UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE COMMISSIONER

April 15, 2002

The Honorable Frank R. Wolf
Chairman
House Appropriations Subcommittee
on Commerce, State, The Judiciary and Related Agencies
241 Canon House Office Building
Washington, D.C. 20515

The Honorable José E. Serrano
Ranking Member
House Appropriations Subcommittee
on Commerce, State, The Judiciary and Related Agencies
2342 Rayburn House Office Building
Washington, D.C. 20515-3216

Dear Chairman Wolf and Congressman Serrano:

I wish to correct a mischaracterization of my views presented to the House Appropriations Subcommittee on Commerce, State, The Judiciary and Related Agencies at the April 10, 2002 hearing on the Federal Trade Commission's budget. It is my understanding that the testimony of my colleague Chairman Timothy Muris contained certain inaccurate statements about my views of the clearance agreement between the Chairman and Assistant Attorney General Charles James. More specifically, Chairman Muris inaccurately announced that I recommended eliminating civil antitrust jurisdiction from the Department of Justice. This statement is not correct. Accordingly, I respectfully request that your hearing testimony be corrected to accurately reflect my views.

Since his testimony, Chairman Muris informed me that the basis of his characterization was a reference contained in an attachment to a statement I publically released on March 5, 2002.[1] This attachment was one of several documents that the Senate Commerce Committee staff asked me to provide to give them background and perspective about clearance issues.

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[1] Statement of Commissioner Mozelle W. Thompson Concerning the March 5, 2002 Clearance Agreement Between the Department of Justice and the Federal Trade Commission, *available at* <www.ftc.gov.opa/2002/03/clearancemwt> (attached).

Included in these documents was a list of alternatives for dividing antitrust enforcement among multiple agencies.

One of the three options I listed restated an option that the ABA Antitrust Section's Special Committee on the FTC discussed in 1989. (This Special Committee was chaired by the prominent antitrust counselor and former FTC Chairman, Miles Kirkpatrick, and coincidentally included as a member a law professor from George Mason University Law School – Timothy Muris). The ABA Report offered that an argument could be made to eliminate DOJ's civil antitrust jurisdiction:

> Our system of government traditionally has entrusted many critical legal decisions to multi-member panels (e.g., three-member courts of appeals panels, the nine-member Supreme Court, and multi-member independent agencies). Multiple voices may improve quality and increase public trust. With the critical merger enforcement decision having moved from the courts to the prosecutors, there is virtue in preserving a multi-member prosecuting agency. [Footnote: "This argument counsels in favor of shifting all civil antitrust enforcement to the FTC."][2]

Chairman Muris's testimony before your Subcommittee would lead one to erroneously believe that my reference to this historic option constituted my "recommendation" about how clearance issues should be resolved between the FTC and DOJ. However, Chairman Muris's characterization ignored the very next document in the above-referenced attachments. That document, titled "Allocating Antitrust Investigations Involving the Media and Entertainment Industries by Content and Distribution," is where I recommend "a more rational[] re-allocation of media/entertainment industries."[3] The document specifies in two charts: (1) the FTC/DOJ existing industry allocation in the broad media and entertainment sectors (based on the current respective expertise of the two agencies); (2) the industry allocation under the Muris/James Agreement; and (3) my recommendation concerning how to allocate media and entertainment industries between the two agencies.

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[2] Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, Vo. 56 Antitrust & Trade Regulation Report No. 1410 (April 7, 1989) at S-34 (excerpt attached). Footnote 168 indicates that the Committee did not discuss further the option of granting the FTC exclusive federal civil antitrust jurisdiction because the Committee members believed that such a change was unlikely.

[3] "List of Documents Submitted," (Attachment to March 5, 2002 Statement, *supra* n.1) at item 4.

I have repeatedly stated that "[w]hile generally I favor interagency agreements that enhance the speed and efficiency of case processing, the [Muris/James] Agreement raised substantial concerns."[4] I continue to believe that there are steps we can all support to improve the clearance process, even though clearance issues may not be as significant a problem as portrayed by Chairman Muris. But I also believe that the impact of significant industry re-allocations and limiting legislatively granted concurrent jurisdiction, as contained in the Muris/James Agreement, warrants greater consideration and more open discussion than what has occurred thus far.[5]

Thank you for your consideration and the words of support and praise that you and other members expressed for the Commission's work during this past year.

