The Antitrust Modernization Commission: A retrospective from the perspective of the American Antitrust Institute

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I. PERSPECTIVES AND PROCESSES

This is my third and, I hope, final effort to make sense of the Antitrust Modernization Commission, which I will refer to in this article as the AMC or the Commission. In my first essay,[1] written after passage of the legislation,[2] but before all the commissioners had been appointed, I described the statutory framework, summarized five prior experiences of blue-ribbon reviews of antitrust policy,[3] offered some com-

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EDITOR-IN-CHIEF'S NOTE: *Please consult the American Antitrust Institute's Web site, http://www.antitrustinstitute.org for a comparison of AMC, AAI, and ABA Antitrust Section Recommendations..*

[1] Albert A. Foer, *Putting the Antitrust Modernization Commission into Perspective*, 51 BUFF. L. REV. 1029 (2003).

[2] 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

[3] *I.e.*, the Temporary National Economic Committee (1938–41); the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955); the White House Task Force Report on Antitrust Policy (1967–69) (the Neal Report); the National Commission for Review of Antitrust Laws and Procedures (NCRALP) (1977–79); and the International Competition Advisory Committee (ICPAC) (1998–2000).

parisons of these previous blue ribbon antitrust commissions, and laid out a proposed modus operandi for the AMC.

Because the legislation was so entirely open-ended as to what the AMC was supposed to study, my proposal included an initial phase for defining principal areas of investigation, which I suggested should be very broad: changes in the economy since the Temporary National Economic Committee (TNEC); aggregate measures of concentration; market concentration; measures of economic performance; technological change; the regulatory environment; globalization; business strategy; antitrust administration and process; and antitrust enforcement policies. Investigation of these topics would provide the facts upon which the AMC could determine what changes in the economic environment had occurred that might necessitate modernization. In a subsequent phase, testimony would be taken on the public policy implications of the evidence that had been gathered. Finally, there would be debates, votes, and reporting.

I concluded:

> Based on past experience, it would be a mistake to gear the inquiry toward near-term legislation. Prior blue ribbon antitrust study commissions (even those with political leaders participating) have not generated much or important immediate legislation, but at their best have contributed to the on-going national dialogue about the role of competition in our economy, clarifying what is generally accepted and what is open to debate. Given the multitude of questions that are today being asked about antitrust, both by advocates of more and advocates of less enforcement, this type of clarification will more likely than not be useful. [4]

As the AMC's life unfolded, I became a regular attendee of its meetings. In 2006, I wrote my second essay, which I called "a half-time report."[5] It was too early to predict what the AMC would say to Congress, but by then it was clear what issues would be debated and voted on.

It was also clear that my particular proposed approach had been thoroughly rejected. Instead of beginning by systematically surveying

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[4] Foer, *supra* note 1, at 1051.

[5] Albert A. Foer, *Half-Time at the Antitrust Modernization Commission*, 40 U.S.F. L. REV. 601 (2006).

the landscape, the AMC reached out to the public for ideas on what issues to study. The commissioners ultimately voted to take up twenty-nine types of questions, ranging from broad and controversial questions such as "What should be the remedies and legal liabilities in private antitrust proceedings?" and "How does the current intellectual property regime affect competition?" to relatively simple and uncontroversial questions such as "Should section 3 of the Robinson-Patman Act (relating to criminal penalties) be repealed?"[6]

In settling on the questions it wanted to pursue, the AMC rejected many others. For example, it chose not to take up then-Assistant Attorney General Hewitt Pate's suggestion to undertake or at least design a comprehensive empirical study of the costs and benefits of antitrust enforcement. It rejected proposals of the American Antitrust Institute (AAI) and others to report on the purposes and goals of antitrust, the role of concentration, the impact of trade policies on competition, the impact of newly created retailing "buyer power," and controversial emerging issues such as "patent ambush," relating to standard setting (although it later made a recommendation in this latter regard). By this time, more than one-third of the AMC's working life had expired and an observer could legitimately ask whether the particular set of questions adopted represented the best strategy for determining what, if anything, needs to be "modernized."[7]

Working groups were established and eventually 10 study plans were approved containing 176 separate questions and calling for 29 separate hearings—a challenging agenda. The approach selected by this Commission of eleven lawyers and one economist was heavily legalistic.[8] The Commission did not undertake or contract for new research, although it stimulated several volunteer consultants to prepare a framework for policymakers to analyze proposed and existing antitrust exemptions and immunities. Nor did it project a research

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[6] *Id*. at 609.

[7] *Id*. at 611.

[8] The twelve bipartisan commissioners and their backgrounds have been described thus, summarizing: "The Commission as a whole—while made up of esteemed and experienced antitrust experts—is dominated by people whose recent backgrounds strongly suggest a defense orientation." *Id*. at 603.

program that it could recommend for the future.

