

COMMENTS ON  
**THE FTC-DOJ CLEARANCE PROCESS**

BEFORE THE  
**ANTITRUST MODERNIZATION COMMISSION**

BY  
**TIMOTHY J. MURIS**

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Foundation Professor of Law  
George Mason University School of Law

Of Counsel  
O'Melveny & Myers LLP  
1625 Eye Street, N.W.  
Washington, DC 20006-4001  
Phone: 202-383-5350  
FAX: 202-383-5414  
E-mail: [tmuris@omm.com](mailto:tmuris@omm.com)

Thank you for inviting me to testify about the FTC/DOJ clearance process. Because of my role in the 2002 Clearance Agreement — effective for only 11 weeks — I know more about this topic than I ever dreamed I would upon becoming FTC Chairman in June, 2001.

Let me begin with my last public statement on the subject at the FTC, during the 2004 ABA Spring Meeting, including a brief exchange with then-Assistant Attorney General Hew Pate:

[T]here is a serious problem with clearance. I see a lot of my friends out here in the audience, alumni of both agencies. I have talked to you about the clearance issue, and 90 percent of you were opposed to the resolution that Charles James and I reached. The reason is you thought your agency, whatever agency you were from, got the worst of the deal.

There are three classes of cases: there are the ones that clearly go to the FTC; there are the ones that clearly go to the DOJ; and there are the ones that are in dispute. If you think the ones in dispute belong to your agency, clearly it was a bad deal. That is the overwhelming view of the alumni that I have talked to from both agencies.

The staffs who are still there were a little more muted. However, my good friend Rhett Krulla—this was not rehearsed—was at a speech of mine when I went through this analysis, and I said, “A lot of people believe that we gave away too much.” Rhett piped up and said, “You sure did.” Rhett is an honest man. . . .

Worse than the parochial interest of the two agencies, the process does consume real resources. And even worse than that are strategic plays. For example, I just signed a second request where the clearance fight went to the end. Worse than that, I’m convinced that strategic use of second requests continues, and causes merger investigations. I couldn’t prove this, because the lawyers at both agencies are great lawyers, and whatever they are working on they believe it’s in the public interest.

I saw the change in incentives that occurred when we had the clearance deal. One attorney was kind enough to tell me—I said, “You don’t want to investigate this?” He said, “What for? The only reason to investigate this would have been if we were still fighting with Justice.”

Again, no one in the future will ever tell you this, no one in the past will ever have told you this—but I think the system of fighting with each other distorts incentives. Speaking of Rhett, I put Rhett, the meanest, toughest guy we had, on resolving clearance contests with DOJ after the Justice Department pulled out of the clearance agreement. So that shows you how I responded to the incentives.

MR. PATE: The process I think right now is working in a way that is not as fast or as efficient as it would have worked under the agreement that Charles and Tim reached. That's a shame. I think that I am probably guilty, along with all the rest of the DOJ alumni in the room, of thinking that that deal wasn't a very good deal for the DOJ and that too much was given away.

MR. MURIS: I rest my case!<sup>1</sup>

With this background, let me describe the issue as I found it in mid-2001, what my friend Charles James and I tried to do about the problem, and what happened. I conclude with a few thoughts on the future.

#### **I. Clearance as of Mid-2001**

Clearance reforms were not an urgent personal priority when I was nominated in April 2001 as FTC Chairman. Clearance problems had not been serious when I was at the FTC in the 1980s; in my time as head of the Bureau of Competition, I encountered perhaps a handful of disputes each year.<sup>2</sup> By 2004, however, I knew that, despite efforts by earlier administrations, delays in the clearance process caused concern in the antitrust community.<sup>3</sup>

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<sup>1</sup> See *Roundtable Conference with Enforcement Officials*, 72 ANTITRUST L.J. 283, 304-05 (2004).

<sup>2</sup> The DOJ and the FTC informally have discussed the allocation of antitrust enforcement responsibilities from the beginning of the Commission's operations in 1914. The agencies adopted the first formal clearance agreement in 1948. The agencies modified these arrangements in 1963, 1993, and 1995.