Sincerely,

Mozelle W. Thompson /by cat

Mozelle W. Thompson

cc: Chairman Timothy J. Muris

Attachments

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[4] Statement of Commissioner Mozelle W. Thompson Concerning the Abandoned Clearance Agreement Between the Department of Justice and the Federal Trade Commission, January 18, 2002, *available at* <http://www.ftc.gov/opa/2002/01/ftcdojmt.htm> (attached). *See also*, March 5, 2002 Statement, *supra* note 1.

[5] *See e.g.*, Statement of Mozelle W. Thompson, Concurring in Part in, and Dissenting in Part from, The Federal Trade Commission's April 10, 2002 Testimony before the Subcommittee on Commerce, Justice, State, The Judiciary, and Related Agencies, House Committee on Appropriations, *available at* <www.ftc.gov/os/2002/03/budgetmwt>.

Statement of Commissioner Mozelle W. Thompson

Concerning the March 5, 2002 Clearance Agreement Between the Department of Justice and the Federal Trade Commission

With profound disappointment I learned today that DOJ Assistant Attorney General for Antitrust Charles James and FTC Chairman Timothy Muris executed an agreement that allocates merger reviews and conduct investigations between the two agencies on the basis of industries. This Agreement - which is identical to the one proposed on January 17th - was executed without substantive consultation with me, without approval of the FTC's Congressional committee Chairmen, and without the meaningful public dialogue that such a sweeping proposal deserves.[1] On January 17th, when this Agreement was first put forward, I stated that "[w]hile generally I favor intra-agency agreements that enhance the speed and efficiency of case processing, today's announced Agreement raises substantial concerns." During the intervening weeks my concerns have not been addressed and, in fact, for several reasons have only been heightened.

First, it was only last Thursday that I saw for the first time a memorandum prepared by four private antitrust attorneys who advised the Chairman and Assistant Attorney General on, among other things, how to allocate between the FTC and DOJ the future review of cases in various industries. Despite repeated prior requests, this memorandum was not provided to me or my colleagues but was instead belatedly posted with other documents on the FTC Web site. This non-public consultation with private attorneys is not a substitute for meaningful consultation with FTC Commissioners who are appointed by the President and confirmed by the Senate to work on behalf of the public interest.

Second, the documents that have been publicly provided as support for the Agreement are fundamentally flawed. For example, letters from the ABA Antitrust Section, former FTC and DOJ officials, Senators Herb Kohl and Mike DeWine, and the U.S. Chamber of Commerce each state support for some form of clearance agreement, but the authors take great pains to avoid stating that they support today's Agreement. Also, the proffered statistical data supporting the Agreement overstate DOJ's expertise in media and cable transactions, while failing to note the FTC's considerable experience in these matters. (See Attached)

Finally, I continue to be concerned that the public benefit of the Commission's independent expertise and knowledge in certain key industries, such as media, entertainment, and high technology, will be lost. Reviews of mergers and conduct - such as anticompetitive foreclosure - in these industries may be among the most important antitrust matters reviewed by the federal antitrust agencies. History demonstrates that the five-member independent Commission has used its democratic decision-making process to protect media consumers, the industry, and democracy.[2] Moreover, the Commission's substantial expertise and meaningful bi-partisan agency enforcement actions in the high-technology area may no longer be available to the public. See, for example:

- Sony *et al.* (compact disc cooperative pricing policies)
- Warner Communications & Vivendi Universal (price fixing/advertising restraint)
- Time Warner/EMI (pre-recorded music merger)AOL/Time Warner (broadband merger)
- Barnes & Noble/Ingram (booksellers)
- Random House (book publishing and resale price maintenance)
- MSC.Software (computer-aided engineering software merger)
- Hearst (pharmaceutical database merger)
- Automatic Data Processing (salvage yards parts trading database merger)
- Cablevision/TCI (New Jersey cable television systems merger)
- Time Warner/TCI (cable and cable programming merger)
- VNU N.V./Nielsen Media Research (advertisement media service merger)
- Cooperative Computing (computer management information systems merger)
- Autodesk./Softdesk (computer-aided design engines merger)
- Cadence Design (software layout environment for chip design merger)
- Adobe Systems (computer programming and software merger)

- Boulder Ridge Cable TV (cable television restraint)

In the end, I believe that issues raised by today's clearance Agreement are far too important to be resolved in secret or only with documents acting as a substitute for meaningful consultation. Thus, in the spirit of transparency - and with the hope that fuller discussion and debate will occur - I am making publicly available several analyses that I prepared in response to Congressional staff requests. (See attached) The information and statistics in these documents directly challenge the assertions contained in materials generated "after-the-fact" to justify the Agreement.