Information flowed into the Commission primarily from public comments. These typically offered policy analysis but, with few exceptions, no empirical data.[9] The AAI played a leading role by establishing volunteer working groups to parallel the AMC's study groups and filing comments addressing in depth nearly all of the questions posed by the AMC. The Antitrust Section of the American Bar Association also provided substantial comments, albeit rather late in the day. [10]

Another major source of information was the public hearings. Typically, these involved a panel of four witnesses who submitted written statements that they summarized, followed by questions from the commissioners. By and large, the hearings were occasions for well-informed advocates to promote previously developed and publically known positions relating to the questions before them. Full transcripts were published on the AMC's Web site,[11] which as of this writing is still available to the public. And the third source of information was material internally generated by the AMC's staff. Typically, this seems to have been limited to summaries of the issues and discussion documents setting up the Commission for votes on recommendations.

Although the process got off to a painfully slow start, the Report and Recommendations (the AMC Report), containing 449 pages of

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[9] One exception was the AAI's submission of a study of private antitrust cases, later published in more complete form as Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases,* 42 U.S.F. L. REV. 879 (2008). Another exception was the statement provided to the Commission by Harry First. Antitrust Modernization Comm'n Hearings on the Allocation of Antitrust Enforcement Between the Federal Government and the States (Oct. 26, 2005), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-First.pdf.

[10] The AMC graciously acknowledged both the AAI and the ABA for expending "extraordinary resources in support of the Commission's work." ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS xi (April 2007) [hereinafter AMC REPORT].

[11] http://www.amc.gov. The AMC is generally to be applauded for the transparency with which it conducted its business.

text and 80 identified recommendations, was published in April 2007, within the statutory three-year time constraint, under the leadership of Chairman Deborah Garza and with the staff leadership of Andrew Heimert and Susan DeSanti.

In October 2008, the AAI published its own 414-page book in the form of a transition report to the next administration, (the AAI eport).[12] The purpose of this was not specifically to critique the AMC report, but rather to provide an alternative paradigm to the antitrust enforcement regime that has been dominant for much of the time since the Chicago school took power under the Reagan administration. Because the AMC Report is essentially, although certainly not in all respects, a defense of the status quo in antitrust, it was perhaps inevitable that the AAI Report would be seen as an answering volume. Indeed, many of the positions presented in the AAI Report were first developed in public comments to the AMC.[13]

In my "half-time" article, I called attention to seven issues that I thought would be most controversial and potentially important for the future of antitrust. Here, in this recapitulation and evaluation of the AMC experience, I will address each of those issues, indicating both what the AMC said and what the AAI Report says. As an orienting generalization, the AMC report seems to be most concerned with the burden on the business sector created by antitrust enforcement, while the AAI report is most concerned with maintaining a competitive environment in the face of what it sees as underenforcement.

II. ROLE OF THE STATES

At the outset there had been speculation that Microsoft Corporation, angered by the monopolization case brought against it by the Clinton

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[12] AM. ANTITRUST INST., THE NEXT AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT (Albert A. Foer ed., 2008), *available at* www.antitrustinstitute.org [hereinafter AMC REPORT].

[13] A highly detailed side-by-side comparison of the recommendations of the AMC and the AAI may be found at http://www.antitrustinstitute.org /Archives/AAIAMCABAMatrix.ashx. Also included as a third comparison are the 2008 transition recommendations of the ABA Antitrust Section.

administration, was somehow "behind" the AMC and that it was particularly upset by the role that many of the states had played in joining with the Justice Department (DoJ). When the AMC was formed, its sponsor, then-House Judiciary Committee Chairman James Sensenbrenner, identified the role of the states as one of the three topics he thought most important to study.[14] Some conservatives were advocating that states should not participate in antitrust cases involving interstate commerce[15]; or in the alternative, they should not participate in cases in which the federal antitrust enforcers had either reviewed a matter or had taken formal enforcement action.[16] Particular concern was expressed with regard to whether states should be able to challenge mergers. State representatives were left off the AMC and had no obvious spokesman within the membership. So one of the principal concerns of the AAI as well as the states and supporters of state enforcement was that the AMC would recommend some major restrictions on the states.

It didn't happen. The AMC found that "[i]n general, the types of antitrust cases brought by state antitrust enforcers have been consistent with those brought by federal antitrust enforcers" and that the "costs of state antitrust enforcement do not warrant eliminating the states' authority to enforce the federal antitrust laws."[17] To the extent that differences exist between state and federal enforcers, "federalism suggests the states should continue to have the ability to make their own judgments on how best to seek to protect their consumers."[18] Accordingly, no statutory changes were recommended with respect to the states, although states and federal enforcers were encouraged to achieve further coordination and cooperation.

