suppose, for example, that management had a project that gave real promise of developing a cure for cancer. Do we really want to tell management that it can't pursue that project because we want the money passed on to widget consumers instead? I don't think so. Let's take the most extreme example. Suppose management says, "Hey, we just want to give the gains to our shareholders in the form of increased dividends." Does it make sense for antitrust enforcers to say "No can do."? Again, I think not. Shareholders also go by another name: consumers. Hello. Should that set of consumers—the consumers who, incidentally invested their capital to own the company—be told that they can't have the money because the government insists that another set of consumers get it instead?

In terms of antitrust lingo, the issue is framed as one of "consumer welfare" versus "total welfare." In reality, of course, total welfare always translates into consumer welfare in the long run. To the extent that "consumer welfare" is a proxy for things like "pass on," it should be rejected as counterproductive and anticompetitive officious intermeddling.

Notwithstanding my criticisms, the fact is that (as I said at the outset) much progress has been made in moving toward a proper analytical approach to analyzing efficiencies in the merger context. I am hopeful that, before too much more time goes by, efficiencies will be—as they should be—fully and properly taken into account in merger analysis.

Publishing enforcement statistics. The reason I don't join in the recommendation that the agencies publish more statistics on merger enforcement is that I fear that doing so will create an irresistible temptation for agencies to bring ill-considered enforcement actions in order to "improve" their statistical score-card. Such data has been misused in the past with some frequency to complain of "under enforcement" or to trumpet "rigorous enforcement." During Bill Baxter's time at the Antitrust Division, for example, there was a significant increase in cases under Section 1 challenging price-fixing. At the same time, Baxter put an end to the steady stream of improvident merger and monopolization cases that had characterized prior enforcement activities. He was routinely lambasted by some for being "lax" in antitrust enforcement. One of his successors, with an eye to the numbers, brought lots of cases that were routinely settled with a consent decree. At the time, I characterized this as "the McDonald's approach to vigorous antitrust enforcement"—"the government wants its quarter-pound of flesh." D. Kempf, *Antitrust Law Developments*, 33rd Annual Northwestern Corporate Counsel Institute (October 13, 1994). I told the business group to whom I was speaking that this approach had good news and bad news for them. The bad news was that many mergers that were competitively benign still would likely require a consent decree to close—another notch in the antitrust enforcement gun. The good news was that mergers with serious anticompetitive implications would also be permitted to close—so long as the closing was accompanied by an acceptable consent decree—and ever more robust (albeit nonsensical) enforcement statistics.

Updating the Merger Guidelines to cover innovation and non-horizontal mergers. This strikes me as a bad idea. The most likely outcome would be "innovation" in fuzzy merger-enforcement theories. The role of innovation will develop better if it is done in the context of actual cases—with the assistance of the courts if need be. As for non-horizontal mergers, those are almost never challenged. For good reason. An effort to "explain" this carries with it the temptation to fashion "creative" new theories as to when such mergers can be anticompetitive and should be challenged. Again, it would be better to leave well enough alone and let "guidance," to the extent it is needed at all, develop in the context of actual proposed transactions and, also again, with the assistance of the courts if need be.

The HSR Act. The sky was not falling before the HSR Act became law, and HSR was not, as the report seems to suggest, the greatest thing since sliced bread. To the contrary, the

HSR Act, at least at the time it was passed, was viewed as simply something that would make it a little easier for the agencies to get a preliminary injunction blocking a prospective anticompetitive merger. Thus, as noted in the report, the stated purpose of the HSR Act at the time it was passed was just "to provide advance notification . . . of very large mergers" and "to improve procedures to facilitate enjoining illegal mergers before they [were] consummated."

As things have turned out, however, HSR has had a quite different effect on merger enforcement. To begin, it appears to have made it *harder* for the agencies to get a PI in merger cases. Before the passage of HSR, the government sought to enjoin mergers far more that it does today. Not only that, but the government almost always got a PI blocking a merger when it sought one. Indeed, as Justice Stewart observed in *Von's*, "The sole consistency that I can find is that in litigation under [Section] 7, the Government always wins." *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966). That's not true anymore. Now the government loses merger cases with a fair degree of regularity. In my view, the way that HSR proceedings have evolved over time is one of the reasons for that.

As originally envisioned, there was to be a three-step HSR process—(1) a 30-day waiting period after notification of the proposed merger was provided to give to the enforcement agencies time to review it; (2) if an agency wanted any additional information to help it decide whether or not seek a PI blocking the merger during the pendency of a case it would bring on the merits, it could make a "second request" for more information; and (3) there would be a very short second waiting period (20 days) after substantial compliance with the second request during which the agency could decide whether or not to bring a PI action seeking to block the proposed merger. That dream has long since vanished.

As the report notes, second requests have become draconian in nature (compliance with a second request now "typically takes six months and costs $5 million"), and "the reviews in more complex investigations can take eighteen months and cost the merging parities up to $20 million." Moreover, the HSR phase, instead of merely a way to assist in the PI process, has become the whole ball game when it comes to merger enforcement. The agency doesn't seek *limited* information to assist it in deciding whether or not to seek a PI but rather *comprehensive* information that, absent clearance, it can use either in a consent decree negotiation or in a full-scale assault on the transaction. And one of the Commission's recommendations (in which I did not join) urges Congress to drive the nail in the coffin by precluding the FTC from even pursuing a Section 7 case against a merger once the agency has failed in an effort to get a PI.