<sup>3</sup> See, e.g., A.B.A. Sec. Antitrust L., *The State Of Federal Antitrust Enforcement – 2001: Report of the Task Force on the Federal Antitrust Agencies*, at 28-29 (2001) (applauding recent efforts by the federal agencies to reduce the time needed to clear merger matters and noting that “this is an area that requires constant attention”; cautioning that “a lack of continuing efficiency in this area would generate unhappiness and frustration in the served community far beyond the cost of the resources necessary to maintain recent good performance”), available at [http://www.abanet.org/antitrust/pdf\\_docs/antitrustenforcement.pdf](http://www.abanet.org/antitrust/pdf_docs/antitrustenforcement.pdf).

Shortly before my arrival at the Commission as Chairman, my perception of the extent of clearance problems changed. My specific interest in revising the clearance agreement between the DOJ and the FTC arose during discussions with outgoing Chairman Robert Pitofsky and his senior staff. These discussions revealed that disagreements over the allocation of specific matters between the agencies undermined the effective administration of federal antitrust enforcement and infused the DOJ/FTC relationship with friction. The deficiencies of the clearance status quo were substantial and, unless corrected, were likely to grow worse. Our conversations indicated that the clearance process had so deteriorated that Chairman Pitofsky and his team had devoted considerable effort with senior officials at DOJ to devise comprehensive reforms. Intense negotiations occurred in 1999 and 2000 to overhaul the clearance process and to adopt a comprehensive allocation of specific industries between the two agencies. Charles James and I eventually embraced an approach that strongly resembled the framework our immediate predecessors had broached, but ultimately could not resolve.

My conversations also revealed that the actual allocation of specific matters was opaque at best. For example, as a condition for obtaining clearance to study the AOL/Time Warner transaction in 1999, the FTC Chairman promised the Assistant Attorney General for Antitrust that the Commission's work on the merger would *not* count in deciding which agency had superior experience for the purpose of resolving future clearance disputes. For future clearance disputes, the two agency heads agreed that the FTC's work on AOL/Time Warner would be treated as though it never happened.

The adverse effects of the clearance disputes I had discussed with Chairman Pitofsky became clear when I assumed office on June 4. By then I had learned of the existence of a pending, year-long clearance dispute concerning matters involving the digital distribution and

sale of music. At each agency, the overwhelming belief among those familiar with the dispute was that the other agency did not have a reasonable claim. In short, the prevailing view on both sides was that the other *was acting in bad faith*. Unfortunately, this attitude is all too common in clearance disputes. This belief was especially peculiar in the music industry because it was evident that both agencies had a reasonable claim to some expertise – the FTC to distribution and marketing issues, and the DOJ to intellectual property issues associated with music licensing. Although we could not agree which expertise was more relevant without a fuller investigation of the music matters, neither agency seemed willing to acknowledge the obvious fact that each had a principled claim to the matter.

Through early July 2001, the agencies remained deadlocked over clearance in the music matters. Top management of both bodies continued to spend considerable time in contentious, unproductive efforts to break the impasse. Charles James and I enlisted a mediator (Professor Thomas Morgan of the George Washington University Law School) to propose a solution to the dispute. After considering written materials and oral presentations by both agencies, the mediator recommended granting clearance to the DOJ. The FTC then cleared the matter to the DOJ.

The music episode was symptomatic of a serious breach between the two agencies. Further reflection and analysis underscored four basic problems with the clearance status quo.

*Delays in Clearing Matters.* It is unacceptable for the federal antitrust agencies to postpone serious inquiry into potential competitive problems in music, or any other, industry. As the music episode demonstrated, clearance disputes needlessly delay the initiation and resolution

of investigations. On average, from 1982 through 1989, ten clearance disputes arose each year.<sup>4</sup> In contrast, between 1990 and 2001, the average annual number of contested clearances grew to 83. In three of those years, the number of disputes surpassed 100. Though serious delays (including the music episode) occurred in non-merger matters, the problem arose most acutely in mergers. In the premerger review process, a delay of even a week in assigning a transaction can impose significant costs on the agencies and the merging parties. Days lost in debating clearance rob the agencies of time to narrow the scope of second requests to issues of genuine competitive concern. In addition, these delays sometimes can trigger the issuance of a second request simply to permit an investigation that would have occurred, but for the clearance dispute, in the initial thirty-day waiting period. In other cases, to reduce the probability of a second request, the filing is withdrawn and then refiled.