The State Enforcement chapter of the AMC Report provides an excellent overview of the issues, including voluminous references to the existing literature, testimony, public comments, and statistical

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[14] The other two areas were intellectual property and globalization.

[15] Virtually all states have antitrust laws that parallel the federal laws and states are empowered by federal statute to initiate federal antitrust cases on behalf of their citizens.

[16] *See*, *e.g.*, RICHARD A. POSNER, ANTITRUST LAW 281 (2d ed. 2001).

[17] AMC REPORT, *supra* note 10, at 186.

[18] *Id*.

information provided for the most part by the National Association of Attorneys General. Its substantive conclusions are well-supported.

The AAI Report does not disagree with the AMC, but goes further in praising the advantages of state enforcement, calling special attention to the weaknesses that are created by a lack of adequate funding.[19] It makes several legislative suggestions that could provide additional funding, urges state attorneys general to play a larger role in advocating for competition policy within state governments, and calls on the next federal administration to promote a tone of mutuality that encourages the states themselves to give greater priority to enforcing their own antitrust laws.

III. PRIVATE ENFORCEMENT

Just as no AMC commissioners were appointed to speak for the states, there were no practitioners who could be expected to speak consistently for the plaintiffs' antitrust bar or for consumers who are damaged by antitrust violations. From the outset, the excluded groups were concerned that the AMC would make dramatic recommendations to their detriment.

This concern was increased during the hearings when such ideas as the following were raised by witnesses or commissioners: (1) reduction of the circumstances under which treble damages are mandatory (e.g., applying them only to more serious per se violations or allowing the court after trial to decide whether to multiply damages); (2) eliminating joint and several liability and the no-contribution rule (thereby reducing plaintiffs' leverage to gain favorable settlements); and (3) allowing fee-shifting so that the loser will pay the attorneys' fees for both sides (as opposed to the current rule that the liable defendant pays the plaintiffs' attorneys fees). Because a high proportion of plaintiffs' antitrust cases are brought on a contingent fee basis, any of these changes could affect the cost-benefit analysis that determines whether a private case for damages will be brought.[20] The AAI opposed all of these proposals.

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[19] AAI REPORT, *supra* note 12, at 206–208.

[20] Foer, *supra* note 5, at 618–19.

The AMC Report weighed a variety of possible recommendations concerning treble damages but in the end concluded, significantly, that there is no need to change the treble damages rule.[21] At the same time, it rejected an AAI-supported proposal to make prejudgment interest available in antitrust cases.[22] It also recommended against changes in the statute providing for attorneys' fees, although it suggested that in determining whether a requested fee is reasonable, "courts should consider whether, among other factors, the principal development of the underlying evidence was in a government investigation."[23] As amorphous as this "among other factors" recommendation is, it might lead some courts to exercise their discretion in ways that reduce the incentive for bringing contingent fee cases in precisely those situations (i.e., hard-core price fixing cases) where damage to consumers and customers is most clear-cut and substantial.

The AMC's handling of joint and several liability requires some explication. The AMC Report sets out the situation in this way:

> Under the antitrust laws, liability is joint and several for all defendants, with no right of contribution among defendants. Thus, a plaintiff may obtain treble the damages resulting from the entire conspiracy from a single participant of a price-fixing conspiracy or other anticompetitive agreement. An antitrust defendant may not seek contribution from any other co-conspirator, however. In addition, if one or more defendants settle an antitrust claim, under the rule governing claim reduction, the plaintiff's remaining claim is reduced, after trebling, by the amount of the settlement. Under these combined rules, if an alleged co-conspirator settles for less than the full amount of damages fairly attributable to it, trebled, non-settling defendants arguably remain liable for more than their "fair" share of damages.[24]

Although the AMC Report (again, significantly) does not recommend eliminating joint and several liability, it concludes that "[t]he current rules concerning contribution and claim reduction are fundamentally unfair."[25] It proposes legislation that would "permit non-

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[21] AMC REPORT, *supra* note 10, at 245.

[22] *Id*. at 249.

[23] *Id*. at 250.

[24] *Id*. at 251.

[25] *Id*. at 252.

settling defendants to obtain reduction of the plaintiffs' remaining claims against the non-settling defendants by the ratable share of liability of the settling defendants or the amount of the settlement, whichever is greater."[26] In addition, the legislation should permit non-settling defendants to seek contribution from other non-settling defendants to the extent a plaintiff has collected a disproportionate share of its judgment from one or more of the non-settling defendants.[27] The AMC Report provides a model statutory amendment.