Given the changes that have occurred under HSR compared to what was originally envisioned, I have mixed feelings about the Commission's recommendation that the FTC be barred from bringing an administrative complaint challenging a merger where it has sought to get a PI blocking the transaction but failed in that effort. As the system now operates, I favor the recommendation. But I don't like the way the system now operates. I would prefer that the focus of the HSR proceedings return to being a relatively quick and simple exercise by the agency to decide whether or not it will seek a PI to block the transaction during the pendency of a case on the merits—with the FTC using its authority to combine the PI proceeding with its case on the merits in appropriate cases (as the DOJ routinely does). As now-Justice Ginsburg emphasized in *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981), the district court's ruling in a PI case "must be made under time pressure and on incomplete evidence" and "the risk of an erroneous assessment is therefore higher than it is after a full evidentiary presentation." In that context, a subsequent FTC administrative proceeding should not be barred. (Indeed, the *Weyerhaeuser* case itself came to reflect the wisdom of this approach. There, the district court thought the transaction was likely anticompetitive, but let it close and proceed to an administrative trial on the merits because of powerful "equities" considerations. At that trial, an FTC ALJ determined that the merger was not anticompetitive—a decision that was affirmed on appeal by the full Commission.)

In short, what I would prefer to a one-bite-at-the-apple rule for the FTC or DOJ is a return to fast-track HSR review, followed by an expeditious PI proceeding and, if needed, a full trial on the merits. I find it disgraceful that HSR proceedings currently drag on as long as they do. My hunch is that, under a fast-track regime, just as many consent decrees would be entered into as is now the case. It would just be done faster, cheaper and better. If I had my druthers, I would urge Congress to take steps to get the HSR procedure back to what was originally intended. No more calls from agencies to parties wishing to merge saying "We can make a decision now if you force us to do so, but it may not be in your interest for us to do that. How about, instead, extending the waiting period so that we can continue our review of the transaction?" Usually (though not always), the temptation to do so proves irresistible to the business people. Then, unfortunately (and increasingly), things just seem to drag on forever.

Exemptions and immunities. The antitrust laws suffer from Rodney Dangerfield Syndrome: they get "no respect." Or at least they don't get the respect they should.

There is a reason for this, of course. Citizens don't think that something is truly "evil" when lots of people are expressly authorized to do it. People see massive price-fixing every day by their friends and neighbors—all perfectly legal, because it is done pursuant to some immunity or exemption that excludes those particular price-fixing activities from the reach of the antitrust laws. So when people learn that yet another friend or neighbor has also engaged in price-fixing (but without the benefit of an exemption or immunity), they don't seem to think it is so "bad." After all, every one else does it, and they don't get into trouble. So why should Joe?

I sometimes tell the story of two brothers who successfully engage in price-fixing—one of dairy-farm products and the other of dairy-farm implements. When it all comes to light, one brother is named Farmer-of-the-Year, has his picture on the cover of *Iowa Gazette* and goes to a big dinner in his honor in a black tux, while the other brother is named Felon-of-the-Year, has his picture on the cover of *Police Gazette* and goes to the big house in an orange prison suit. (*See* addendum, *A Tale of Two Guys*)

What I take from this unfortunate state of affairs is that exemptions and immunities from the antitrust laws have a double-barreled adverse effect. First, they countenance anticompetitive activity that adversely affects consumers. Second, they breed disrespect for laws generally and for the antitrust laws in particular.

Nearly everyone—including the Antitrust Modernization Commission—waxes on about how antitrust exemptions and immunities are not a good idea, should seldom be granted and, when they are, should be reviewed frequently thereafter to see if the time is ripe to get rid of them. I certainly join in the Commission's principal recommendations in this regard. But you have to wonder how serious it all is. If exemptions and immunities are such a bad idea, how come we have so many of them? And why do they seem to persist in perpetuity? Something doesn't quite square.

Perhaps most revealing is the shape of the discussion when it turns to the subject of which particular antitrust exemptions and immunities should be eliminated. There is a lot of support for eliminating those that are inconsequential, but there is little support for eliminating those whose adverse competitive impact is greatest. In fact, there is little appetite even to discuss the subject.

And so it was with the Commission. Early on, there was talk at Commission meetings/hearings about how maybe we should consider recommending to Congress that it get rid of things like the baseball exemption and the Webb-Pomerene Act. But the impact of those exemptions on the average American doesn't amount to a hill of beans. Baseball is so afraid of losing its antitrust exemption that it conducts it affairs as if it didn't have one to start with. Thus, in baseball, as in other sports, there is free-agency for players, mobility for teams, etc. As for Webb-Pomerene, it authorizes American firms to do business abroad jointly under certain circumstances. Thus, for example, two widget manufacturers might be able to sell their widgets to consumers in Bolivia and Bulgaria at jointly-determined prices—hardly a big event for your average American consumer.