For the record, I continue to support the goal of clearance efficiency and reform, and believe there are workable parts of the present Agreement. But very little has been provided to justify the jiggering of the FTC's current antitrust authority, and I have seen nothing to demonstrate the need to move all responsibility for ensuring competitiveness in information, technology, thoughts and entertainment, to the executive branch through the Department of Justice.

What the events of the past six weeks have shown is that transparency in policymaking at the Federal Trade Commission and the Department of Justice is needed now more than ever. I hope it can begin with substantive dialogue to meaningfully discuss ways to resolve clearance issues related to our nation's media, entertainment, and high technology industries. The public interest demands no less.

List of Documents Submitted

1. Untitled document relating the abandoned DOJ/FTC Clearance Agreement, January 22, 2002.

Demonstrates that:

- The Muris-James clearance delay statistics are not that dramatic;
- Explains the value of the independent, multi-member FTC; and
- Highlights the FTC's recent expertise in cases involving the media and entertainment sectors.

2. Untitled document listing recent FTC cable expertise, Submitted February 20, 2002.

- Shows the great volume of investigations and enforcement actions involving cable mergers and agreements, as well as related media and entertainment markets.

3. "Comments on the Department of Justice's Submission Concerning Media and Entertainment Clearance Statistics," Submitted February 20, 2002.

- A closer examination of what DOJ's statistical analysis actually shows: the FTC is more effective in bringing enforcement actions in the media and entertainment sectors, and that the bulk of DOJ's expertise and enforcement actions are in relatively narrow slices of the overall media and entertainment sectors.

4. "Allocating Antitrust Investigations Involving the Media and Entertainment Industries By Content and Distribution," Submitted February 22, 2002.

Illustrates:

- The current division of FTC and DOJ areas of expertise for clearances;
- Shows the James-Muris proposal; and
- Proposes a more rationale re-allocation of media/entertainment industries.

Procedural Improvements for Clearance. The bulk of the proposed clearance improvements involve process and timing; industry allocations are a separate issue. According to the FTC Chairman, the changes will improve the clearance process and ensure that clearance disputes are resolved within 10 days. The agencies may enact these process changes without allocating

industries between the two agencies.

Clearance Statistics. The press release to announce the abandoned clearance agreement stated that, over the past two years, 32 disputed clearance matters took 15 days or longer to resolve. Several statistics may help put this number in context:

- What the statistic encompasses is not clear, but some number - perhaps as many as half of the 32 cited - may represent conduct investigations that do not involve mergers reported under Hart-Scott-Rodino. Those disputes not involving such mergers, of course, do not delay mergers and acquisitions, and the disputes generally do not hinder any other business activity.
- 32 matters in two years is only a fraction of the perhaps 600 cleared investigations and approximate 7,000 merger filings reviewed by the agencies over the last two years. (Probably around 500 of the cleared investigations were merger investigations and 100 or so non-merger investigations.)
- Chairman Muris states that the procedural and timing improvements would establish 10 days as the maximum delay period due to clearance disputes. These timing improvements could be effectuated whether or not the FTC and DOJ allocate the industries.
- Despite some press accounts of at least one antitrust practitioner claiming that the agencies have issued unnecessary second requests at great expense to the parties because of clearance disputes, no one has identified a specific transaction where such a thing has happened. Indeed, as a practical matter, whenever merging parties' counsel believes that they can provide quick evidence that shows a second request should not issue (or should not have issued) they may provide such evidence to both agencies' staff during any clearance period. (Or to the agency staff issuing the second request after the request has issued and before the merging parties choose to undertake a full search for documents.)

FY01: HSR statistics not public yet. (Likely around 2200 merger filings.)

FY00: 4749 Transactions 339 Investigations cleared 98 2d Requests 80 Challenges

FY99: 4340 Transactions 391 Investigations cleared 113 2d Req. 77 Challenges

FTC Act Section 5. Section 5 encompasses a greater scope of anticompetitive conduct than does the Sherman Act, so it allows the FTC to remedy conduct that can not be reached by DOJ under the Sherman Act. For example, the Commission can reach facilitating practices under Section 5. Facilitating practices (practices that facilitate horizontal collusion) are more typically a problem in oligopolistic industries such as media markets. The facilitating practice count was a critical aspect of the CD MAP case involving the five major music companies. Because of the legal parameters of a Sherman Act case, DOJ's bringing such a case might have proved problematic.