All in all, the plaintiffs' antitrust bar and consumers were able to breathe more easily once the votes were taken. Their largest fears—elimination of treble damages and joint and several liability—were not fulfilled. The proposals to reform the details are somewhat technical and complicated, and the AMC admits that they might reduce deterrence and make it more difficult to settle cases. One can predict that they will not get much attention during an Obama administration.

In contrast with the AMC's rather begrudging acceptance of the role of private enforcement, the AAI Report contains a chapter titled *Restoring the Legitimacy of Private Enforcement*. It begins with the pronouncement that "[p]rivate antitrust enforcement is under siege"[28] and a vigorous defense of the benefits of private enforcement. It urges restoring balance to the federal government's amicus program, which has consistently supported defendants; active support of the European Union's efforts to develop effective private rights of action; study of the impact of the *Twombly* case; support of prejudgment interest; an investigation of the effects of the *Daubert* line of cases; support for efforts to make waivers of class actions or class arbitrations of antitrust claims unenforceable; and opposition to the AMC proposal for settlement claims reduction and contribution.[29]

IV. DAMAGES FOR INDIRECT PURCHASERS

Another issue of great concern to consumers and the plaintiffs' bar is how to handle class actions by indirect purchasers. This has

[26] *Id*. at 252.

[27] *Id*. at 253.

[28] AAI REPORT, *supra* note 12, at 219.

[29] *Id*. at 219–46.

been controversial ever since the Supreme Court's decision in *Illinois Brick*,[30] which took away standing of indirect consumers to seek damages under the federal antitrust laws. This was followed by the passage of state statutes called state *Illinois Brick* repealer laws that, along with some state court interpretations, have given approximately half of American consumers a right to recover indirect purchaser damages. Virtually everyone agrees that the current arrangement doesn't make much sense, but what is the solution? Various groups, including an ABA task force, have advocated some form of federal statute to provide for a single federal court to handle such cases. Making this one of its most important priorities, the AMC allocated two panels of five witnesses each to this complex issue.

To some extent, the morass of multiple state indirect purchaser actions has been mitigated by the Class Action Fairness Act of 2005 (CAFA), which allows for removal and consolidation for pretrial purposes of most indirect purchaser actions in a single federal district court. The AAI's position (which it presented to the AMC) is to study the practical effect of CAFA before determining whether any additional legislation is needed.[31] The AMC Report recommended, however, that Congress enact a comprehensive statute to create a single federal court to handle all aspects of direct and indirect purchaser litigation. This would have the benefit of making it theoretically possible for all American consumers to recover in federal court for losses suffered as a result of an antitrust violation.

The devil is in the details of such proposals. The AAI criticizes the AMC's proposal, which broadly speaking would overturn both *Illinois Brick* and *Hanover Shoe*,[32] because it significantly decreases the

[30] Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

[31] This is also the position taken by the AAI. AAI Report, *supra* note 12, at 238.

[32] *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), held that an antitrust defendant could not assert the pass-on of overcharges from one purchaser to the next as a defense in a suit brought by the direct purchaser. As the AMC Report describes it, *Illinois Brick* ten years later applied what it saw as the logical corollary, holding that the federal antitrust law allowed only direct purchasers to sue to recover the overcharge they had paid. AMC REPORT, *supra* note 10, at 268. This deprived end-use consumers of

incentives for direct purchasers to sue while creating a significant risk that the slack in deterrence would not be made up by indirect purchaser actions, particularly given the failure of the proposal to address the roadblocks to existing indirect purchaser class actions.[33]

V. SINGLE FIRM CONDUCT

Section 2 of the Sherman Act deals with monopolization and attempts to monopolize. A variety of cases headed by the *Microsoft* litigation and the Supreme Court's opinion in *Trinko*[34] inspired controversy concerning the question of what strategies by a single firm, acting alone, should give rise to antitrust scrutiny. Should the Sherman Act be amended to provide greater clarity? Do high technology industries (read, Microsoft) require special treatment in order to encourage their innovativeness?

Early in the life of the AMC, the DoJ, and FTC announced their own joint hearings on single firm conduct, with the intention of eventually issuing a report showing areas of consensus. The commissioners were aware of this and to a large degree punted to the joint agency activity on specifics.[35]

The AMC concluded, first, that "there is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central fea-

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the ability to recover their overcharges, leaving the burden of suing in the hands of direct purchasers who may have passed on the overcharges and who may have on-going supplier relations with the defendant such that they would not want to engage in litigation.

[33] AAI REPORT, *supra* note 12, at 239.

[34] United States v. Microsoft Corp., 253 F.3rd 34 (D.C. Cir. 2001); Verizon Commc'ns Inc. v. Trinko, 540 U.S. 398 (2004).

