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ABSTRACT

Title: Half-Time at the Antitrust Modernization Commission

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This paper is written at the half-way point in the three-year life of the Antitrust Modernization Commission. It reviews the legislative background and details the actions (and not taken) taken during the set-up and issue-identification phases. The paper outlines the principal issues that appear to be at stake, focusing on the role of the states, private enforcement, damages for indirect purchasers, single firm conduct, the Robinson-Patman Act, mergers, and immunities and exemptions. Finally, the paper addresses the question of whether what the AMC does will matter.

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Half-Time at the Antitrust Modernization Commission

Albert A. Foer[1]

As I write in the late fall of 2005, the Antitrust Modernization Commission ("AMC") has lived approximately one-half of its statutory three-year life. We cannot yet predict what the AMC will report to the Congress and President in April, 2007, but much can be said about what plays have been called in the first half and what is potentially at stake in the game.

I. The Rule Book

The AMC is the brainchild of F. James Sensenbrenner, a Republican Member of Congress from Wisconsin, who had recently become Chairman of the House Judiciary Committee when he introduced H.R. 2325. No hearings were held on the bill and it was generally assumed to be going nowhere, but at the last minute Chairman Sensenbrenner attached it to an appropriations bill and it sailed through unopposed, although without noticeable support from anyone other than the Chairman. [2]

There is, therefore, no legislative history to speak of. Sensenbrenner himself had talked about the need to study the intersections of antitrust and (1) high technology, (2)

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[1] J.D., University of Chicago, 1973. President of the American Antitrust Institute ("AAI"), www.antitrustinstitute.org. The author circulated a draft of this article to the AMC Commissioners and staff, seeking comments. The Executive Director provided the only response, saying "We do not have any comments on the article, although we do not agree with some of the characterizations of the Commission and its work." Correspondence dated November 10, 2005, on file at the AAI.

[2]. The Antitrust Modernization Commission Act of 2002 ("The Act"), Pub. L. No. 107-273, §§ 11051-60, 116 Stat. 1856. is subtitle D of the 21st Century Department of Justice Appropriations Act The Act was passed on November 2, 2002, available at http://www.amc.gov/pdf/statute/amc_act.pdf.

intellectual property, and (3) international law.[3] The legislation, however, says nothing about specific topics to be taken up by the AMC. Rather, it sets forth four specific duties:

> (1) to examine whether the need exists to modernize the antitrust laws and to identify and study related issues; (2) to solicit views of all parties concerned with the operation of the antitrust laws; (3) to evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and (4) to prepare and to submit to Congress and the President a report.[4]

The AMC has twelve members, who were variously appointed by the President, the Senate, and the House, with an equal mix of Republicans and Democrats.[5] Before appointing members, the appointers were required to consult with each other "to ensure fair and equitable representation of various points of view in the Commission."[6] There is no evidence that this occurred. In fact, it would be difficult to say that there are any commissioners who represent the Federal Trade Commission or the Antitrust Division[7], the states, consumers, small business, or the plaintiffs' bar, to name but a few obviously missing stakeholders. While some of the Commissioners or the firms that employ them occasionally represent plaintiffs and some of the Commissioners served in enforcement posts earlier in their careers, the Commission as a whole –made up of talented and

[3] Sources said that the AMC was modeled after the National Bankruptcy Review Commission. Jaret Sieberg, Bill Calls for Blue-Ribbon Antitrust Panel, The Deal (Feb. 16, 2001), available at http://www.thedeal.com (copy on file with author).

[4] The Act, section 11053.

[5] Four members were appointed by the President (two having to come from the "opposition party"); two by the majority leader of the Senate; two by the minority leader of the Senate; two by the Speaker of the House of Representatives, and two by the minority leader of the House.

[6] Id., Section 11054 (h).

[7] When they were appointed, Makan Delrahim worked in the Senate and Deborah Majoras was in private practice. Delrahim subsequently became Deputy Assistant Attorney General for Antitrust, but in fall, 2005, joined a Washington, DC, law firm. Majoras was required to step down from the AMC when she was appointed Chair of the FTC. Several Commissioners had earlier high-level experiences in the two federal antitrust agencies.

experienced antitrust experts-- is dominated by people whose recent backgrounds strongly suggest a defense orientation.[8]

In a previous article drafted before the Commissioners were appointed, I offered four generalizations to be gleaned from the statutory framework of the AMC.[9] First, because the statute provided almost no direction, it would be up to the Commission itself to define its own scope and priorities. Second, whether Congress would achieve its objective of a politically balanced and broadly representative Commission would depend as much on the appointments of staff and expert consultants as on the appointment of

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[8] The Commissioners and their affiliations are: Deborah A. Garza (Chair) (Fried, Frank, Harris, Shriver & Jacobson, Washington, DC; former Chief of Staff in the Antitrust Division), Jonathan R. Yarowsky (Vice Chair)(Patton, Boggs Washington, DC office; former General Counsel to the House Judiciary Committee), Bobby R. Burchfield (McDermott, Will & Emory, Washington, DC; replaced Deborah Majoras (Jones Day, Washington, DC) after she was appointed to be Chair of the Federal Trade Commission)), W. Stephen Cannon (Constantine Cannon, Washington, DC; former General Counsel to Circuit City with substantial experience in the Antitrust Division and the Senate Judiciary Committee), Dennis W. Carlton (Economist, University of Chicago; Senior Managing Director, Lexecon, which—like the large law firms, most often represents large corporate antitrust defendants), Makan Delrahim (appointed while Chief Counsel to the Senate Judiciary Committee, but has since been Deputy Assistant Attorney General for Antitrust and is now with Brownstein, Hyatt & Farber, Washington, DC) , Jonathan M. Jacobson (appointed while at Akin Gump et al., but now at Wilson Sonsini Goodrich & Rosatti in New York), Donald G. Kempf, Jr (appointed while Executive Vice President, Morgan Stanley, in New York)., Sanford M. Litvack (Hogan & Hartson in Los Angeles; former Assistant Attorney General for Antitrust), John H. Shenefield (Morgan Lewis in Washington, DC; former Assistant Attorney General for Antitrust), Debra A. Valentine (Vice President, United Technologies; former General Counsel, FTC), and John L. Warden (Sullivan and Cromwell in New York). Biographical information is available on the AMC website, www.amc.gov.