Administrative Litigation. Congress established the FTC as an expert antitrust body with its own administrative litigation process to handle novel, cutting-edge antitrust cases. For example, administrative litigation has helped develop the law in such novel areas as antitrust immunities (*Ticor Title Insurance*; *Superior Court Trial Lawyers*). This ability could be critical when litigating deregulating markets such as cable and when involving complex conduct cases.

Independent Agency.

- Congress provided that the FTC would be comprised of five members with staggered seven-year terms. By law, only three Commissioners may be from the same political party. The structure allows for more diverse views, greater independence, and greater continuity in decision-making.

Policy-Making Agency.

- The FTC has power to conduct industry studies and prepare reports to Congress (and post-enforcement evaluations) under Section 6. Unlike the DOJ, Congress gave the FTC authority to use compulsory process to evaluate public policy issues, conduct industry studies, and perform retrospectives on past enforcement actions. This power is especially

important in emerging, dynamic, and deregulating markets, such as cable, media, and software. Examples of recent Commission workshop and report subjects include:

- Business-to-Business (B2B) Electronic Marketplaces (2000)
- Competition Policy in the World of E-Commerce (2001)
- Electronic Signatures in Global and National Commerce Act (2001)
- Internet Retailers, Marketers and Suppliers (2001)
- Mobile Wireless Web, Data Services and Beyond: Emerging
- Technologies (2000)
- Marketing Violent Entertainment to Children (2000 and 2001 Reports on Movies, Video Games, and Pre-Recorded Music)
- Divestiture Study (1999 Policy Report)

Synergies with Consumer Protection Activities. The Commission's consumer protection mandate has provided the agency growing expertise in high-tech industries. For example, consumer fraud cases involving Hewlett Packard and Microsoft (PDAs); AOL, CompuServe, and Prodigy (ISP services); and Sharp Electronics (Mobile/Hand-held PCs).

The Commission's Recent Media, Entertainment and High Tech Investigations/Cases

- Sony et al. (compact disc cooperative pricing policies)
- Warner Communications and Vivendi Universal (price fixing and advertising restraint)
- Time Warner/EMI (pre-recorded music merger)
- AOL/Time Warner (broadband merger)
- Random House (book publishing and resale price maintenance)
- MSC.Software (computer-aided engineering software merger)
- Hearst (pharmaceutical database merger)
- Automatic Data Processing (salvage yards parts trading database merger)
- Cablevision/TCI (New Jersey cable television systems merger)
- Time Warner/TCI (cable and cable programming merger)
- VNU N.V./Nielsen Media Research (advertisement media service merger)
- Cooperative Computing (computer management information systems merger)
- Autodesk./Softdesk (computer-aided design engines merger)
- Cadence Design (software layout environment for chip design merger)
- Adobe Systems (computer programming and software merger)
- Boulder Ridge Cable TV (cable television restraint)

Below is a sampling of the numerous cable industry mergers and agreements that the Federal Trade Commission has investigated in recent years:

[DETAILED CASE DESCRIPTIONS TO BE PROVIDED LATER]

The Department of Justice's Submission
Concerning Media and Entertainment Clearance Statistics
Provided to the Senate Committee on Appropriations

On January 29, 2002, The Department of Justice provided a set of materials to the Senate Committee on Appropriations. When viewed beyond the facade of the aggregate numbers presented, the materials demonstrate the Federal Trade Commission's success relative to the Department, as well as its expertise in significant segments of the broad, diverse media and entertainment sectors.

1. The materials reveal that the FTC is the more effective compared to DOJ in the DOJ-defined combined areas of telecommunication, media, and entertainment.

- DOJ's Attachment A shows that the FTC is almost twice as likely as DOJ to take

enforcement action in these areas following a substantial investigation:

- **FTC: 64%** of agency's substantial investigations result in enforcement actions.
- **DOJ: 36%** of agency's substantial investigations result in enforcement actions.

2. The FTC tends to investigate complex and novel media and entertainment antitrust matters, while DOJ frequently handles narrow cookie-cutter media and entertainment investigations. These DOJ cookie-cutter investigations result in many easy-to-get consent decrees; however, these matters do not add much value to DOJ's expertise in other media and entertainment industries.

- For example, DOJ's Attachment C shows that a significant part of the Attachment A statistics are simple, cookie-cutter cases that increase DOJ's numbers but not experience:
  - Radio and TV station mergers: 37 enforcement actions in 66 investigations; and
  - Billboard acquisitions: 9 enforcement actions in 12 investigations.