[35] As it turned out, the DoJ and FTC could not agree on what to say. The DoJ unilaterally issued a report that took a largely hands-off attitude toward single firm conduct, and the FTC not only refused to sign on to the report but published a rather scathing critique. *See* Thomas O. Barnett & Hill B. Wellford, The DoJ's Single-Firm Conduct Report: Promoting Consumer Welfare Through Clearer Standards for Section 2 of the Sherman Act, *available at* http://www.usdoj.gov/atr/public/speeches/238599.htm.

tures."[36] This is an important though hardly earth-shattering conclusion, simply because any other conclusion would have opened up Pandora's box with respect to monopolization law.

A second area of discussion involved exclusionary conduct. Again, the AMC concluded that there is no need to amend section 2. The AMC endorsed the (conservative) standards currently employed by U.S. courts and hoped for continued evolution of the law in the courts, moving toward the development of "the proper legal standards to evaluate the likely competitive effects of bundling and unilateral refusals to deal with a rival in the same market."[37]

The third area of discussion relating to monopoly focused on patents, one of the topics that House Judiciary Chairman Sensenbrenner had asked the AMC to look into. In general, the AMC endorsed "the goal of encouraging innovation and at the same time avoiding abuse of the patent system that, on balance, will likely deter innovation and unreasonably restrain competition."[38] With respect to the specific area of the interaction between standard setting and patents, a currently hot area of development, the AMC opined only that joint negotiations with intellectual property owners by members of a standard-setting organization with respect to royalties prior to the estab-

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[36] AMC REPORT, *supra* note 10, at 32.

[37] *Id*. at 83. Bundling and unilateral refusals to deal were the subjects of special attention. The AMC recommended a three-part test to determine whether bundled discounts or rebates violate section 2 and stated that in general, firms have no duty to deal with a rival in the same market. *Id*. at 99, 103. It also endorsed the Supreme Court's decision in *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006) to the effect that market power should not be presumed from a patent, copyright, or trademark in antitrust tying cases. AMC REPORT, *supra* note 10, at 105.

[38] AMC REPORT, *supra* note 10, at 119. This included suggesting that Congress "seriously consider" the FTC and National Academy of Sciences recommendations targeted at ensuring the quality of patents and that Congress "should ensure" that the Patent and Trademark Office is adequately equipped to handle the burden of reviewing patent applications with due care and attention within a reasonable time period. *Id*. The AMC also urged the courts and the Patent and Trademark Office to avoid an "overly lax" application of the obviousness standard. *Id*.

lishment of the standard, without more, should be evaluated under the rule of reason.[39]

The AAI Report has a significantly stronger pro-enforcement tone with respect to how monopolization should be approached.[40] While the AMC was largely pleased with the way standards of interpretation are currently applied, the AAI called for greater respect for post-Chicago developments, as reflected in the *Kodak* case[41]; calls for tests for exclusionary conduct that balance concerns for "false negatives" as well as "false positives"; supports proposals for stronger remedies, such as the use of monetary sanctions; urges revitalization of the essential facilities doctrine; rejects cost-based safe harbors for loyalty and bundled discounts by dominant firms; and suggests treating a vertically integrated monopolist's refusal to sell or license its intellectual property to a downstream competitor the same as a refusal to sell or provide access to physical property.[42]

VI. ROBINSON-PATMAN ACT

The Robinson-Patman Act (R-P Act), outlawing certain types of price discrimination, is easy to criticize and has often been targeted for repeal. The AMC Report urges its repeal and claims, without much analysis or documentation, that small business is adequately protected from truly anticompetitive behavior by application of the Sherman Act.[43] Small business had no representation within the Commission and the testimony of small business witnesses was apparently given little weight. While all the reasons why price discrimination may sometimes be beneficial are trotted out, there is little discussion of how it may also be anticompetitive.

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[39] The intellectual property section of the AMC Report is reviewed in depth by Michael Carrier, an AAI Advisory Board member. Professor Carrier concludes that the AMC got it about right. Michael Carrier, *Pictures at the New Economy Exhibition: Why the Antitrust Modernization Commission Got it (Mostly) Right*, 38 RUTGERS L. J. 473 (2007).

[40] AAI REPORT, *supra* note 12, at 55–93.

[41] Eastman Kodak Co. v. Image Technical Servs. Inc., 504 U.S. 451 (1992).

[42] AAI REPORT, *supra* note 12, at 56–57.

[43] AMC REPORT, *supra* note 10, at 317.