The Republican appointees are Cannon, Delrahim, Kempf, and Warden. Democratic appointees are Jacobson, Shenefield, Yarowsky, and Valentine. Presidential appointees are Garza, Carlton, Litvack, and Majoras (replaced by Burchfeld)(Carlton and Litvack represent the "opposition party".).

A Washington Post article by Jonathan Krim, A Less Public Path to Changes in Antitrust, May 12, 2005, http://www.ffhsj.com/antitrust/pdf/alert_110901.pdf, hinted at close relations between several of the Commissioners and the Microsoft Corporation, and concluded, "The makeup of the panel and the questions it is examining, however, suggest that most of the focus will be on the needs of antitrust defendants, or potential defendants."

[9] Albert A. Foer, Putting the Antitrust Modernization Commission into Perspective, 51 Buffalo Law Review 1029 at 1031-32 (2003). This article attempted to suggest what could be learned from important predecessor blue-ribbon antitrust study commissions, including the 1938-41 Temporary National Economic Commission, the 1955 Attorney General's National Committee to Study the Antitrust Laws, the 1969 White House Task Force on Antitrust Policy, the 1979 National Commission to Review Antitrust Law and Procedures, and the 1998 International Competition Policy Advisory Committee.

Commissioners. Third, the critical appointment would be that of the chairperson, who is empowered to control the executive director and the staff. With members likely to be very busy part-timers, the staff would probably play a driving role on agenda, priorities, spending choices, and report wording. And fourth, the ability to hold a large number of meetings, hear substantial amounts of testimony, obtain specialized experts, and recruit a top quality staff would be influenced by the funding. Congress authorized a total of four million dollars for three years, which will presumably be doled out in annual appropriations.

This is not the first blue-ribbon antitrust study commission.[10] Indeed, over the past seventy years, a new commission seems to have been born roughly once every generation. Some commissions have been established by Congress, some by the Executive Branch. They have had widely varying durations and resources. Their assignments have sometimes been broad, sometimes narrow. Rarely have they had an immediate impact on legislation, but sometimes their longer-term impact has been significant. For example, the Temporary National Economic Commission (TNEC) focused attention on the role of industrial concentration, leading nine years later to the Celler-Kefauver amendments to the Clayton Act.[11]

The TNEC membership was evenly balanced between the Administration and Congress. [12] The AMC, on the other hand, is made up of experts but no Senators or Members of Congress. When the Report is eventually submitted, there will be no politicians with any foreseeable buy-in to the AMC's Report, other than Congressman Sensenbrenner, but he is not a member of the AMC and will not even be Chairman of the House Judiciary Committee when the Report is submitted, because of term limits adopted by the Republicans.

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[10] See the above footnote 8.

[11] See Rudolph J.R. Peritz, Competition Policy in America, 1888-1992: History, Rhetoric, Law 159 (rev. ed. 2000).

[12] See Foer, note 8 supra, at 1033.

II. The Game Plan for the First Half

A. Getting Organized

The first task of any study commission is to make the transition from statutory framework to physical reality. Appointments would have to be made within sixty days of enactment of the law and the three-year clock would start running with the first meeting of the Commission.[13] The appointment process was apparently not on the top of any politician's priority list because the appointments were not completed for sixteen months.[14] Indeed, the Commission's charter could not be filed until April 2, 2004. On June 28, 2004, the AMC issued its first press release, announcing the identification of the Chairperson (Deborah A.Garza) and the Vice Chairperson (Jonathan R. Yarowsky), the membership, and the schedule for its first public meeting.[15] Ms. Garza is a partner in the Washington office of Fried, Frank.[16] The press release also announced the appointment of

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[13] Act, Sections 11054(e) and 11058. The charter is found at http://www.amc.gov/pdf/charter/amc_charter.pdf. The Commission goes out of existence thirty days after the Report is submitted. Act, Section 11059.

[14] The last appointments were announced by the President on March 5, 2004(Dennis W. Carlton of Illinois; Deborah A. Garza, of the District of Columbia, to be Designate Chairman upon appointment; Sanford M. Litvack of New York; and Deborah P. Majoras of Virginia). See http://www.whitehouse.gov/news/releases/2004/03/20040305-5.html.

[15] See http://www.amc.gov/pdf/news/press_release040628.pdf.

[16] When Ms. Garza joined Fried Frank in 2001, Rick Rule, head of Fried Frank's antitrust practice, said, "I'm thrilled that Deb has chosen to join the firm. She is one of the best antitrust lawyers of her generation. At the Justice Department, she helped to develop enforcement policies, particularly in the area of merger review, that guide the Antitrust Division today. In private practice, she has been involved in some of the major antitrust matters of the past two decades, including the representation of Exxon in its merger with Mobil and the representation of the National Football League in its landmark litigation with the United States Football League. By attracting Deb to become a leader in our antitrust department, Fried Frank has taken a major step in its effort to build the preeminent antitrust practice." Fried Frank press release, http://www.ffhsj.com/pressreleases/garza.htm. She previously was an antitrust partner in the Washington DC office of Covington & Burling. The head of Fried Frank's antitrust section, Rick Rule, moved from Covington in January, 2001. Both Rule and Garza worked in the Antitrust Division of the Justice Department during the Reagan and elder Bush administrations. Garza rose to Chief of Staff and Counselor in 1988-89. Rule rose to be the Assistant Attorney General in the Antitrust Division and was responsible for following a distinctly "Chicago School" approach to the Division, which in practice meant dramatic cutbacks in the scope of antitrust enforcement. Tech Law Journal E-Mail Alert, Feb. 26, 2001, http://www.techlawjournal.com/alert/2001/02/26.asp. Rule was a key member of Microsoft's negotiation

Andrew J. Heimert as Executive Director and General Counsel.[17] Mr. Heimert had been an attorney in the FTC's Office of Policy and Coordination within the Bureau of Competition. The first public meeting was held on July 15, 2004,[18] and the Commissioners announced that the final report would be submitted in April, 2007.