The big exemptions and immunities—the ones that count—are the ones for labor and agriculture. They impact much of what the average American eats and drinks and uses to do things. And they do it every day. All day. These exemptions cost American consumers billions of dollars a year. Every year. As things turned out, there wasn't much interest in facing up to those exemptions and immunities. Too much of a political football, I suppose. The thinking—probably correct—ran something like this: No Democrat from an industrial state can support repeal of labor antitrust exemptions and no Republican from an agricultural state can support repeal of food and dairy antitrust exemptions; so you get a bipartisan standoff: "I'll let you keep your exemption, if you'll let me keep mine."

The Commission's recommendations do state that "immunities from the antitrust laws should be disfavored." The recommendations go on to urge narrow construction, periodic review, sunsetting and other positive reforms. Some of my fellow Commissioners bemoan the fact that the Commission did not take the next step and recommend the elimination of specific exemptions and immunities. Maybe we should have. After all, the arguments for specific exemptions and immunities, as others have noted, are all pretty much the same and not convincing. And any exemption or immunity that becomes an ex-exemption or an ex-immunity is perhaps a step in the right direction. Still, I think we would have looked silly—probably even cowardly—had we recommended the elimination of third-string exemptions and immunities that don't have much impact and ducked addressing those exemptions and immunities that have widespread reach and do serious harm to hundreds of millions of Americans every day. I don't see much glory or accomplishment from swatting an irritating gnat to death while ignoring an 800-pound gorilla that is wreaking havoc in the room. If we're serious about our opposition to exemptions and immunities from the antitrust laws, then let's approach it in a serious manner. Let's start with the mortal sins, not the venial sins. Let's start with those that cause major harm, not with those that are minor irritants.

Regulated industries. The antitrust analysis of regulated industries is a close cousin to the antitrust analysis of exemptions and immunities. In both cases, the workings of free markets are displaced. In the case of exemptions and immunities, they are replaced with sanctioned price-fixing; in the case of regulation, they are replaced with government regulation. For the most part, government regulation hasn't worked out very well. It leads to a host of problems—not the least of which is "regulatory capture." Over time, instead of the regulators protecting the public from those being regulated, the regulators end up protecting those being regulated from the public.

Over the past several decades these realities and the other inadequacies of regulation have become increasingly apparent and there has been a commendable movement toward deregulation. As the Commission recommendations state: "In recent decades, public policy in the United States has moved towards partial or full deregulation in industries formerly subject to economic regulation—that is, regulation of prices, costs, and entry. The trend toward deregulation has benefited consumers and the economy and should be furthered where practicable." I wholeheartedly concur with this view. The only reason I did not join in some of the specific recommendations that follow with respect to what Congress should or shouldn't do when they decide to go in the opposite direction is that those recommendations strike me as a bit presumptuous. Once Congress has decided that there are good and sufficient reasons for regulation of some sort, then I think that those reasons—and not antitrust considerations—should guide Congress as to what is the best course. I would likely disagree with the starting premise in almost all cases, but that is beside the point. Once Congress concludes that there are sound reasons to regulate, then it is those sound reasons that should drive what follows.

Does antitrust matter? I'd like to believe it does, and I do believe it does—at least when it comes to price-fixing and other naked restraints that clearly violate Section 1 of the

Sherman Act. To me at least, the economic theory is rock solid and the evidence with which I am familiar is wholly persuasive. But there is a lack of empirical studies to back up these beliefs. More importantly, some recent work by distinguished scholars calls the question into issue. (*See, for example*, R. Crandall & C. Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. of Econ. Perspective 2 (2003).)

In a thoughtful early written submission to the Commission, the then-sitting Assistant Attorney General for the Antitrust Division, R. Hewitt Pate, suggested that the Commission undertake to study this question in depth. As he put it:

> Some antitrust commentators contend that there is no empirical foundation for the conviction that antitrust enforcement benefits consumers and the economy. It seems plain to me that combating cartels and forestalling perceived needs for regulation have alone provided great benefits, but more empirical evaluation of the effects of antitrust enforcement would certainly be desirable. The Commission should consider engaging respected experts (including those who do not earn their living providing antitrust services) to design a rigorous study of the effects of antitrust enforcement. Data could be collected and evaluated, with case selection criteria and evaluation standards objectively designed in advance. Such a study might run for several years. Bolstering empirical evaluation of antitrust enforcement could be an important and lasting achievement of the Commission. (Letter to D. Garza from R. H. Pate, January 5, 2005; http://www.amc.gov/comments/pate.pdf).

Unfortunately, in my view, the Commission decided not to do follow this suggestion. At our hearings, several of those who testified endorsed Hew Pate's suggestion, including another former head of the Antitrust Division and a former Chairman of the Federal Trade Commission. As one outgrowth of such testimony and other considerations, our Commission did recommend that such studies be undertaken in the merger area (and that consideration be given to commissioning outsiders to do them). I certainly hope both that that will be done and that, over time, the undertaking will be expanded to include the kind of more fundamental study recommended by Mr. Pate.

Patents and antitrust. The first antitrust statute, the Sherman Act, was enacted in 1890. The patent laws predate that by more than a century. Indeed, the framers of the Constitution thought patent laws were so important that they expressly provided for them in the Article I, Section 8. Patent and antitrust are complementary in some respects, but there are also some tensions between them. After all, antitrust condemns monopolies and patents grant them. An effort to harmonize the two is all to the good, of course, and I join in the thrust of the Commissions recommendations in this regard.