3. By adjusting Attachment A's results (through subtracting out the numbers relating to DOJ's cookie-cutter cases), the revised statistics offer that, of the two agencies, the FTC has brought a greater number of enforcement actions in the overall media and entertainment sector:

- **FTC: 14** Enforcement Actions
- **DOJ: 12** Enforcement Actions

4. Because of DOJ's failure to prosecute a large percentage of matters that it investigates, the adjusted Attachment A figures shows even more dramatically how much more effective the FTC has been in the FTC's investigations of media and entertainment matters:

- **FTC: 64%** enforcement percentage.
- **DOJ: 19%** enforcement percentage.

5. DOJ's expertise in the telecommunications industry of course does not create expertise for media and entertainment sector because DOJ's telecommunications experience lies primarily in telephone and radio related areas.

6. Three current FTC Commissioners believe that the FTC has a unique role in media and entertainment investigations: Commissioners Anthony and Thompson so stated in their January 18, 2002 statements concerning the abandoned clearance agreement. And Commissioner Leary, as reported recently in *FTC Watch*, supports the FTC involvement in challenging, dynamic media and entertainment cases:

The FTC's primary mission, as envisioned by Congress is to provide forward-looking guidance that tackles intellectually challenging cases, Leary says. For example, he said, the Commission needs to stay focused on: . . . merger cases in new rapidly changing arenas, such as AOL/TW - 'that absorbed more time and energy than any other cases since I've been here and was all worth it.'"[3]

7. The DOJ category labeled "Media and Entertainment" - as demonstrated by Attachment A - constitutes a wide variety of different industries with various structures and market dynamics. Expertise in one type of matter and market - say analyzing TV station mergers or billboard mergers - does not benefit the agency in analyzing matters involving another industry, such as the cable or broadband industries (and the AOL/Time Warner merger). Several possible rationale alternatives could be pursued instead of the proposed clearance agreement:

- If industries are allocated within a global clearance agreement:
- The industries could be divided up more precisely to take account of the current significant expertise of the agencies. Because certain areas are so distinct (*e.g.*, billboards versus music), further dividing the list could be undertaken without sacrificing administrative efficiencies; and
- The FTC could review all matters in industries that are converging (where cable and television and Internet may ultimately interface) and those industries that are deregulating. These matters are the ones where the reviewing agency must look forward and contemplate rapidly changing industries - the five-member nonpartisan Commission is

well-suited to achieve the important public policy objectives for these industries and consumers. If Congress wants both agencies to share jurisdiction and disfavors the current, expertise method of sharing jurisdiction, investigations may be randomly assigned to one agency or the other, regardless of the industry. No time or administrative effort would be wasted, and one agency alone does not necessarily shape the future of industries, especially emerging or important media and entertainment industries.
    - A hybrid allocation system could be easily devised to allocate matters within certain specified industries to one agency or the other, with all other matters randomly assigned.
- Congress could unify merger and conduct investigations within the FTC and continue the DOJ's criminal jurisdiction, a result that would provide for maximum efficiency, fully utilize the FTC's independent antitrust purpose and structure, and continue to take advantage of DOJ's role as the federal government's criminal prosecutor.

Allocating Antitrust Investigations Involving the Media and Entertainment Industries By Content and Distribution

Media/Entertainment Content	Current	Muris	Thompson
Advertising Services	DOJ	DOJ	FTC
Magazine Publishing	DOJ	DOJ	DOJ
Newspaper Publishing	DOJ	DOJ	DOJ
Movie Production	DOJ	DOJ	DOJ
Music Licensing Rights	DOJ	DOJ	DOJ
Cable/Satellite programming (MVPD)	Mix	DOJ	FTC
Upstream Internet video content	-	DOJ	FTC
Book Publishing	FTC	DOJ	FTC
Pre-recorded Music	FTC	DOJ	FTC
Sports	FTC	DOJ	FTC
Games/Toys	FTC	DOJ	FTC

Media/Entertainment Distribution	Current	Muris	Thompson
Radio Stations	DOJ	DOJ	DOJ
Television Stations	DOJ	DOJ	DOJ
Outdoor Advertising/Billboards	DOJ	DOJ	DOJ
Movie Distribution	DOJ	DOJ	DOJ
Satellite Services (*e.g.*, DBS)	DOJ	DOJ	DOJ
Set-top Boxes and other inside-the-house Internet and cable equipment	DOJ	DOJ	FTC
Upstream Internet video distribution	-	DOJ	FTC
Cable Services (video/data/audio)	FTC	DOJ	FTC
Cable infrastructure	FTC	DOJ	FTC
Video Rentals	FTC	DOJ	FTC
Gaming	FTC	DOJ	FTC

Endnotes:

1. It is curious that the Chairman claims that the Agreement is purely an "inside baseball" administrative matter, thus not warranting a Commission vote, or Congressional or public consultation. Yet the Chairman sees that the Agreement constitutes a significant enough policy change that it warrants two press conferences and several press releases over the past six weeks.