Once the Chair had appointed Heimert as Executive Director, a variety of logistical tasks needed to be completed, such as the hiring of staff, location of a physical office, compliance with the usual range of administrative filings, and establishment of a website.[19] Staff biographies may be found on the website.[20]

The first meeting opened with remarks by Congressman Sensenbrenner, the legislative father of the Commission.[21] In this and subsequent meetings, the AMC decided to create "working groups" to suggest topics for study and to call for public comments once the topics were selected. On January 8, 2005, the Commission identified an initial slate of 25 topics for study.[22] This was eventually revised and individual

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team in the government's landmark Microsoft case. Fried Frank Antitrust Law and Competition Alert, Nov. 9, 2001, http://www.ffhsj.com/antitrust/pdf/alert_110901.pdf.

[17] The appointment of the Executive Director is by the Chair is subject to approval by the Commissioners. Section 11056(a)(1). There is nothing on the record indicating that this appointment came to a vote.

[18] See http://www.amc.gov/pdf/news/press_release040716.pdf.

[19] The website is www.amc.gov.

[20] The staff consists of the Executive Director and General Counsel (Andrew J. Heimert), two Counsels (William F. Adkinson, Jr., and Todd Anderson), an Economist (Michael W. Klass), two Senior Advisors (William E. Kovacic and Alan J. Meese), a Law Clerk (Hiram Andrews), and a Paralegal (Kristin M. Gorzelany). Mr. Kovacic was nominated for a Republican seat on the Federal Trade Commission and has apparently played only a limited role on the AMC staff. The only controversial appointment was that of Alan J. Meese, a law professor whose reputation as an antitrust conservative was raised by at least one Commissioner.

[21] The transcript of this meeting may be found at http://www.amc.gov/pdf/meetings/transcript040715.pdf. Records relating to all public meetings are available on the AMC's website.

[22] See http://www.amc.gov/pdf/news/press_release050119.pdf.

Commissioners were named to work on particular "study groups."[23] The Chair did not appoint official leaders of any study group.[24] The function of the study groups was to review the testimony and public comments on the specific topics and to make recommendations to the full AMC as to what policies should be adopted for the final report.

While the Commission as a whole was shaped to function in accordance with the Federal Advisory Committee Act, the Commission took the position that study groups would are not covered and can therefore meet and act in private.[25]

B. Developing the Agenda

How might a study commission, whose only assignment is to make recommendations relating to the possible modernization of antitrust structure its agenda? Answering this was the first major task of the AMC. One approach would be to begin with extensive data collection. "Modernization" presumably implies that some circumstances of importance to antitrust have changed and that these changes now require antitrust also to change by taking "modern" developments into account. Thus one might start by comparing relevant aspects of the political economy at some point in the past with the present and perhaps with predictions about the future. Only after this task has been accomplished would the Commission then turn to policy recommendations. This

[23] See http://www.amc.gov/pdf/meetings/list_of_study_groups_rev.pdf and http://www.amc.gov/pdf/meetings/study_group_participants-list.pdf.

[24] At any early stage, these were deemed "working groups" and leaders were appointed, but once the specific topics were selected for study, the AMC's membership was assigned to leaderless "study groups." Not to appoint what would in effect be subcommittee chairs might be viewed as a management decision to retain centralized control. In any event, it deprived the study groups of a formal leader with responsibility for developing and shepherding a program.

[25] The FACA is at 5 U.S.C. app. The American Antitrust Institute formally urged that study groups conduct their business in public view. The initial response from Executive Director Heimert was that subgroups of this type are not covered by the FACA. The AAI provided a legal memorandum to the contrary and requested reconsideration, which was denied on November 10, 2005. Correspondence on file at the AAI.

approach is essentially the model of the Temporary National Economic Committee whose multivolume picture of the economy at the time of the Great Depression was called by one historian "the most dramatic and sweeping investigation of American industry ever undertaken."[26] This model of surveying the landscape is what the author recommended to the AMC.[27]

But the TNEC did not have an immediate impact. As Alan Brinkley put it, "It had gathered the data. It would be up to others to decide how to use it."[28] Thus a different approach, targeting, might seem more compelling to those who know what they want to achieve and are anxious to show results. Such prior antitrust study commissions as the National Commission for Review of Antitrust Laws and Procedures (1977-79) and the International Competition Advisory Committee (1998-2000) are examples of the targeting approach, in that their charters were more carefully delimited. The AMC, so lacking in statutory direction, decided to define its agenda by self-identifying specific questions that it would attempt to answer.

At its first public meeting, on July 15, 2004, the AMC decided to solicit public comments on what issues it should study.[29] In the meanwhile, it would reach out to the "consumer, business, academic, legal, and enforcement communities" for further enlightenment and at its next meeting, not scheduled until January 10, 2005, it would decide on what issues to study. Someone must have noticed that the clock was ticking, because the next meeting was actually held on October 20, 2004. At this meeting, eight work groups were established and each Commissioner was appointed to serve on two or

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[26] Susan Wagner, The Federal Trade Commission 81 (Ernest S. Griffith & Hugh Langdon Elsbree eds., 1971).

[27] Foer, op. cit., 1047-50.

[28] Alan Brinkley, The End of Reform 127 (1966).