I do have some concern, however, that some who labor in the antitrust vineyard give the antitrust laws a primacy over other fields that is not always warranted. This is understandable; those who spend all day, every day in a particular field can be expected to view the importance of that field as paramount. It is such concern that leads me not to join in the Commission's unqualified recommendation that Congress give consideration to the suggestions of the FTC with regard to possible changes in the patent laws. The FTC's report pays lip service to the importance of the patent laws, but some of its suggestions strike me as betraying a deeper hostility to the patent laws and a desire to have antitrust considerations improperly trump the patent laws. Let me give an example of to what I'm referring.

The FTC's first recommendation is that there be an administrative procedure at the PTO "for post-grant review and opposition that allows for meaningful challenges to patent validity short of federal court litigation." This sounds fine; after all, the PTO is where the "experts" reside. When there is some controversy as to the validity of a just-issued patent, let's let these experts take a fresh look, and let's do it in a proceeding that allows both sides of the story to be told—and tested on cross-examination. In its second recommendation, however, the FTC appears to do an about-face. It says that, should a patent then be attacked in court, the deference traditionally awarded to the validity of the patent because of the review by the experts at the PTO—now even involving a second review—should be thrown out the window. The FTC proposes that this be accomplished by replacing the "clear and convincing" evidentiary test for rebutting the presumption that a patent is valid with the "preponderance of the evidence" test. To me at least, some of the FTC's suggestions come across more as efforts to torpedo patents so that there will be more competition than efforts aimed a making the patent system work better so that only truly deserving patents are issued.

Direct/Indirect purchaser claims. I've always thought that the strange twin rulings in *Hanover Shoe* and *Illinois Brick* are explainable mainly by the order in which they arrived at the Supreme Court. Had *Illinois Brick* been the first case, I can't imagine that the Court would have held that persons clearly injured by an antitrust violation could not recover. Quite the contrary, I think that argument would have been rejected out of hand. And for good reason. Then, when *Hanover Shoe* came along next, the Court likely would have said that defendants can, of course, assert a "pass-on" defense to ensure that those who weren't damaged don't get windfall recoveries.

But it didn't happen that way. Instead, *Hanover Shoe* was the first of the two cases to come before the Court. The rest, as they say, is history. Fearful that antitrust violators would escape without consequence were a "pass-on" defense countenanced, the Court said defendants could not assert such a defense. Then, when *Illinois Brick* reached the Court, it stated, in a burst of deference to symmetry, that indirect purchasers could not sue. So there we were: people who weren't injured (because they had passed on the overcharges to their customers—sometimes with a mark-up that meant they actually made a profit on their supplier's price-fixing) could not only get windfall recoveries, but huge windfall recoveries—three times the damages they didn't suffer. To make matters worse, their customers, who were the ultimate target of the price-fixing activities to start with, couldn't recover bubkes.

Various States looked at this and—understandably—said "Hey, this makes no sense." So they passed state laws that said, in effect, of course indirect purchasers can sue and recover for price-fixing that causes them (as it was intended to do) actual injury and damages. What has followed has been a nightmare—both substantively and procedurally. We have the spectacle of massive recoveries by people who didn't suffer the loss of a dime (and in some cases actually made money) and the denial of recovery (at least at the federal level and many States) to many of those who suffered substantial damages. The situation cries out for corrective action.

The Commission thoughtfully considered a wide range of possible recommendations, including federal preemption, an overturning of only *Illinois Brick* and others. In the end, the Commission decided—wisely, in my view—to make a recommendation that would serve to conform antitrust to the way things generally work in other areas. Specifically, we fashioned a recommendation whose aim, as it expressly states, is to prevent "duplicative recoveries, denial of recoveries to persons who suffered injury or windfall recoveries to persons who did not suffer injury"—all three of which can occur under the present regime. I believe we succeeded, and I hope Congress will implement our recommendation.

One last observation on this subject. The Commission's final recommendations with regard to the subject of direct and indirect purchaser claims were not settled upon until our February 22, 2007 meeting, and our ultimate recommendation differed from the draft pending as we began that meeting. The drafting of that section of the report, however, had been substantially completed before the February meeting. While there was tinkering after the meeting to get that section of the report to conform to the final recommendation, I fear that the report may not capture adequately the spirit of the final recommendation. These recommendations were not about procedural convenience and ease of administration. While they may contain some useful suggestions on that front, the recommendations were driven primarily by the desire to achieve fairness and a just result.

Some thoughts about the Commission and its work. I suspect that all of the Commissioners have reflected on their experiences serving on the Antitrust Modernization Commission—certainly I have. Let me close with some observations on that subject.

The AMC leadership and staff. The Commissioners were fortunate to have Deb Garza and Jon Yarowsky at the helm as our Chair and Vice-Chair, respectively. Together, they provided a steady hand on the rudder and quiet, but effective, leadership. All of the Commissioners are indebted to them for all they did for the rest of us. In addition, the work of the Commissioners, both individually and collectively, was made easier by the assistance of an able staff—from our Executive Director and Senior Counsel to our clerical personnel. Not only did they do an outstanding job, but they did it under tight deadlines, often having to integrate a great deal of input (sometimes conflicting) from various Commissioners. Throughout, they did their jobs with a positive and cheerful disposition.