The AAI Report devotes an entire chapter to Buyer Power, which was rejected as a topic for AMC investigation. It argues that the R-P Act, for all its faults, still serves a useful antitrust purpose and rather than repeal it, if anything, it can be reformed to conform its function more closely to what is generally viewed as economically sensible.[44] The AAI also goes into depth to define and analyze the increasingly familiar phenomenon of buyer power and to explore ways in which good and bad exercises of buyer power might be distinguished.[45]

VII. MERGERS

Mergers and acquisitions have apparently resulted in a large-scale consolidation of American industries in recent years, although one wouldn't learn this from the AMC. The AMC, coming at the issue from the perspective of whether merger law hurts big business, concluded that no statutory changes are needed. It did not think that current policy is "materially hampering the ability of companies to operate efficiently or to compete in global markets."[46] It did not question in any serious way whether there has been too much consolidation as a result of weak merger laws or inadequate enforcement. The brunt of the AMC's recommendations is that the enforcement agencies should give more weight to evidence demonstrating that a merger will enhance efficiency and should give more weight to certain efficiencies and to evidence that a merger will enable companies to increase innovation. There are also recommendations in support of retrospective studies of merger enforcement decisions and of greater transparency.

A separate chapter of the AMC Report focuses on procedural issues in the pre-merger review process.[47] These tend to be quite specific suggestions for the agencies. Recommendations to Congress include de-linking funding for the FTC and DoJ from Hart-Scott-Rodino filing fee revenues; revising the Hart-Scott-Rodino Act to

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[44] AAI REPORT, *supra* note 12, at 128–37.

[45] *Id*. at 99–130.

[46] AMC REPORT, *supra* note 10, at 53.

[47] *Id*. at 151–72.

more quickly resolve conflicts between the agencies on which one will handle a particular merger; and to ensure that mergers are treated the same no matter which agency reviews them.

The AAI's Report calls on the next administration to "correct the systematic tendency of the federal enforcement agencies . . . to allow mergers that should be stopped and to encourage the courts to do the same."[48] Its main thrust is to advocate the use of presumptions clarifying the line where enforcement should generally occur and the factual showings that merging firms must make in rebuttal. High levels of concentration, under the AAI's proposals, would carry more weight than under current interpretations. The AAI also discusses the differences between the DoJ and FTC and concludes that if modernization is required, it should come in the direction of conforming to the FTC model rather than the DoJ model.

VIII. IMMUNITIES AND EXEMPTIONS

There is not much controversy in the antitrust community as to the undesirability of having laws that are honeycombed with immunities and exemptions limiting the applicability of the antitrust laws. The question is, what to do about it? How to deal with existing immunities and exemptions? How to keep new ones from being placed on the statute books? The AMC could in theory have taken evidence on each item in its long list of immunities and exemptions, but it quickly became obvious that the Commission lacked the time and resources—ultimately, the will—to do this. Instead, it treated the problem at the 30,000-foot level.

Essentially, the AMC urges Congress not to displace free-market competition absent extensive, careful analysis; says that statutory immunities should be disfavored; provides a list of factors and processes to be considered before granting new immunities; recommends various limitations when new immunities are granted; and urges courts to construe all antitrust immunities and exemptions narrowly.[49]

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[48] AAI REPORT, *supra* note 12, at 140. This tendency is documented in the AAI Report.

[49] AMC REPORT, *supra* note 10, at 334–37, 348–56.

As precatory language, this is unexceptionable and has the support of the AAI. The question, of course, is whether Congress or the courts will pay attention. One can only speculate whether Congress might be more likely to pay attention had the AMC documented in depth a small number of high impact situations that could have been pinpointed for reform.

IX. REGULATION

In a similar vein, the AMC Report praises the transition to deregulation, without analyzing in depth particular sectors in which deregulation occurred, and urges further deregulation, although it rather glaringly does not suggest where further deregulation should be undertaken. (In view of the banking meltdown which occurred subsequent to the AMC Report, one wonders whether the commissioners, working a year or so later, would have been so sanguine about the effects of deregulation.) Where regulation applies, the AMC Report calls for antitrust also to apply, to the maximum extent possible, consistent with the regulatory regime.[50] Courts are admonished to interpret savings clauses to give deference to the antitrust laws.[51]

Some recommendations add a degree of specificity. The AMC pointedly urges a narrow interpretation of the *Trinko* decision, i.e., that it does not displace the role of the antitrust laws in regulated industries.[52] It urges Congress to address the question of whether the filed-rate doctrine should continue to apply in regulated industries.[53] With respect to merger reviews involving regulated industries, the AMC Report urges that full merger enforcement authority be in the hands of the antitrust agencies, subject to the Hart-Scott-Rodino Act, and urges Congress to re-evaluate whether any "public interest" factors other than competition should be taken into account by regulatory agencies.[54] Finally, the AMC offers guidance to the courts on the

[50] *Id*. at 337–42.