[29] See July 14, 2004, Memorandum of Proposed Process, http://www.amc.gov/pdf/news/comments_proc_memo2.pdf.

more groups.[30] It was reported that public comments had been received from over 35 individuals and organizations. Finally, it was determined that the working groups, each under an appointed leader, would circulate recommendations to the full Commission by December 17, and these would be voted upon at the next meeting, now scheduled for January 13, 2005.[31]

At last, on January 13, 2005, the Commissioners took up a litany of specific questions, as prepared by the various work groups.[32] After introductions by the working group leaders, the Commissioners voted to take up 29 questions, ranging from broad and controversial questions like "What should be the remedies and legal liabilities in private antitrust proceedings?" or "How does the current intellectual property regime affect competition?" to relatively simple and uncontroversial questions like "Should Section 3 of the Robinson-Patman Act (relating to criminal penalties) be repealed?" A few questions were deferred for further discussion.

The next public meeting, on March 24, attracted eight Commissioners, an audience of fifty, and lasted a mere twenty-five minutes. It was scheduled to deal only with two matters that had been deferred. The first matter was whether to study the topic of timetables for criminal and civil non-merger antitrust investigations by the FTC and DoJ. The Commissioners voted not to make this a separate issue for study, but to address the issue in the Final Report.[33]

The second question was somewhat more sensitive. Assistant Attorney General Hewitt Pate had sent a letter to the AMC urging it to undertake or design a

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[30] The work groups were for mergers, acquisitions and joint ventures; civil procedures and remedies; criminal procedures and remedies; immunities and exemptions; regulated industries; intellectual property; international antitrust; and single firm conduct. AMC Working Group Assignments, http://www.amc.gov/pdf/meetings/wgassignmentsoutline.pdf.

[31] Id.

[32] The minutes of this meeting are at http://www.amc.gov/pdf/meetings/minutes050113.pdf.

[33] Minutes of March 24, 2005, meeting, http://www.amc.gov/pdf/meetings/minutes050324.pdf.

comprehensive empirical study of the costs and benefits of antitrust enforcement. The Commissioners found themselves in the position of not wanting to offend the Department of Justice, but having already publicly committed themselves to a menu of tasks that some thought to be overwhelming, were reluctant also to undertake the type of comprehensive study being proposed. The Commissioners voted unanimously not to undertake the study, but rather to "undertake more limited empirical studies where appropriate as part of its consideration of issues selected for further study and identify areas in which further empirical research could be useful."[34]

During the ensuing period, the approved study questions were re-organized under slightly different topics and "study groups" replaced "work groups," with Commissioners assigned to one or more study groups. Each group produced a "study plan" and these were reviewed and voted upon at the fifth public meeting, on May 9. The outcome was the adoption of nine study plans (Enforcement Institutions; Exclusionary Conduct; Immunities and Exemptions; International Antitrust; Merger Enforcement; New Economy; Regulated Industries; Remedies; and Robinson-Patman) and agreement to publish them in the Federal Register with a request for public comments.[35]

Each study plan contained a list of the issues adopted for study and then a series of questions for public comment. For example, in the case of the Enforcement Institutions Study Plan, there were three questions about dual federal merger enforcement; four questions about differential merger enforcement standards; four questions about the allocation of merger enforcement among states, private plaintiffs, and federal agencies; and three questions about the role of states in enforcing non-merger antitrust laws. The plan also called for four (and possibly five) separate hearings with panels of witnesses.[36] A tenth study plan, Criminal Issues, was adopted at the sixth meeting on July 28, 2005.

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[34] Id.

[35] See Minutes of May 9, 2005, meeting, http://www.amc.gov/pdf/meetings/minutes050509.pdf.

[36] See Memorandum re Enforcement Institutions Study Plan, http://www.amc.gov/pdf/meetings/enforcement_institutions_study_plan.pdf.

Altogether the ten study plans contained 176 separate questions and called for 29 separate hearings.

As important as what issues were placed on the table are the ones that were not. We've already seen that both a large-scale view of antitrust within the context of a changing political economy and comprehensive empirical projects were rejected. Also not taken up were a number of important questions, hotly debated in the antitrust community, relating to the purposes and goals of antitrust,[37] the role of concentration,[38] how to deal with power buyers,[39] the problem of patent ambush,[40] and reform of the antidumping laws.[41]

From April 2, 2004 (the filing of the charter) until May 9, 2005 (approval of the study plans), more than a third of the AMC's life had been spent on getting organized and deciding what issues to study. The result cannot be evaluated until after the Report is written, but one can question whether more efficient use could have been made of the first year and whether the particular set of questions adopted represents the best strategy for determining what, if anything, needs to be "modernized."

Insofar as has been revealed in public meetings, the approach selected by this panel of eleven lawyers and one economist is heavily legalistic. The Commission itself

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[37] For a review of the debate over the proper goals of antitrust, see AAI Working Paper No. 05-09, Albert A. Foer, The Goals of Antitrust: Thoughts on Consumer Welfare, http://www.antitrustinstitute.org/recent2/350.cfm .

[38] For a review of current issues relating to the role of concentration, AAI Statement on Horizontal Merger Analysis and the Role of Concentration in the Merger Guidelines, http://www.antitrustinstitute.org/recent2/296.cfm .

[39] The AAI conducted a symposium on power buyers and antitrust, the papers of which were presented in a symposium issue of the ABA's Antitrust Law Journal, volume 72, Issue 2 (2005). For an overview, see Albert A. Foer, Introduction to Symposium on Buyer Power and Antitrust, 72 Antitrust L.J. 505-508 (2005).

[40] See the submissions to the AMC at http://www.amc.gov/public_submissions.htm.