2. Indeed, the non-consultative actions in this situation only demonstrates why the FTC's role as an independent bi-partisan

deliberative body is so important.

3. *FTC: Watch*, "When Is Antitrust Disgorgement a Good Idea?" at p. 3 (January 14, 2002).

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REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION

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There also are advantages in having antitrust enforcement decisions made by a multi-member agency. The best example is provided by merger enforcement. Frequently, the critical question in merger litigation is whether a complaint will be filed. Time and again, parties abandon or restructure proposed transactions in the face of a federal complaint; when they proceed, they often lose in court, at least when the FTC sues. Our system of government traditionally has entrusted many critical legal decisions to multi-member panels (e.g., three-member courts of appeals panels, the nine-member Supreme Court, and multi-member independent agencies). Multiple voices may improve quality and increase public trust. With the critical merger enforcement decision having moved from the courts to the prosecutors, there is virtue in preserving a multi-member prosecuting agency.[168]

In addition to the benefits and possible benefits of dual enforcement, those Committee members favoring its retention are impressed by the apparent absence of real harm. Critics of dual enforcement usually point to the waste that stems from having two federal agencies, to increased uncertainty, to questionable case selection, to flawed adjudication processes, and to the lack of any genuine expertise. These points are worth considering briefly.

Most Committee members doubt that dual enforcement wastes substantial resources. Consolidation of support services such as libraries could save only a little. Even if there is a minimum efficient size for antitrust enforcement agencies, below which agency leadership resources would inevitably be used inefficiently, many Committee members doubt the FTC and the Antitrust Division have shrunk below this threshold.

Many Committee members also doubt that dual enforcement presents substantial problems of uncertainty. Although Section 5's wording differs from that of the antitrust laws, the FTC has interpreted them as being the same or very similar, and recent court decisions have rebuffed the FTC when it interpreted Section 5 expansively.[169] The area of greatest interagency overlap is merger enforcement, but a Committee survey of leading merger lawyers found almost unanimous agreement that dual enforcement has created little uncertainty and has prevented very few transactions. Most lawyers surveyed perceive that the two agencies evaluate mergers by similar standards. Moreover, the Hart-Scott- Rodino process permits relatively quick, inexpensive government merger reviews, and thus clients are undeterred by uncertainty. Of course, uncertainty costs would rise were the areas of overlap between the agencies to increase, and the agencies to adopt significantly different antitrust policies. In part because the agencies are aware of this risk, most Committee members are not persuaded that the uncertainty cost of dual enforcement is high.[170] Moreover, if the agencies adopted substantially different policies, the President might be able to use his supervisory authority to encourage greater consistency.[171]

There is general agreement that the FTC has engaged in some questionable case selection over its history. Some on the Committee believe that this has been caused in part by the agency's rather amorphous mandate and by its vulnerability to congressional pressure. Others point to the cases that were brought by the Antitrust Division that have now fallen from favor,[172] noting that the FTC has not had any monopoly on prosecutorial misjudgment. The Committee is not persuaded that the likely costs from future questionable case selection are sufficiently great to justify abolishing the FTC's antitrust role.

FTC adjudication is considered above as a possible strength, but the agency's perceived lack of expertise is a greater concern. The agency is at the mercy of the presidential appointment process, and without first-rate commissioners the agency cannot serve its intended role.[173] Although the Committee is troubled by the uneven quality of FTC appointments, our concern is insufficient to persuade a majority of us that the FTC's role in antitrust enforcement should be ended.

A majority of the Committee have concluded that, on balance, it should not recommend consolidating antitrust enforcement in a single agency. Dual enforcement has certain benefits and imposes only limited costs. Moreover, antitrust enforcement is less "dual" than sometimes thought. The Antitrust Division generally limits its activities to criminal antitrust enforcement and merger enforcement, and ever

[168] This argument counsels in favor of shifting all civil antitrust enforcement to the FTC. This seems unlikely to occur, and the Committee did not discuss the possibility at any length.