*Distortions in Internal Agency Resource Allocation.* The agencies waste precious enforcement resources contesting the right to examine specific matters and in conducting investigations in marginal matters for the purpose of using the experience gained to assert claims to other cases in the future.

*Interagency Friction.* As the music dispute showed, a serious clearance impasse – even if not routine – disrupts the work of the two institutions and endangers the cooperation and trust that are essential for the agencies to develop coherent, effective national competition policies. There is a natural and healthy competitive rivalry between the agencies. Both hire highly capable and motivated attorneys and economists who strive to make their institution preeminent. Yet both also must work together routinely. The competition to excel is commendable and useful, but acrimonious battles over enforcement terrain place destructive pressure on the

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<sup>4</sup> The clearance statistics in this testimony were given to Congress and released publicly during testimony and a variety of press interviews and public appearances during 2002.

agencies and divert attention from their overriding mutual responsibility – to enforce the antitrust laws effectively.

It also became clear to me in 2001 that the two agencies have struggled with the clearance problem for years in ways not immediately apparent to external observers, even to expert students of the federal antitrust enforcement process. I understood the awkwardness for the Commission and the DOJ of engaging in a detailed public discussion that would highlight inefficiencies or tensions that clearance disputes engendered. Raising and addressing such issues publicly might lead outsiders to question whether the agencies were exercising their joint responsibilities appropriately.

*Diminished Transparency.* The clearance process created considerable ambiguity over the likely assignment of specific matters to the DOJ or the FTC. In certain sectors, such as energy and media, the parties to a merger could not predict accurately which agency would obtain clearance. This precluded the parties from approaching an agency before filing a premerger notice to begin identifying and addressing competitive concerns. Recourse to pre-filing discussions, which the European Commission has used effectively to expedite merger reviews, would not be feasible in the U.S. if the identity of the reviewing agency could not be determined with certainty in advance.

## **II. The Reform Process**

Our efforts to explore improvements proceeded in several directions. Immediately following resolution of the music clearance dispute, I proposed and Charles James agreed to supplement the views of our respective staffs by obtaining the perspectives of former DOJ and FTC officials who had dealt extensively with the clearance process. In August, 2001, Charles

and I met with four antitrust practitioners – Kevin Arquit, William Baer, Joe Sims, and Steven Sunshine – to discuss possible enhancements for the clearance process.

We sought the views of these individuals because they had extensive experience with the clearance process both as government officials and as private practitioners. Two (Baer and Sunshine) had served in the federal antitrust agencies during Democrat administrations, and two (Arquit and Sims) held such posts principally during Republican administrations. Joe Sims' testimony today describes the process the four followed.

The internal review revealed some important trends in the clearance process. First, the two agencies had achieved a *de facto* exclusive allocation of sectors for most products. Second, the existing allocation sometimes resulted in a seemingly irrational distribution of authority – for example, the FTC handled matters involving automobiles, while the Justice Department dealt with the production of trucks. Third, in some instances, technological change and deregulation had blurred the traditional boundaries between different products and, consequently, had eroded the basis on which the two agencies had distributed antitrust matters between them. Fourth, the allocation of specific matters – such as the granting of clearance for the AOL/Time Warner merger to the FTC – sometimes occurred through non-public side agreements between the heads of the two antitrust agencies, as discussed above.

In December of 2001, Charles and I discussed prospects for negotiating a new clearance agreement. I also had extensive discussions with senior FTC officials about comments made by the four former government antitrust officials.<sup>5</sup> Early in January, Charles and I agreed in principle about the essential procedural and substantive elements of a new clearance framework. Although I signed the 2002 Clearance Agreement on January 17, for reasons that I will discuss

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<sup>5</sup> Joint Letter from Kevin Arquit, Bill Baer, Joe Sims & Steve Sunshine to Messrs. James & Muris (Dec. 21, 2001), *available at* <http://www.ftc.gov/opa/2002/02/clearance/clearideas.htm>.

below, the Division did not sign until March 5. On orders of the Department of Justice, the Division unilaterally abrogated the new agreement on May 19, 2002.