[41] See note 47 below and the AAI's comments on International Issues, http://www.amc.gov/public_studies_fr28902/international_pdf/050715_AAI_International.pdf.

has neither undertaken nor contracted for new research.[42] If new information is to be taken into account, it will probably have to be furnished by the public, through formal comments or testimony. According to AMC staff, the single example of the Commission reaching out in a formal way to stimulate volunteer consultants to produce desired research is the assignment to Darren Bush (University of Houston Law Center), Gregory Leonard (NERA Economic Consulting), and Stephen Ross (University of Illinois College of Law) to prepare a framework for policymakers to analyze proposed and existing antitrust exemptions and immunities.[43]

C. The Role of the Public

The AMC's outreach to this point in time has reflected four phases: informal seeking of suggestions from antitrust notables; a request for public comments on what should be the agenda; the request for public comments on topics selected by the Commission for study; and public hearings.

(1) Informal Outreach

Prior to its first public meeting, the Commission determined that it would initially reach out in an informal way to the antitrust community for ideas about how it should proceed and what topics it should focus on. The present author was scheduled to visit with the Commission at its new offices for such a discussion. It turned out to be a one-hour unstructured conversation that included the Executive Director and three Commissioners hooked in by conference call. There appears to be no public record of who else participated in this initial outreach program or whether other conversations were more productive than the author's.

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[42] Prior blue-ribbon antitrust commissions had sometimes contracted out for specific research or had been able to assign specific research to government agencies with expertise. The AMC's statute permitted these strategies, at the discretion of the Commission. The Act, Sections 11056(h), 11507(b).

[43] This framework is expected to be presented at hearings on December 1, 2005, to elicit reaction from panelists and Commissioners.

(2) Request for Comments on the Agenda

On July 23, 2004, the Commission asked the public to provide comments by September 30 on what issues it should study.[44] Thirty-eight comments were received.[45] Some comments, like those of the American Antitrust Institute and the American Bar Association Antitrust Section,[46] were broadly based; others dealt with specific issues of particular interest to the authors, such as the American Homeowners Grassroots Alliance, which was principally concerned with antitrust issues relating to the real estate industry, or the Americans for Tax Reform ("[A]ntitrust laws, if they ever served a useful purpose, now only exist to stifle productivity growth and development of new products and services.").

After the Commission made its initial cut on topics for study, another eleven public comments were submitted, unsolicited. Five of these urged the Commission to reconsider its decision not to include the patent ambush issues.[47] Five urged the Commission not to attempt to reevaluate the antidumping laws.[48] The eleventh criticized the Commission for not being responsive to public comments.[49] The Commission did respond, however, to the politicians' concerns that it lacked both the specific expertise and the statutory mandate to take up antidumping, by removing this subject from the agenda of topics.

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[44] 69 Federal Register 43969, July 23, 2004, http://www.amc.gov/public_studies_fr28902/immunities_exemptions_pdf/fr_notice040723.pdf.

[45] They are posted at http://www.amc.gov/commission_study_issues.htm.

[46] Described in Ronan P. Harty, The Antitrust Modernization Act: An Introduction, The Antitrust Source, November, 2004, http://www.abanet.org/antitrust/source/11-04/Nov04-Harty1129.pdf.

[47] These comments were submitted by the American Antitrust Institute, Sun Microsystems, Cisco Systems, Hewlett-Packard, and International Business Machines. http://www.amc.gov/public_submissions.htm.

[48] These comments were submitted by Senators Specter and DeWine; Congressman English; Congressmen Rangel and Conyers; Senator Byrd; and the Committee to Support U.S. Trade Laws. Id.

[49] Letter from Carl Lundgren, Relpromax Antitrust Inc., Id.

(3) Request for Public Comments on Substance

For the first nine study plans, the AMC on May 19, 2005, requested the public to provide comments by June 17, July 1, or July 15, 2005, depending on the topic. In effect, this meant that an organization wishing to respond to all 176 questions in a timely fashion would have no more than four to six weeks of the early summer to prepare all of its comments. Given that most organizations would require time to do research, write thoughtful comments, and clear them through any sort of committee or internal review process, this hardly seemed to be a welcoming invitation.

Ninety-two comments were filed in a timely fashion, with another 18 filed as of the end of October. But these numbers are misleading. Sixty-one of the 110 filings related to the Immunities and Exemptions Study Plan, and most of these were by industries wishing to hold onto their own current exemptions and immunities. Moreover, of the remaining submissions, ten were submitted by the American Antitrust Institute, four were submitted by the International Chamber of Commerce, and three by sections of the American Bar Association.

The American Antitrust Institute, an independent non-profit organization, had geared up for the AMC by establishing volunteer working groups to parallel the AMC's study groups. With a streamlined internal review process and the flexibility to allow each working group to submit comments under its own identification, the AAI was able to address in some depth nearly all of the questions posed by the AMC. [50]

[50] The current author served on every AAI working group and edited all papers to provide consistency both in formatting and in overall substantive positioning. Each paper represented a consensus of its working group, ascertained through telephone conferences and e-mail exchanges, but there were no votes taken and no one member should be assumed necessarily to agree with all statements in the comments. The timing imposed by the AMC severely limited the potential for in-depth legal or economic research. Thus the only AAI comment that provided new empirical data was the comment on Criminal Remedies, in which attention was called to information that had recently been published by Professors John Connor and Robert Lande (two members of a working group chaired by attorney Kenneth Adams), showing that the harm caused by cartel pricing was significantly greater than previously thought. http://www.amc.gov/public_studies_fr28902/criminal_pdf/050930_AAI_Criminal_Remedies.pdf.