The "inside baseball" perspective. Looking back, there are some things that might have been done differently. One is the composition of the Commission. Many of the Commissioners are "experts" in the antitrust field and have spent most of their professional careers laboring in the antitrust field. That proved valuable in many ways. Still, the Commission might have benefited had its membership included more individuals who were not part of the antitrust "inside baseball" establishment. Among other things, such individuals generally have a balanced perspective of all relevant considerations and do not elevate antitrust to an unwarranted primacy as a consideration that should be taken into account more than other important considerations.

The same can be said of the witnesses who appeared before us. They too came from the antitrust establishment for the most part. No one was excluded, of course, and the Commission extended a broad invitation for testimony and written submissions that was published in the *Federal Register*. But not a lot of people sit around reading the *Federal Register* to see what they want to do next week. Fortunately, some individuals from the business world or otherwise outside the antitrust arena did provide the Commission with their views by way of valuable testimony or written submissions. Some others were also invited, but declined to participate—perhaps not wanting to raise their antitrust profile. Whatever the circumstance, however, in retrospect, the Commission should have done more to get the views of "real" people from the commercial world who have to live out their business lives under the rules of the antitrust laws day-in and day-out.

The recommendations and the report. The fingerprints of the Commissioners—all twelve of them—are all over each and every one of the recommendations made to the President and Congress. That is not true as to the report that accompanies the recommendations. In short, the recommendations are decidedly the work product of the Commissioners, while the report is primarily the work product of the staff. Each Commissioner had an opportunity to read and comment on the report, of course, but the Commissioners did not do the same kind of intense scrutiny, study and discussion and debate that was done in the case of the recommendations. I say this not so much as a criticism of the report but rather so that those who review the work of the Commission will understand that the Commissioners' individual, collective and collaborative efforts were directed to the recommendations far more than to the report.

Miscellaneous. There are many issues the Commission didn't address. We had to pick and choose among many possible topics and attempt to use our limited time most effectively. Looking back, there are some things we didn't address that I wish we had. Specifically, for example, I wish we had taken a closer look at whether it makes sense to have two antitrust enforcement agencies whose responsibilities often overlap. The FTC seems to have gotten away from what was envisioned as one of its primary ongoing activities at the time of its creation, scholarly studies of matters of importance to sound antitrust policy. Perhaps if its enforcement responsibilities were limited to areas that did not overlap with those of the DOJ, its efforts could be more productively redirected to an area it has largely abandoned. We should also have examined Section 5 of the FTC Act and whether it plays a positive or negative role in the ongoing effort to achieve sound antitrust enforcement. Finally, the Commission's examination of the topics on which we chose to focus was done within the construct of the existing antitrust framework. Some suggested that we take a more bottoms-up approach, starting with a blank sheet of paper and trying to fashion a "better" framework from scratch. Some of the submissions we received in this regard were quite exciting; I wish we had had the time to give the consideration to them that they warranted.

Addendum: A Tale of Two Guys

It was the best of times; it was the worst of times. The best of times for John Doe, and the worst of times for James Doe. Here's how it all happened.

John and Jim Doe were brothers, twin brothers, in fact—the only two children of Frank and Mary Doe. They were born and raised on the Doe family farm, just outside of Smallville, Iowa.

Frank Doe ran a very successful dairy farm. In the early 1950s, he decided to expand by opening a dairy-farm equipment dealership in Smallville. With the post-war boom in farm mechanization, it too was a big success. When John and Jim returned home from their stint in the Army during the Korean War, they went into the family businesses with their dad, John running the dairy farm and Jim running the dairy-farm equipment dealership. And when Frank died in the mid-1970s, he left the farm to John and the dealership to Jim.

John and Jim Doe became successful businessmen. Over time, they also became industry leaders. John eventually became head of the local dairy-farm coop, and Jim the head of the local association of dairy-farm implement dealers. One of the things that both John and Jim did as heads of their respective organizations, was lead the effort to establish fair prices for their respective industries to charge customers. They were good at this too.

When people realized what an outstanding job John had done in setting prices for dairy-farm products, he was named Farmer-of-the-Year, there was picture of him on the cover of *Iowa Gazette* and he went to a big dinner honoring him in a black tux. When people realized what an outstanding job Jim had done in setting prices for dairy-farm implements, however, he was named Felon-of-the-Year, there was a picture of him on the cover of *Police Gazette* and he went to a big jail in an orange prison suit.

Fixing prices, you see, is legal for certain dairy farm products but illegal for dairy-farm implements. Dairy farm coops persuaded Congress to pass laws making it okay for them to fix prices—one of the many so-called "exemptions and immunities" from the antitrust laws. Those selling dairy-farm implements, however, failed in their efforts to secure such legislation making it okay for them to fix prices.

And so our story ends. John Doe is a hero, and Jim Doe is a villain. And yet they both did exactly the same thing.

Separate Statement of Commissioner Shenefield

I write separately to address the Commission's views on antitrust exemptions and immunities, and also on the Robinson-Patman Act.

Exemptions and Immunities

The central organizing principle of the U.S. economy is competition, which will spur productivity and enhance innovation. Notwithstanding the prominence of the free market model, the economy nevertheless tolerates some notable exceptions to the rule of competitive markets. Frequently, those exceptions are marked by statutory exemptions and immunities from the full application of the antitrust laws. The Commission's report ably describes the background and explains the continued persistence of these occasional deviations from the competitive principle.