[169] *See* E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984); Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981). *But cf.* United Air Lines, Inc. v. CAB, 766 F.2d 1107 (7th Cir. 1985) (interpreting Section 411 of Federal Aviation Act, which parallels Section 5).

[170] Other Committee members are more concerned about possible uncertainty, for the reasons stated earlier. The Committee is in agreement that, assuming dual enforcement will continue, both agencies should strive to adopt consistent enforcement policies.

[171] *See generally* American Bar Association Recommendation, *reprinted in* 38 Admin. L. Rev. 206 (1986) (supporting executive oversight of agency rulemaking); Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 Admin. L. Rev. 181, 200-201 (1986) (arguing that the President "may consult with and demand answers from" independent agencies, and exercise supervisory authority, although the "ultimate power to decide rests with the relevant agency").

[172] *E.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. International Business Machines Corp., Civ. No. 69 Civ. 200 (S.D.N.Y. 1982) (dismissed by stipulation); United States v. Cuisinarts, Inc., Crim. No. H-80-49 (D. Conn. Dec. 19, 1980) (*nolo contendere* plea accepted and $250,000 fine ordered in criminal resale price maintenance case).

[173] It is trite but true that the Commission can be no better than its leaders. The importance of strong leadership is addressed above at Section III.

allocate its resources and assist the states. In addition, we voiced our strong support for the Competition and Consumer Advocacy Program.

We also emphasized that it is important to both the public and the agency that the FTC provide guidance as to its current thinking on antitrust and consumer protection. "Guidance," as we defined it, includes a range of activities, cease and desist orders, guides, policy statements, advisory opinions, and Magnuson-Moss rules.

We urged that economists continue to participate in all aspects of the Commission's work—not only in deciding the cases or projects to be undertaken, but throughout the proceedings. We recommended that studies by FTC economists should focus on the operation of U.S. industries and the U.S. antitrust and consumer protection systems, rather than on abstract economic research.

The Report also examined two other topics essential to the FTC's success: obtaining adequate resources and ensuring that Congress exercises a proper role with respect to the FTC's work. On the former topic, without selecting specific budget figures or personnel numbers, we expressed our belief that current resources are insufficient and should be gradually increased. On the latter, while we recognize Congress's obligation to oversee FTC activities, we expressed concern that Congress may have unduly interfered with the details of FTC proceedings, particularly in pending matters. Congress should continue to review the general policies of the FTC, but it should not become involved in pending proceedings, nor alter the outcome of specific decisions except by substantive legislation.

Respectfully submitted,

Miles W. Kirkpatrick *Chairman*	Basil J. Mezines Alan B. Morrison Timothy J. Muris
Joan Z. Bernstein	Robert Pitofsky
Michael F. Brockmeyer	James F. Rill
Nancy L. Buc	Edwin S. Rockefeller*
Calvin J. Collier	J. Thomas Rosch
Kenneth G. Elzinga	Alan H. Silberman*
Ernest Gellhorn	Cass R. Sunstein
Caswell O. Hobbs, III	William L. Webster

* See separate statements by Mr. Rockefeller and Mr. Silberman.

APPENDIX A: MEMBERS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION

Miles W. Kirkpatrick (chairman), a Philadelphia, Pa., attorney and a member of the Advisory Board to BNA's Antitrust and Trade Regulation Report, and formerly chairman of the ABA Antitrust Section, chairman of the 1969 ABA Commission to Study the Federal Trade Commission, and chairman of the FTC

Joan Z. Bernstein, vice president and general counsel of Chemical Waste Management, Inc., and formerly a Washington, D.C., attorney who served as general counsel to the Environmental Protection Administration and to the Department of Health, Education, and Welfare, and as director of the FTC's Bureau of Consumer Protection

Michael F. Brockmeyer, assistant attorney general and chief of Maryland's Antitrust Division, and chairman of the Multistate Antitrust Task Force of the National Association of Attorneys General

Nancy L. Buc, a Washington, D.C., attorney and a fellow of Brown University, who has served as chief counsel to the Food and Drug Administration and as assistant director of the FTC's Bureau of Consumer Protection

Calvin J. Collier, Senior Vice President, General Counsel and Secretary, Kraft General Foods, who has been chairman and general counsel of the FTC, associate director of the Office of Management and Budget, and deputy under secretary of the Commerce Department

Dr. Kenneth G. Elzinga, professor of economics at the University of Virginia, co-author of *The Antitrust Penalties: A Study in Law and Economics*, co-editor of *The Antitrust Casebook: Milestones in Economic Regulation* and *The Morality of the Market: Religious and Economic Implications*, and a member of the Board of Trustees of Hope College