It is anticipated that the Antitrust Section of the American Bar Association will provide comments comparable in breadth. Working groups were established by the Section to prepare comments on various topics, but the ABA's internal procedures proved sufficiently cumbersome that the first comments did not begin arriving at the AMC before late October, 2005. An example would be the fourteen page single space filing on October 19 by Section Chairman Donald C. Klawiter titled "The Enforcement Role of the States with Respect to the Antitrust Laws."[51] On two of the potentially more controversial issues addressed, the Antitrust Section's comments can be described as mild. "Absent a valid empirical basis," the Section stated that it was "unwilling to recommend dramatic changes to the system of dual federal-state merger enforcement or to discount the criticisms of the system as it currently exists."[52] On the question of whether private enforcement should continue to be available to challenge mergers, the Section suggested that the AMC "should not take any action to encourage or discourage any change to the system."[53]

(4) Hearings

As of the end of October, 2005, the AMC had held hearings on six topics: Indirect Purchaser Actions; the Robinson-Patman Act; Civil Remedies Issues; the State

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For a flavor of these comments, consider the "Comments of the American Antitrust Institute's Working Group on the New Economy." http://www.amc.gov/public_studies_fr28902/new_economy_pdf/050715_AAI-New_Economy.pdf. The Working Group, which included at least four antitrust law professors who teach courses on high technology or intellectual property law, was chaired by Professor Rudolph Peritz of the New York Law School. The other members were Joseph Bauer (law professor, Notre Dame), Michael Carrier (law professor, Rutgers, Camden), Albert Foer (attorney, AAI), Philip Nelson (economist, Economists, Inc.), Roger Noll (economist, Stanford), Mark Patterson (law professor, Fordham), Douglas Rosenthal (attorney, then with Sonnenschein, Nath & Rosenthal), Jonathan Rubin (attorney and economist, AAI), F.M. Scherer (economist, Harvard), Robert Skitol (attorney, Drinker Biddle & Reath) and Philip Weiser (law professor, U. Colorado).

[51] http://www.amc.gov/public_studies_fr28902/enforcement_pdf/051019_ABA_Govt_Enf_States_Roles-Enf_Inst.pdf.

[52] Id.

[53] Id.

Action Doctrine; Exclusionary Conduct; and State Enforcement Institutions.[54] Nine additional hearings had been scheduled before the information phase of the Commission's planned activity ends in January, 2007: Criminal Remedies; Federal Enforcement Institutions; New Economy; Merger Enforcement; Government Civil Remedies; Statutory Immunities and Exemptions; Regulated Industries; Noerr-Pennington Issues; and International Issues.[55] The original plan had called for 29 hearings, which was probably twice as many as the Commissioners could actually handle, along with their on-going full-time professional responsibilities.

The typical AMC hearing involves a panel of four witnesses seated at a table before and facing the arrayed Commissioners. After a brief welcome from Chairperson Garza, the four witnesses, whose written statements are handed out beforehand, are each given five minutes to summarize their statements. One Commissioner is designated as the lead questioner. After he or she has asked a series of questions, every other Commissioner is provided time to ask questions of any or all of the panelists. As with the questioning by an appellate judge, questioning is often the way a Commissioner signals his or her perspective, but thus far it has proven difficult to predict where most Commissioners will come out when votes are eventually taken.

A hearing usually lasts two hours. The full transcript is published after some delay and editing on the www.amc.gov. With only four witnesses on a given topic, it is obvious that all viewpoints will not be heard. Although the Commission has attempted to construct panels that represent several different constituencies in a generally balanced way, some efforts (e.g., exclusionary conduct; mergers) appear to have been less successful than others (e.g., treble damages).

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[54] http://www.amc.gov/commission_hearings.htm.

[55] http://www.amc.gov/commission_hearings/pdf/Hearings_Schedule.pdf. The timetable of the Commission's activities is at http://www.amc.gov/pdf/meetings/amc_timeline050330.pdf.

By and large, very little if any "new" information has thus far been provided at the hearings. They are primarily occasions for well-informed advocates to promote previously developed positions relating to the matters before them. Some Commissioners (notably John Shenefield, who had chaired an earlier blue ribbon antitrust study commission) have from time to time made it a point to try to illuminate areas of consensus and difference within the panels.

III. The Second Half

A. The Timetable

As the Commission returns to the field to play the second half, what remains to be accomplished? By the end of February, 2006, the staff is expected to have compiled summaries of the research and information gathered. From March through May, the Study Groups and staff will prepare options for recommendations and the Commission will begin meeting to deliberate on findings and recommendations. A draft report and recommendations are anticipated to be completed in August and the report should be finalized in December. The final printed report is scheduled for release on April 2, 2007.

Among the important procedural questions that still need to be answered are: (1) Will the study group meetings in which recommendations are initially formulated and debated be open to the public? (2) When will the Report drafts be released to the public (and will they be released as soon as prepared or all at once)? (3)Will the public have an opportunity for meaningful in-put once draft materials are available? And (4) how will the Report handle dissents and individual statements by Commissioners?

B. What Is at Stake?

Out of the 176 questions targeted by the Commission, a few clusters are likely to prove most controversial and potentially important for the future of antitrust. I will call attention to seven of these.

(1) Role of the States

The role of the State Attorney General as an antitrust enforcer has a long history, going back before the Sherman Act in some States, but it became much more salient during the years of the Reagan Administration, a period when Federal antitrust was in severe retrenchment. The fact that many of the States disagreed with the Department of Justice (not to mention Microsoft Corp.) in this generation's landmark monopolization case led to complaints that the States were an unnecessary complication and that they should be made to bow out of any cases involving interstate commerce or (less severe) any cases in which the Federal antitrust enforcers had reviewed a matter or (less severe), had taken formal enforcement action.

The States were rather pointedly left off of the AMC and have no obvious representative within the membership. Recognizing this disadvantage, the States and their coordinating arm, the National Association of Attorneys General, have been hard at work gathering data to demonstrate their importance within the overall scheme of antitrust enforcement and that the system is not broken. (Some of this information was presented by Professor Harry First in his testimony on October 26.)[56] Based on questioning by Commissioners, one could surmise that most at risk may be the States' jurisdiction over mergers that impact on more than one State, which is to say, most mergers.

[56] http://www.amc.gov/pdf/meetings/amc_timeline050330.pdf. This presentation can be considered an exception to the generalization that very little "new" information has been provided to the AMC by witnesses.