### **III. Results of the Process: The March 2002 Clearance Agreement<sup>6</sup>**

The agreement that Charles and I reached addressed the allocation of antitrust responsibilities between the two agencies. While it assigned primary areas of antitrust responsibility to the FTC and DOJ, neither agency transferred “jurisdiction” to the other. In allocating areas of primary responsibility, the 2002 Clearance Agreement followed five basic principles. First, it sought to allocate responsibility to the agency with clearly superior expertise in that sector. For example, DOJ’s leading role in metals made it the appropriate candidate to handle all such matters in the future. For the most part, the new agreement recognized historical patterns of enforcement activity and expertise.

Devising an effective allocation system required each agency to relinquish participation in some commercial sectors of substantive interest to that institution, because the other institution had superior expertise. I was aware that some of the professional staff of the agencies would not welcome some of the formal assignments of primary oversight responsibility. Nonetheless, I believed that a well-specified assignment of sectors to each agency was essential to improving the routine administration of the clearance process, eliminating the strategic use of the clearance process to enlarge agency turf, increasing transparency for affected parties, and enabling the agencies to benefit from specialization.

Second, the 2002 Clearance Agreement combined in one agency responsibility for handling related products, even if both agencies had some experience in the general field. For

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<sup>6</sup> Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice Concerning Clearance Procedures for Investigations (Mar. 5, 2002), *available at* <http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf>.

example, the FTC was assigned all energy matters, the result of combining the FTC's traditional work in petroleum and natural gas with DOJ's historical work in electricity. Such allocations grouped commercial activities with closely related issues under the oversight of one agency.

Third, for industries in which both agencies had experience and the rules of the previous clearance regime seemed certain to tip the preponderance of activity toward one agency, the Clearance Agreement assigned responsibility to the agency that likely would have emerged as the primary reviewer for the sector. By this rationale, the Agreement gave responsibility for communications, entertainment, and media to DOJ, just as it gave all of energy to the FTC.

Fourth, the new agreement permitted each agency to allow the other to handle matters within the first agency's area of primary responsibility. The 2002 Clearance Agreement created a right of first refusal and eliminated the concern that, by permitting an agency to handle a specific matter, oversight responsibility may have been surrendered permanently.

Fifth, for sectors featuring considerable technological dynamism that might cause distinct areas in which each agency has expertise to converge, the Agreement created a separate process for evaluating expertise and allocating matters. The major issue was how to draw a hard boundary between computer hardware, in which the FTC had expertise, and computer software, handled by DOJ. The 2002 Clearance Agreement created a convergence committee tasked with recommending further refinements to the allocation of information technologies.

Finally, because we recognize that ours is a dynamic economy, we agreed that the entire framework of the clearance relationship should be evaluated in four years.

#### **IV. Benefits of the 2002 Agreement**

The 2002 Clearance Agreement improved the implementation of the nation's antitrust laws and delivered important — albeit short-lived — benefits for consumers, taxpayers, and the business community.

*Gains from Specialization.* One benefit was the enhanced specialization that the new agreement would have permitted. As we heard repeatedly during testimony at the DOJ/FTC hearings on health care and on antitrust and intellectual property, detailed, industry-specific knowledge contributes to sound enforcement decisions. In several industries, the depth of expertise is likely to determine the quality of enforcement analysis. For example, the assignment to the FTC of primary oversight responsibility for pharmaceuticals and most elements of health care — areas in which the agency already had substantial enforcement programs — would have improved the Commission's ability to devise effective competition policy strategies.