The Commission's broad mandate and compressed schedule made it impossible to investigate any of the specific exemptions and immunities sufficiently to allow the Commission to feel comfortable in recommending the repeal of any of them, including some of the most ill-considered and egregious examples. Although understandable, that shortcoming in the Commission's work was an opportunity missed. Empirical data on sectoral deregulation suggest the magnitude of the missed opportunity, and counsel the way forward. I believe the President and Congress should create another commission of experts to undertake a broad-ranging evaluation of the antitrust exemptions and immunities now on the books. Although the repeal of some of the most unfortunate, including particularly the McCarran-Ferguson Act, the Shipping Act exemption and the Export Trading Company Act and Webb-Pomerene exemptions should not be delayed, the creation of such a commission would set the stage for a thorough and long-overdue policy review of all exemptions and immunities, thus going a long way to complete the deregulation work so well begun in the administrations of Presidents Ford and Carter.

Robinson-Patman Act

Notwithstanding its reticence with respect to the repeal of specific exemptions and immunities, the Commission recommends total repeal of the Robinson-Patman Act. Moreover it does so on a record composed more of academic opinion than of solid evidence. There is no serious disagreement that enforcement of the Act has on occasion had unnecessarily anticompetitive effects. The question for judgment is whether there is a rationale for conserving a kernel of the Act, amended to address the most serious criticisms. The Commission believes there is not, and accordingly recommends total repeal. I am unpersuaded by the record before the Commission, and thus do not support the Commission's recommendation.

Instead, I believe reform is in order. Any such reform should import into the Robinson-Patman Act two fundamental concepts that would preserve the benefit of maintaining a law prohibiting anticompetitive discrimination but avoid the unnecessary disadvantages of the Act in its current form. First, I favor amending or reinterpreting the statute to make it clear that plaintiffs in secondary line cases under section 2(a) of the Act must prove competitive injury through the existence either of market power or buyer power (which would also affect liability under section 2(f) as well). I would also amend the statute to introduce a parallel competitive injury requirement into sections 2(d) and 2(e). Second, I would relax the cost justification standard by permitting a preferential price that was "reasonably related" to cost savings attributable to dealing with the favored buyer.

I join the Commission in recommending repeal of section 3 of the Act (the criminal provision). I would also repeal section 2(c).

My recommendation has the advantage over that proposed by the Commission of being politically feasible. I opt for sensible and incremental reform that has at least a chance of making important progress.

Separate Statement of Commissioner Warden

My views depart from those of a majority of Commissioners as to three significant issues: (1) the role of state law; (2) state "enforcement" of federal law; and (3) the rules as to costs and damages in private actions.*

The Role of State Law

I believe that state law—whether called antitrust law, consumer protection law or unfair competition law—that regulates the same business activity with the same purported objectives as the federal antitrust laws should be preempted except in its application to strictly local activities affecting a particular State.

While the Commission has found no compelling factual case for preemption, the potential for the development of inconsistent standards to serve parochial, idiosyncratic or even private interests is clearly present. Business today is increasingly global in scope, and firms are subject to the laws of the United States, the European Union and an increasing number of developed and developing nations and to scrutiny by the enforcement authorities of all those jurisdictions. The exercise of legislative and enforcement jurisdiction by 50 plus additional entities within the United States is a burden on interstate and foreign commerce in terms of merger review and monopolization cases and provides little, if any, countervailing benefit.

Legitimate interests of the States and their citizens regarding multistate and multinational conduct are fully protected by their respective ability, appropriately circumscribed by standing and antitrust injury requirements, to assert claims under the federal antitrust laws. I am not persuaded by arguments for preserving state law based on historical legal developments during the 19th century. Our notions of the federal commerce power, of the States' ability to exercise their police powers against claims of freedom of contract and of many other matters are far different today, as, of course, is the nature and scope of economic activity. And, as our Report notes, even in 1890, when urging the adoption of what became the Sherman Act, Senator Sherman stated: "Each state can deal with a combination within the State, but only the General Government can deal with combinations reaching to not only the several States, but the commercial world."

Nor am I persuaded by a supposed need for the States to act when federal enforcement is "lax" in the eye of some beholder. The development and enforcement of a coherent, effective and balanced national competition policy by the federal enforcement authorities includes

* Commissioner Garza joins this statement with respect to the role of state law and state "enforcement" of federal law.

decisions on what not to pursue as fully as it does decisions on what to pursue. A national competition policy must be just that—national. As discussed in the next section, both the Supreme Court and Congress have at least implicitly recognized this obvious reality.

State "Enforcement" of Federal Law

I have no quarrel with Congress's decision to grant the States standing to sue under the federal antitrust laws in their capacity as *parens patriae* to recover damages for injured consumers in their respective jurisdictions. As our Report notes, such actions may be preferable in terms of cost and efficiency to consumer class actions. Likewise, the States' right to sue for damages in their proprietary capacity raises no issue.