Ernest Gellhorn, a Washington, D.C., attorney, co-author of *The Administative Process* (1st, 2d, & 3d eds.), a public member and chair of the Rulemaking Committee of the Administrative Conference of the United States, and a member of the American Law Institute, who has served as a professor of administrative law and antitrust law at Duke University and the University of Virginia, and as dean of the law schools at Arizona State University, Case Western Reserve University, and the University of Washington

Caswell O. Hobbs, a Washington, D.C., attorney, author of articles on antitrust and trade regulation, and a member of the Council (and formerly an officer) of the ABA Antitrust Section, who has served as director of the FTC's Office of Policy, Planning, and Evaluation

Basil J. Mezines, a Washington, D.C., attorney, author of *Administrative Law* and *Trade Associations and the Antitrust Laws*, and a member of the Advisory Board to the BNA Antitrust and Trade Regulation Report, who has served as executive director of the FTC and as director of its Bureau of Competition

Alan B. Morrison, director of the Public Citizen Litigation Group and a member of the Administrative Conference of the United States, and formerly a visiting professor at Harvard Law School and a member of the Board of Governors of the District of Columbia Bar

Timothy J. Muris, George Mason University Foundation Professor of Law at George Mason University Law School, co-editor of *The Federal Trade Com-*

Statement of Commissioner Mozelle W. Thompson

Concerning the Abandoned Memorandum of Agreement Between The Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations

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Yesterday, Assistant Attorney General James and Chairman Muris abandoned their plans to announce an Agreement that would have redefined how the Federal Trade Commission and the Antitrust Division of the Department of Justice allocate the review of future antitrust matters. Under the claim that the Agreement would streamline the federal government's review of antitrust matters, the abandoned Agreement would have reallocated by industry the agencies' antitrust review responsibilities. While generally I favor interagency agreements that enhance the speed and efficiency of case processing, the abandoned Agreement raised substantial concerns.

First, redefining the Commission's future antitrust responsibility raises weighty issues that warrant close attention from each Commissioner in order to ensure that the public interest is adequately protected. Rather than simply codifying or clarifying the existing merger review responsibilities, the abandoned Agreement would have altered which agency would have primary responsibility for investigating both mergers and other anticompetitive practices in certain industries.[1] Such an important change demands careful consideration by each of the five Commissioners.

The abandoned Agreement was the product of private discussions between Chairman Muris and Assistant Attorney General James. Chairman Muris failed to consult with, or provide meaningful opportunity for, other Commissioners to provide any input. In fact, I was not even provided with a copy of the completed proposed Agreement until yesterday. This lack of transparency makes it difficult for the other four Commissioners to discharge their obligation to determine whether consumers would actually benefit from such a significant change at this agency.

Second, I am also concerned about the substance of this private "horse trading" because it may deprive consumers of the benefit of the Commission's independence, expertise, and knowledge. The Commission is an independent, nonpartisan body made up of five presidential appointees with varied expertise and professional experiences. I believe these perspectives have led to significant, positive agency actions in dynamic "new economy" industries that presented novel antitrust issues. But Chairman Muris's Agreement would have transferred the Commission's jurisdiction in publishing, media, entertainment, computer software, and Internet-related industries to the Department of Justice, thereby consolidating responsibility for the review of all matters relating to media content in the Department of Justice. This transfer would have deprived the public of the benefit of the Commission's recent experience in matters such as:

- AOL/Time Warner[2] (broadband);
- Random House[3] (book publishing);
- MSC.Software[4] (computer-aided engineering software);
- Hearst[5] (pharmaceutical databases);
- Sony[6] (compact disc cooperative pricing policies); and
- Time Warner/EMI[7] (pre-recorded music).[8]

Moreover, the public would have also lost the full potential of synergies arising from other ongoing related Commission activities that encompass: law enforcement investigations in Internet fraud cases; Internet privacy policy workshops and studies; advertising enforcement activity in the media space; and public workshops in cutting-edge areas (such as the June, 2000 Business-to-Business Electronic Marketplaces Workshop).

In summary, I am disappointed that the Commissioners were not invited to participate in this public policy decision that would have so profoundly shaped the future of the Commission. The lack of transparency in the negotiation of matters as important as those covered in the abandoned Agreement can compromise my responsibility to the public to give thorough and careful consideration to matters that will have an important impact on all consumers. However, my greater fear is that the