The increasing importance of industry-specific knowledge underscores the need for specialization. If they are to maintain the expertise needed to make intelligent enforcement decisions, the DOJ and the FTC cannot afford to spread their resources across the entire American economy. Nor is it tolerable for one agency to expend effort skirmishing on the frontier of another agency's enforcement terrain in the hope of capturing territory for its own cases in the future. A conscious decision to forego clarity in delineating primary areas of responsibility to some extent makes each agency's traditional orbit of activity "contestable," but only at the considerable cost of reducing, in any one sector, the expertise that can make the difference between wise and failed enforcement decisions.

*Improvement to Interagency Cooperation.* During the 11 weeks when the 2002 Clearance Agreement was in effect, the clearance process operated more efficiently. Under the

new agreement, matters were cleared within an average of two business days of an agency's request for clearance. In fact, on April 25, 2002, while the Agreement was in place, I received a memo from the FTC's Clearance Officer, Bob Jones, about an historic event:

At this moment, for the first time in my tenure as Clearance Officer, perhaps for the first time in the modern clearance era, there are no pending clearance requests. None, nada, zip. World peace will undoubtedly follow.<sup>7</sup>

The statistics before, during, and after the 2002 Clearance Agreement are illuminating. For the HSR process — the most visible aspect of clearance to the bar — in the nine months of my chairmanship before the Agreement, as well as in the first several months after its dissolution, about 15% of clearance requests were contested.<sup>8</sup> During the 11 weeks when the new agreement was effective, there were no clearance disputes over HSR filings. For non-HSR requests, fewer than 5% were contested before the Agreement, less than 2% during the Agreement, and about 9% after the Agreement. The time needed to resolve all requests fell while the 2002 Agreement was effective, from over 5 days to about 1.4 days. Merger requests took longer to resolve. On average, these requests consumed about eight days before the Agreement, fell to less than seven while the Agreement was effective, and returned to the higher level after it ended.

Moreover, the 2002 Agreement's inherent flexibility was demonstrated by the fact that each agency cleared to the other matters within its primary area of responsibility.

*Increased Transparency.* By providing greater predictability in the assignment of specific antitrust matters, the 2002 Clearance Agreement would have reduced the costs for

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<sup>7</sup> Memorandum from Bob Jones, FTC Clearance Officer, to Tim Muris, FTC Chairman, April 25, 2002 (*quoted in Roundtable Conference with Enforcement Officials*, 70 ANTITRUST L.J. 261, 275-76 (2002)).

<sup>8</sup> As I discussed in various interviews and other public appearances, we compiled statistics only for a short period after the 2002 Agreement ended. Although there have been many clearance contests in the three years since, I do not know whether the level of discord has increased, decreased, or stayed about the same.

businesses to comply with antitrust laws. Making the decision-making process more transparent also would have supported FTC/DOJ efforts internationally to encourage other countries to develop antitrust procedures that are easily comprehended by affected businesses so as to minimize compliance costs.

## **V. Criticisms of the Agreement**

### **A. The Agreement Hurts My Agency**

As explained in the introduction to this testimony, the alumni of both agencies wholehearted believed that the 2002 Clearance Agreement disfavored their alma mater. I received numerous calls to the same effect: FTC alums castigated me for giving away the store, while DOJ alums ruefully asked how I managed to take so much away from the Division. Moreover, some former heads of the agencies were only willing to sign a tepid letter that supported the need to address clearance delays but explicitly avoided any endorsement of the industry allocation.<sup>9</sup> Efforts to produce a stronger letter failed.

### **B. The FTC Should Analyze Media Mergers**

The Agreement's allocation of communications, entertainment, and media matters to the DOJ was criticized on two grounds. Some observers argued that, under the terms of the clearance process before 2002, Justice was not destined to become the primary reviewer for communications, entertainment, and media. Others suggested that, notwithstanding the terms of the previous clearance process, the FTC should maintain a substantial role in these industries because, compared to DOJ, it applies a substantive standard and method of analysis that more broadly account for the public interest.

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<sup>9</sup> Letter from Joel I. Klein et. al. to Charles A. James, Assistant Attorney General for Antitrust, U.S. Department of Justice & Timothy J. Muris, Chairman, Federal Trade Commission (Feb. 4, 2002), *available at* <http://www.ftc.gov/opa/2002/02/clearance/multiletters.pdf>.