[51] *Id.* at 339.

[52] *Id.* at 340.

[53] *Id*. at 341.

[54] *Id.* at 363–66.

interpretation of the state action doctrine, aimed at narrowing its ability to override the federal policy in favor of free-market competition.[55]

The AAI Report does not deal specifically with most of these issues, but it provides four chapters that discuss specific sectors accounting for approximately 35% of the national economy, in which there is a heavy regulatory presence: the media, agriculture and food, health, and energy. In each case, there is an attempt to project the role of competition and of antitrust intervention, with proposals for the next administration. The level of specificity is very different from that in the AMC Report, and the attitude toward some degree of regulation is less hostile, reflecting what might be described as a more complex approach toward the role of government within a competition policy context. The AAI Report, like the AMC Report, was written before the economy buckled and did not analyze the financial services sector or address the question that is now emerging of how to identify and what to do about situations in which a company or an industry becomes too big (or too essential in some way) to be allowed to fail.

X. SOME ADDITIONAL TOPICS

In light of the recent rapid growth in the number of jurisdictions with competition policy laws, and despite the fact that a special commission had only recently reported on antitrust and international competition,[56] the AMC (in response to Chairman Sensenbrenner's priorities) made several recommendations on international antitrust enforcement, including general endorsement of "procedural and substantive convergence on sound principles of competition law"[57] and development of a centralized international premerger notification system.[58] The AMC Report also endorses amendment of the Interna-

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[55] *Id*. at 344, 366–77.

[56] U. S. DEP'T OF JUSTICE, INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST: FINAL REPORT (2000).

[57] AMC REPORT, *supra* note 10, at 216.

[58] *Id.* at 217.

tional Antitrust Enforcement Assistance Act,[59] providing budgetary authority to the FTC and DoJ for international technical assistance (instead of depending on USAID),[60] the greater use of comity principles,[61] and a clarifying interpretation of the Foreign Trade Antitrust Improvements Act.[62]

In its comments to the AMC, the AAI had advocated taking up the controversial consumer issue of how to ratchet back the antidumping laws. The commissioners found that there was some pointed opposition on Capitol Hill to their touching this topic, and therefore they stayed completely away. The AAI also submitted a proposal for the establishment of a centralized permanent training facility for foreign competition policy staff, as an alternative to the decentralized and periodic technical assistance approach that is followed.[63] This idea was apparently never taken up.

The AAI Report applauded the movement toward informal harmonization through regular conversation and the development of best practices documents by the International Competition Network,[64] but did not devote a separate chapter to international developments.

The AAI Report contains a chapter on institution building that has no equivalent in the AMC Report. It calls on the enforcement agencies, including the states, to do joint and several long-term planning for the first time. It calls on Congress to increase the budgets of the FTC and the DoJ, and it calls on the agencies to improve the training

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[59] *Id*. at 218.

[60] *Id*. at 219.

[61] *Id*. at 220–25.

[62] *Id*. at 225–30. The Commission was unable to come up with language to do this and could state only as a general principle that purchases made outside the United States from a seller outside the United States should not be deemed to give rise to the requisite effects under the Foreign Trade Antitrust Improvements Act.

[63] Am. Antitrust Inst., Comments of the AAI Working Group on International Issues (July 15, 2005), *available at* http://govinfo.library.unt.edu/amc/public_studies_fr28902/international.pdf/050715_AAI_international.pdf.

[64] AAI REPORT, *supra* note 12, at 18.

and career-building benefits for their staffs. It emphasizes the need for educating the public as to the value of competition and it lays out steps for increasing transparency as a fundamental responsibility.

XI. CLOSING OBSERVATIONS

The early history of the AMC set off warning bells among advocates of an activist approach to antitrust. The law itself was passed without hearings as part of an appropriations bill, championed by one member of Congress, James Sensenbrenner, who had become chairman of the House Judiciary Committee and who had no particular background in antitrust but wanted to make a mark. Many people thought they saw behind the Commission the hand of Microsoft, angered by the case brought against it (successfully) by the previous administration. The appointment of the commissioners, albeit half by each political party, suggested a very conservative, pro-defendant orientation. Key stakeholders who appeared likely targets of negative actions—the states, consumers, plaintiffs' attorneys, small business, the FTC, and the DoJ—were not represented.[65] The person appointed as chair, Deborah Garza, was closely associated with Rick Rule, a former Assistant Attorney General under Ronald Reagan who had aggressively represented Microsoft. Another of Microsoft's attorneys, John Warden, was a member of the Commission.