The AAI Working Group advocated that the States maintain their current jurisdiction over mergers and more generally stressed the significant contributions made by the concurrent enforcement of antitrust laws by state and federal agencies, opposing any plan for imposed allocation of authority.[57]

(2) Private Enforcement

It is estimated that over 90% of antitrust litigation is by private parties. Both the statutory scheme and common law have combined to encourage antitrust litigants in certain ways, most notably treble damages, joint and several liability, the no-contribution rule, and attorney fees for victorious plaintiffs. Perhaps in response, courts and Congress have adopted various techniques for making life more difficult for plaintiffs, such as the requirements for standing, antitrust injury, and evidentiary presumptions.[58] While virtually no one is advocating elimination of private actions, the defense bar and their clients have long been interested in finding additional ways to tie the hands of plaintiffs.

Among the ideas on the table of the AMC are reduction of the circumstances under which treble damages are mandatory (e.g., applying them only to hard core per se cases such as horizontal price fixing; allowing the court to decide after trial whether to multiply damages); whether to eliminate joint and several liability and the no-contribution rule (thereby reducing plaintiffs' leverage to gain favorable settlements); and whether to seek 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

[57] http://www.amc.gov/public_studies_fr28902/enforcement_pdf/050715_AAI_Enforc_Inst.pdf.

[58] See, for example, Joseph P. Bauer, The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing, 62 U. Pitt. L. Rev. 437 (2001).

whether a private case will be brought. For example, elimination of treble damages would reduce the pay-off for a victory (and influence downward the starting point for settlement negotiations). Thus not only plaintiff lawyers but consumers—neither of whom are represented on the Commission-- are concerned about what the AMC will recommend.

The AAI Working Group's comments argued against modifying the treble damage rule or making any procedural changes relating to civil antitrust remedies, other than to support the introduction of prejudgment interest. The Working Group supported continuation of awarding legal fees to a successful plaintiff and opposed changing the current rules relating to joint and several liability, contribution, and claim reduction.[59]

(3) Damages for Indirect Purchasers

Ever since the Supreme Court's Illinois Brick opinion in 1977,[60] there has been controversy over whether indirect purchasers (most often, classes of consumers) should be permitted to seek damages in antitrust cases. Roughly half of the consumers in the nation have the right to sue for such damages under what are known as State Illinois Brick Repealer laws. 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, with (or perhaps without) preemption of State indirect purchaser laws. The AMC considers this complex issue so important that it allocated the subject two panels of five witnesses each.

The AAI Working Group supported the need for States to be able to have laws to provide indirect purchasers. It recommended that there be an opportunity to evaluate the

[59] http://www.amc.gov/public_studies_fr28902/remedies_pdf/AAI_Remedies.pdf.

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

impact of the recently passed Class Action Fairness Act before any effort be made to enact further reform. [61]

(4) Single Firm Conduct

Section 2 of the Sherman Act deals with monopolization and attempted monopoly. In recent years, a variety of cases, headed by the Microsoft litigation and the Supreme Court's decision in *Trinko*,[62] have inspired much conversation and literature concerning the question of what strategies by a single firm, acting alone, should be considered illegitimate. While it seems unlikely that the AMC will propose legislative revisions, it could attempt to provide expert guidance to courts and enforcers on standards for applying Section 2. This territory is hotly contested between traditionalists and conservatives, the former tending to support intervention and the latter tending to support non-interference by the government.

The AAI Working Group's comments urged that the appropriate standards should be allowed to emerge through the normal playing out of the common law. Moreover, it does not interpret *Trinko* as having adopted any particular standard for treatment of refusals to deal. The Working Group supports the continuing development of the essential facilities doctrine. [63]

(5) Robinson-Patman Act

The Robinson-Patman Act outlaws certain types of price discrimination and is one of the laws that may facilitate control over power buyers, a phenomenon raising new

[61] http://www.amc.gov/public_studies_fr28902/remedies_pdf/AAI_Remedies.pdf.

[62] Verizon Communic's Inc. v. Trinko, 540 U.S. 398 (2004).

[63] http://www.amc.gov/public_studies_fr28902/exclus_conduct_pdf/050715_AAI-Exclus_Conduct_revd.pdf.

levels of concern as giant retailers like Wal-Mart emerge, but not considered by the AMC to amount to an issue worth considering in the process of modernizing.[64] The R-P Act has rarely been enforced at the federal level during the past thirty years but it remains in effect, helps shape much domestic commerce, and is often the subject of private litigation. Small business –which is not represented on the Commission-- adamantly supports continuation of the R-P Act and its active enforcement. It appears likely that the AMC will recommend revisions or outright repeal, and will almost certainly recommend repeal of criminal jurisdiction under the R-P Act, which is never utilized and has no known supporters.

The AAI Working Group urged that the R-P Act be reformed but that it not be repealed, and suggested three ways in which it might be made more consistent with contemporary ideas about antitrust policy.[65]

(6) Mergers

While not taking on major questions about the purpose or effectiveness of the anti-merger laws or even whether industrial concentration itself should still be the basis of legal presumptions, the Commission appears to be particularly interested in matters of process and administration. One major philosophical question may sneak in, however: the question of what role should be played by efficiencies in a merger antitrust case. In particular, there could be discussion of the question of whether to apply the standard of total welfare or consumer welfare, a technical but controversial issue that calls into play the values underlying antitrust. [66]

[64] See Symposium: Buyer Power and Antitrust, 72 Antitrust L. J. 505-744 (2005).

[65] http://www.amc.gov/public_studies_fr28902/Robinson-Patman_pdf/AAI_R_P_ACT.pdf.

[66] See AAI Working Paper No. 05-09: Albert A. Foer, The Goals of Antitrust: Thoughts on Consumer Welfare in the U.S., **http://www.antitrustinstitute.org/recent2/350.cfm**.