The first criticism insisted that the FTC's work on the AOL/Time Warner merger gave it a superior claim to expertise in the communications/entertainment/media cluster. Although the AOL/Time Warner matter is the best-known FTC intervention in the communications and media field, as I described earlier, the FTC obtained clearance by promising not to invoke experience gained in reviewing the transaction when future clearance issues arose.<sup>10</sup> The FTC could not simply repudiate the promise that gave it clearance in AOL/Time Warner. The DOJ would have been unlikely to acquiesce. An FTC repudiation of its previous commitments to the DOJ concerning clearance would have strained the relationship between the agencies severely and could have created genuine turmoil.

I also dispute the notion that the FTC is the proper custodian of the communications, media, and entertainment portfolio because it uses a distinctive substantive calculus – a broad public interest standard – to evaluate transactions in these sectors. Some said that this distinctive substantive charter allows the FTC to consider a wider array of factors than DOJ uses in merger analysis and lets the FTC operate free from technical analytical constraints that curb DOJ's discretion.

The clear implication of this critique is that U.S. federal merger enforcement policy features a divided substantive standard. By this view, DOJ applies a standard based upon the economic principles contained in the DOJ/FTC merger guidelines and endorsed by the federal

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<sup>10</sup> The FTC's expertise is also said to rest on its work on the Time Warner/Turner merger. Because the matter was concluded more than five years before the 2002 allocation of industries, the rules of the previous clearance agreement excluded the merger from the FTC's experience base. Moreover, a number of the FTC's matters in the communications and media sector involved cable television mergers presenting relatively simple overbuild issues. These cases did not require the FTC to examine the complex interaction of content and distribution providers.

courts, and the FTC applies a less rigid public interest test that encompasses a variety of efficiency and non-efficiency factors. I do not believe merger policy works this way.

If the FTC and the DOJ truly did apply dissimilar standards, the results in the review of any single transaction by a federal antitrust agency would depend upon the identity of the antitrust agency that received clearance, not upon any unified body of substantive antitrust principles. The logic for achieving a single, consistent body of substantive antitrust merger rules is apparent. Federal antitrust merger oversight, and antitrust policy generally, would be irrational if results in individual transactions varied systematically according to the identity of the federal antitrust regulator – if the identity of the regulator could not be predicted with certainty because the Division and the FTC refused to delineate areas of responsibility clearly, and if each strove to preserve the ambiguity that permitted them to fight for clearance of matters of greatest apparent value. Would it be acceptable by any sensible conception of public policy to have roughly one half of the economy governed by one set of antitrust merger rules, and the other half governed by another set? With the broad approval of the competition policy community, the two agencies have worked hard during the past twenty plus years to promote the development of common, reliable competition policy norms for mergers and for other forms of business conduct. The two agencies for the first time issued joint horizontal merger guidelines in 1992 and amended them in 1997. The two agencies issued joint guidelines on intellectual property in 1995. The two agencies also issued joint guidelines on international antitrust matters, competitor collaboration, and health care.

I recite these endeavors to underscore the commitment that the DOJ and the FTC have made to developing common substantive standards and to applying them consistently. The notion that the FTC is a superior forum for analyzing mergers or other commercial phenomena

because it applies distinctive substantive rules fundamentally misapprehends the content and path of modern merger policy. Congress indisputably could choose to place the two institutions on different substantive tracks for merger review. Until this happens, the DOJ and the FTC will continue to promote the establishment of a unified, coherent body of national antitrust rules.

C. Was it Appropriate to Consult with Former Officials?

Some have asked why Charles James and I sought the comments of private antitrust practitioners who previously had served in senior management positions at the DOJ or the FTC. Considerations of personal interest could influence the views expressed by any outsider, including members of the private sector, but I believe we properly accounted for this possibility. In antitrust there is no longer a “defense bar” whose work consists only of helping corporate clients defend mergers. Nor is there a “plaintiff’s bar” whose work is limited to challenging mergers. Instead, there is a private bar of antitrust lawyers whose law firms represent corporate clients that may, or may not, favor any particular transaction. If a firm’s client is a party to the merger, the firm will defend the transaction. If the firm represents a client that is an antagonist to the merging parties, the firm will seek to persuade DOJ or the FTC to stop the deal. The modern, successful antitrust law firm is every bit as proficient at playing “offense” as it is at playing “defense.”