Nor do I question the Supreme Court's long line of decisions allowing the States suing *parens patriae* to seek equitable relief for state-specific injury in federal courts pursuant to Section 16 of the Clayton Act, which governs actions by all private parties. As is further discussed below, the Supreme Court has not, however, conferred on the States general "law enforcement" authority under the federal antitrust laws. Rather, its decisions, which do not distinguish between state actions under Section 16 and other state *parens patriae* actions, clearly require a State to allege and prove injury particularized to its economy and not common to all or a large part of the nation. *See, e.g., Pennsylvania v. West Virginia*, 262 U.S. 553, 591 (1923); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 443, 447–49 (1945); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 270–71 (1972); *see generally Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602–07 (1982).

Permitting the States to seek equitable relief on the same footing as the federal enforcement authorities would pose the same problems as permitting state law to govern national and global activities, as Congress has recognized. When the Clayton Act was enacted in 1914, the Senate rejected an amendment that would have given the States power to enforce the antitrust laws in the name of the United States. 51 Cong. Rec. S14, 526 (daily ed. Sept. 1, 1914).[1] Among the reasons advanced for rejection were "the great danger of having a diversity of conclusions" (Senator Gallinger, 51 Cong. Rec. S14,477, daily ed. Aug. 31, 1914); the prevention of "the carrying out of any uniform policy in the enforcement of the antitrust law" (Senator Colt, 51 Cong. Rec. S14,518, daily ed. Sept. 1, 1914); and the fear that state attorneys general would "desert their own duties for another field that, for one reason or another, they might find to be more attractive" (Senator Pomerene, *id.*, at 14,519.)[2]

The Clayton Act as enacted makes no provision for actions in equity specifically by the States. Given the Supreme Court's earlier rejection of state standing to enforce the Sherman

[1] The portions of the Congressional Record here cited are reprinted in 3 KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (1978).

[2] Recent experience has shown Senator Pomerene to have been more prescient than Nostradamus and with no inkling of the magnetism of television cameras.

Act, *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 70–71 (1904) (those "acting under the direction of the Attorney General" are to enforce the Sherman Act, "according to some uniform plan, operative throughout the entire country"); *Louisiana v. Texas*, 176 U.S. 1, 19 (1900) ("the vindication of the freedom of interstate commerce is not committed to the State of Louisiana"), and the Senate's affirmation of that rejection, any claim of state standing to "enforce" the antitrust laws broader than that enjoyed by any private party or that conferred by the Supreme Court's general *parens patriae* decisions discussed above, is not sustainable.

Because I am convinced that the Supreme Court will reject a claim by one or more States that they may sue as *parens patriae* in equity under the federal antitrust laws for other than state-specific injury if such a claim is squarely presented to it, I see no need for legislative action in this respect. I emphasize the point in this statement because the Commission's Report assumes the States are "enforcement authorities" and because it has a clear impact on the nature of the relief to which a State might conceivably be entitled as a private party suing under Section 16—in contrast to the scope of relief available to the federal enforcement authorities—in any future action that like, for example, *Microsoft*, involves conduct global or national in scope.

Predominantly local matters have in fact been the principal focus of state enforcement, and the States have played a useful and effective role in protecting competition through such enforcement. Their Section 16 actions, as their legislation, should be directed solely to such local matters in the global economy of the 21st century.

Private Damage Actions

Government injunctive actions, with limited exceptions, seek prospective relief barring conduct claimed to be illegal.[3] These actions have served to develop the law and, in my judgment, have thereby saved the Sherman Act from constitutional vagueness challenges. *See generally United States v. United States Gypsum Co.*, 438 U.S. 422, 440–42 (1978); *compare United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921). At the other end of the enforcement spectrum lie criminal prosecutions, which the Department of Justice has, properly, brought only in cases involving "hard core" cartel activity and which, of course, require proof beyond a reasonable doubt. Without endorsing every enforcement decision or the result reached in every case, I join the vast majority of observers in concluding that both of these enforcement mechanisms are working well.

The same cannot be said, in my judgment, of private treble damage actions. Such actions are brought not by enforcement agencies exercising discretion and concerned not to do more harm than good, but by private parties seeking only their own self-interest. The "enforce-

[3] The limited exceptions are cases seeking dissolution or divestiture or what might be termed regulatory relief. Dissolution and divestiture cases have been rare since *AT&T*; the obvious recent example of regulatory relief is *Microsoft*.

ment" aspect of these actions—lauded by many—is purely incidental to their self-seeking motivation. Moreover, the statutory provision for trebling of damages renders relief in these cases punitive, as has been universally recognized. *See, e.g., Cantor v. Detroit Edison Co.*, 428 U.S. 579, 599 (1976); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409 (1945). When that provision is joined with joint and several liability, as it now is, the punitive sanction visited upon a defendant that goes to trial and loses can be truly draconian—indeed, far greater than the maximum criminal fine. *See generally*, II AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 303 (2d ed. 2000); II AREEDA & TURNER, ANTITRUST LAW 32–36 (1978).

The Commission's recommendations for legislation providing for claim reduction and contribution are a solid start toward redressing the Kafkaesque dilemma of a defendant confronted with charges it believes unfounded and wishes to contest. Those who oppose this, and indeed any alleviation of the dilemma, invoke a single mantra—"cartel." To favor cartels is, of course, in a league with opposing motherhood and apple pie. But the issue is hardly so simple and, I hasten to add, neither the problem nor its resolution has anything to do with cartel cases. Indeed, criminal prosecutions are better suited to deterring and punishing cartel behavior than are private civil actions, whose purpose should be to compensate, not to sanction.