As it turned out, the chair oversaw a transparent and fair process, and there was little evidence of a Microsoft agenda. Witnesses were selected with an eye to balance. The AMC Report was moderate in tone and in substance, essentially a blessing of the conservative status quo by a competent and highly interactive, hard-working group of individuals who were themselves largely responsible for shaping the status quo.

In part, the moderation might be attributable to the large-scale participation of the public, in particular, as the AMC Report notes, the ABA and the AAI. The outcome was frequently in line with the ABA's public comments, which were the result of a slow-moving internal

[65] Deborah Majoras resigned from the AMC after being selected as FTC chairman. Makin Delrahim became an official of the DoJ during his term on the AMC.

process that seemingly incorporated a range of views. The AAI, being first in with in-depth comments on virtually all issues, may have helped moderate the commissioners on some votes and helped set up the issues for debate.

The Commission began under a Republican majority in Congress. Much of its deliberating occurred when the Congress it would report to was under a Democratic majority. This, too, may have contributed to its relative moderation, as the Commissioners took into account what might be politically feasible.

Politics, ironically, probably played too small a role in the AMC's history, in the following sense. The legislation called for an equal number of Democrats and Republicans and also said that they should be selected after consultation "to ensure fair and equitable representation of various points of view in the Commission."[66] However, the legislation also stipulated that the twelve members would be appointed by the President, the Senate, and the House, with an equal mix of Republicans and Democrats, but each of the designated appointers operated separately. There is no evidence of consultations by these various appointers to represent "various points of view." The absence of real diversity probably reduced the ultimate ability of the AMC Report to be seen as persuasive to excluded stakeholders.

Moreover, with no clear mandate from Congress, with no elected officials on the Commission and with the only real sponsor, Sensenbrenner, destined to yield the House Judiciary chairmanship before the Report would be issued, the AMC Report, unlike several prior blue ribbon commissions,[67] had no built-in political champions in Congress. When the White House changed hands with the 2008 election, it appeared that the AMC Report would be consigned to the book shelf as an interesting statement of what a bipartisan but relatively narrow group of experts believed in early 2007.[68]

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[66] *See* Foer, *supra* note 5, at 602.

[67] *See* Foer, *supra* note 1, at 1032–45.

[68] The AMC formally presented its recommendations to Congress at a hearing of the Antitrust Task Force of the House Committee on the Judiciary on May 8, 2007. The Joint Written Statement of Deborah A. Garza, Chair, and

So, was the AMC a wasted effort? By no means. First and most importantly, although certainly not its purpose, the AMC Report serves to inoculate the antitrust laws and institutions from attack by the far right. The initial fears of a laissez faire effort to severely delimit antitrust enforcement outlined earlier in this article were for the most part unrealized, which means that a reputable conservative body has now rejected many proposals that some conservatives had floated and which at one point in time seemed politically feasible.

Second, the AMC Report should prove useful both to historians and to foreign jurisdictions that are shaping their own competition policies, simply by documenting in detail many of the controversies that have troubled American antitrust during the early part of the twenty-first century. They can take or leave what is recommended, but they can benefit by having the controversies explored in a clear and competent manner. Much credit goes to the staff as they provided the background for the recommendations voted upon by the commissioners. Hopefully, the AMC Web site, www.amc.gov, will be maintained for a long time, because it provides a wealth of information for researchers and policy advocates.

Third, no report mandated by Congress should necessarily be considered dead; it remains on the shelf, to be trotted out as issues arise in the future, a rifle above the fireplace, even if its legislative recommendations are, as I would predict, not likely to be implemented in the near future. The Temporary National Economic Committee Report, for example, was issued in 1941, and its major impact, the Celler-Kefauver Act's amendments to the Clayton Act, strengthening the law against anticompetitive mergers, was not felt until 1950.

Fourth, the AMC Report can affect courts and agencies without resulting in any legislation whatsoever, either because of its compelling logic or because its conclusions help a decisionmaker justify a decision that would have been made in any event.

Jonathan R. Yarowsky, Vice Chair, of the Antitrust Modernization Commission, is available at http://www.judiciary .house.gov/hearings/May2007 /Garza070508.pdf. As of December 2008, no further action had been taken by Congress.

On the other hand, without regard to substantive policy differences one might have, the AMC may be viewed as a lost opportunity. By taking up such a large number of issues and generally eschewing empirical investigation, it documented the status quo at the expense of providing a vision for the future. There was no effort to say what factors in the economy, the society, or the polity had changed such that "modernization" would be in order. There was no effort to document the state of the economy or to predict what emerging issues would deserve antitrust's attention in the future. Perhaps I am cranky because of the very name of the Commission given by Mr. Sensenbrenner and the sense that if Congress really wanted something valuable, it should have said what it wanted and not merely appropriated four million dollars and three years in the vague hope that something useful would come of it.