The AAI Working Group recommended against any statutory changes in the statutory framework of the merger laws, but urged that concentration should still play a major role in merger analysis. Most members of the Working Group supported the use of consumer welfare, as opposed to total welfare, as the standard for evaluating efficiency claims. [67]

(7) Immunities and Exemptions

The AMC could in theory have taken evidence on each item in the long list of statutory immunities and exceptions that limit the applicability of antitrust laws. It quickly became obvious that the Commission did not have the time or resources to do this and that such an undertaking would not likely lead to legislation. A different agenda emerged, in which the AMC would try to develop a framework for Congress to examine each new (or renewed) request for an immunity or exemption. As mentioned previously, consultants are preparing such a framework. Immunities and exemptions generally are the result of political power exercised on behalf of an industry with the purpose of benefiting the industry rather than consumers, and for this reason any ammunition that would assist Congress in standing more firmly for the public interest would be desirable. It is conceivable that Congress might legislate a framework for itself that its members could point to when approached to support special interest antitrust legislation. This is potentially one of the most fruitful areas that the Commission has decided to pursue.

The AAI's Working Group urged creation of a methodology which, if adopted by Congress, could force Congress to closely examine certain questions before enacting special interest legislation.[68]

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[67] http://www.amc.gov/public_studies_fr28902/merger_pdf/050715_AAI-Merger.pdf.

[68] http://www.amc.gov/public_studies_fr28902/immunities_exemptions_pdf/050715_AAI.pdf. The comments of the AAI Working Group on Immunities and Exemptions were drafted primarily by Warren Grimes (Southwestern University School of Law) and Darren Bush (University of Houston Law Center). Professor Bush is one of the three consultants requested by the AMC to develop and present the framework idea.

C. Will Any of It Matter?

The history of blue ribbon antitrust commissions in general does not suggest that the AMC's final report will generate immediate legislative action. As already mentioned, this particular commission does not have politicians on board who are likely to champion enactment of the Report. Nor will the one politician who has shown interest, James Sensenbrenner, likely be in a privileged position as House Judiciary Committee Chairman, where his own leverage could be particularly useful in pushing forward a legislative agenda. This means that any legislative recommendations of the Commission will have to carry their own weight politically.

Whether any legislative action will occur likely depends upon (1) the substantive recommendations; (2) the style with which they are put forward; (3) the general political atmosphere at the time; and (4) who will take up the cause.

(1) The Substantive Recommendations

Obviously, it is too soon to know what substantive recommendations will be made. The previous section outlined some of the potential, e.g. a federal indirect purchaser law, modifications to the Robinson-Patman Act, or revisions in the role of State or private enforcement. One can imagine that an amendment to R-P that knocks out criminal jurisdiction would not generate either significant opposition or excited support, but a solution to the indirect purchaser problem has evaded legislators for a long time, and modifications to State or private enforcement or to the basic provisions of Robinson-Patman would likely stir up hornet nests of opposition.

(2) Style

By style, I am thinking of (a) quality of presentation, (b) emphasis, and (c) the handling of dissent. The quality of presentation will reflect organization and writing style. Will a committee style render the final report readable only by devoted experts? Antitrust is a difficult enough topic to present to the lay public. Given the large number of topics and subtopics, many of which can only be of interest to experts, it will be a challenge to write something that will be read by more than a handful of antitrust lawyers and economists. Beyond readability is the matter of persuasiveness. How much information will be presented and how persuasive will the analysis be?

A related problem is that there are so many different topics and subtopics in play that it may be difficult for a reader to see the forest instead of the trees. What message will come through? Will it be one that signals things are basically all right, but the common law needs to keep developing? Or will it be one that suggests that so many things are wrong that only severe surgery can save the economy? (I leave out a third scenario which seems eminently desirable to me but most unlikely: that the report would say that what is needed is more antitrust, aggressively and creatively applied to keep an evolving economy flexible, innovative, and serving consumers with choice and competitive prices.)

Finally, how will the report handle dissent? Will individual or groups of Commissioners be inclined to write dissents? Of course one route would be to suppress dissent by only reporting majority recommendations and findings. Another option would be to only make recommendations for which there is unanimity among the Commissioners. Since this would likely result in a very brief report, the real question is how much space to devote to disagreements. Should they merely be footnoted? Should dissenters be permitted adequate space to explain their reasons? The latter may offend majoritarians, but is likely to prove more useful in the long run, by helping to illuminate not only the existence and reasons for disagreement, but the degree of consensus that surrounds any given issue. Failure to incorporate conflicting information, interpretations

and recommendations into the Report almost ensures that they will find their way into the public light through other means, which may only undermine the Report's credibility.

(3) The Political Scene

A large unknown is what the political landscape will look like at the time the report is issued. A set of legislative recommendations decided upon in the expectation of a conservative Republican Congress and White House would very likely have a lesser chance of enactment if elections develop a different picture. Unpredictable economic circumstances such as depression or large-scale corporate scandals could also have a major impact. Depending upon the precise recommendations, various interest groups can be expected to push back in the normal political course of events.

(4) Who Will Take Up the Cause?

I was asked by one of the Commissioners, "Why are the states, the plaintiffs' bar, and consumers so intensely concerned about what we are doing? All we can do is make recommendations."

The answer is that the Commission can start a ball rolling, and no one knows where the momentum will take it. Lobbyists worry about a bill being introduced because one day the bill (originally no more than a recommendation) may become a law, and many resources will have to be spent trying to influence the course of the bill, whose future passage, defeat, or form cannot prudently be taken for granted.

We don't know who will be making decisions about antitrust two, five, or ten years from now, but ideas once put into circulation by a credible blue ribbon commission might find champions in the future.

Moreover, the test of a blue ribbon commission's effectiveness is not limited to legislation. The AMC's report could influence the other institutions that frequently play an even more important role within the antitrust community—the federal and state enforcement agencies, the courts, the antitrust bar, and academics.

As the AMC team comes back out onto the field after a somewhat slow first half, the antitrust crowd watches eagerly, hopeful for a fair, spirited and high quality contest of ideas.