The Supreme Court has recognized the dangers of chilling competitive behavior by the threat of punishment in the context of criminal prosecutions, *Gypsum*, *supra*, and Professor Areeda has observed the obvious fact that the same dangers are presented by treble-damage penalties, AREEDA & HOVENKAMP, *supra*; AREEDA & TURNER, *supra*. But while "over deterrence" is clearly at stake, so are other interests, including fundamental fairness in the judicial process.

First, fundamental fairness requires that before the punitive sanction of trebling is invoked, there be proof by clear and convincing evidence of clearly unlawful conduct.[4] This should pose no problem for those seeking to recover overcharges from cartels, and it at least reduces the likelihood of punishing the innocent through what the academics call "false positives" and I call miscarriages of justice. Single damages seem entirely fair to an antitrust tort plaintiff who can prove its case only by a preponderance of the evidence and cannot demonstrate that the conduct so proven was clearly unlawful, the latter determination to be made taking into consideration both prior legal precedent and whether the conduct was overt and unchallenged for some years.

Second, actions brought by competitors have the potential for themselves being anticompetitive. It is sad, but true, that some firms take the view—to paraphrase General von Clausewitz—that litigation is an extension of business rivalry by means other than competition. All types of antitrust actions can impose on the parties huge costs (often running into

[4] Professor Areeda appears to have endorsed such an approach in the 1978 edition of ANTITRUST LAW, and that endorsement has been continued by his successors in the 2000 edition.

eight figures) from discovery and motion practice, even if ultimately resolved on summary judgment. A prevailing plaintiff, in addition to damages, recovers its attorneys' fees, while a prevailing defendant recovers nothing but narrowly defined "costs." This imbalance probably cannot practicably be redressed in consumer class actions, but it can be in competitor cases where the plaintiff is a substantial firm. Accordingly, I urge that Congress provide for the award of attorneys' fees to prevailing defendants in such cases absent a determination by the court that an award would be manifestly unjust in a particular case. This would not only provide a measure of fairness to the defendant but would discourage rivals from bringing cases that are merely tactical, and would thereby serve the public goal of fostering competition on the merits.

Third, I would award full prejudgment interest to a prevailing plaintiff in any case where treble damages are not awarded. Where damages are trebled, I would make no change in existing law as to the award of interest, since prejudgment interest is not necessary to secure full compensation.

Final Comments

I offer additional comments on three other topics: patents, regulated industries and civil process.

Patents. The Constitution allows patents to be issued only for "inventions." *See* Article I, § 8. That requirement—termed "nonobviousness" in the implementing statute, 35 U.S.C. § 103—"may not be ignored." *Graham v. John Deere Co.*, 383 U.S.1, 6, 13–17 (1966). Despite the Supreme Court's repeated admonitions, both the PTO and the Federal Circuit appear consistently to have ignored the constitutional mandate. It is simply not possible to believe that true "inventions" have reached the level of 174,000 a year, but that is the number of patents the PTO issued in fiscal 2006.

Patents on the obvious impede not only competition but commerce itself by subjecting investment to uncertainty and the expense of litigation. I have little direct experience in this area, but that little has convinced me that a radical rethinking of doctrine is required. The review of "prior art" may be too narrowly confined by looking only to the art of a very specific field. The fact that two—or three or four or more—putative inventors unaware of each other's work dispute which of them was first by a margin of weeks or months to complete an "invention" may itself be evidence of obviousness; it may be that the "invention" was simply the inevitable next step in the evolution of technology by those skilled in the art. The statutory presumption of validity and reinforcing subsidiary presumptions devised by the Federal Circuit may be unwarranted by reality.

I can carry this inquiry no further, but I think Congress should and should do so with the assistance of talented generalists in business, law and science, not just patent specialists. In urging this undertaking, I am not seeking to accord antitrust primacy over patents. There is no conflict between antitrust law and patent law, but there is a conflict between the present administration of the patent laws and the Constitution—a conflict that would exist were there no antitrust laws.

Regulated Industries. While I subscribe in large measure to the section of our Report dealing with regulated industries, in my judgment its usefulness is limited by a failure to distinguish sufficiently between businesses traditionally treated as utilities and now partially or wholly "deregulated" and businesses, particularly those providing financial services, that were never viewed as utilities but have long been subject to economic regulation and are likely to remain so.

Civil Process. The Commission did not study process in civil antitrust litigation, but I would be remiss were I not to include in this statement an exhortation to the courts on that subject. I have made my entire career in the field of commercial litigation, but, as a citizen, it seems incontrovertible to me that such litigation is a social overhead cost that should be minimized to the fullest extent consistent with the objectives of law enforcement, dispute resolution and tort compensation.

Today, the process costs of antitrust cases, like other major commercial cases in the United States, can become truly outlandish. From my 40 years of experience, I am convinced beyond peradventure that this level of cost is orders of magnitude beyond that necessary to fair and reasoned adjudication. The only effective solution lies with the courts themselves; judges must begin to apply cost/benefit analysis to process, rather than the "no stone unturned" approach that often seems to be the order of the day despite the provisions of Rule 26(b)(2). The cost of justice should not, itself, be unjust.