Private practitioners who counsel firms in the communications/entertainment/media sector are skilled at playing offense and defense because their clients demand that they do so. There is no communications/entertainment/media monolith. There is a large constellation of industry players, each wary of the moves of its rivals, customers, and suppliers. For each proposed merger, every industry player calculates how it might benefit or suffer from the transaction and then plans its approach to the antitrust agencies accordingly. For every AOL and

Time Warner that want to merge, there will be other industry participants who want to stop or modify the deal. For most of these companies, whether it is good or bad to have strict or lenient merger enforcement depends upon who is merging. Thus, law firms (and their clients) do not have uniform incentives to seek enforcement by an agency perceived as stricter or more lenient.<sup>11</sup>

D. Congress Should Have Been Consulted

There are some observers who asserted that Congress should have been consulted before the 2002 Clearance Agreement was implemented. It is important to note, though, that Congress has not expressed interest in the clearance issue.<sup>12</sup> Indeed, the agencies had signed previous agreements without Congressional interest or interference.

What happened in 2002 was obviously different. Nevertheless, there is a myth that the 2002 Clearance Agreement failed because of opposition from “Congress.” The opposition came from only one member, albeit an important one, Senator Ernest Hollings (D-SC). We chose not to consult Congress for the simple reason that we believed that Senator Hollings likely would object. Nevertheless, because of my extensive contacts with members and staff of the House of Representatives, much of it stemming from my service in the Reagan Administration, I believed that they would protect the agencies from the Senator’s likely attempts at retribution.<sup>13</sup> (In the

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<sup>11</sup> A key element of private antitrust practice today consists of representing firms that want to persuade an antitrust agency to block or modify a merger. I offer an example involving the law firm to which I was Of Counsel before becoming the FTC Chairman. During the FTC’s review of the AOL/Time Warner merger, this law firm met at least twenty times with FTC Commissioners and staff on behalf of a client that opposed the transaction.

<sup>12</sup> I know of only one modern instance in which a committee of Congress has expressed views about a clearance issue. In 1981, Chairman John Dingle indicated concern that the DOJ had deviated from existing inter-agency clearance policies and had chosen to exercise jurisdiction over Mobil’s possible takeover bid for Conoco.

<sup>13</sup> Ira Teinowitz, *Senator Wants to ‘Eliminate’ FTC Chief: Ugly Public Feud Heats Up Further*, AdAge.com, April 15, 2002, <http://www.adage.com/news.cms?newsId=34450>,

1980s, I had been on both sides of issues involving Senator Hollings, and I knew his well-deserved reputation.) At worst, I felt that we would have been forced to reach a compromise with Senator Hollings.

I was mistaken. It had never occurred to me that, after allowing Charles James to sign the Agreement, the Department of Justice would have so little interest in defending its position that it would repudiate without consulting either the FTC or the White House. But that is exactly what happened.

E. Clearance Should Be an Issue for the Full Commission, Not Just the Chairman

Clearance issues and agreements have, in modern times, been the purview of the Chairman, not the full Commission. Nevertheless, because at bottom, matters are for the full Commission whenever three Commissioners say they are, I consulted with Commissioners Tom Leary and Orson Swindle about my plans to negotiate a new agreement with the Antitrust Division. Both told me that they would not challenge the historical arrangement that the clearance issue was to be handled by the Chairman alone. During the resulting controversy, both stood by their decision, even though at least one was uncomfortable with some of the many issues involved, and I will always be grateful for their support.

Commissioner Mozelle Thompson, however, took a different view. Although Commissioner Thompson was a valuable member of the agency – his work on international consumer protection alone merits him high marks in the Commission’s history – he was perhaps the most vociferous advocate of “his” agency in the long history of the clearance process. In fact, in 2002, Commissioner Thompson suggested that:

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*available at* <http://www.ftc.gov/opa/2002/04/adagenews.pdf>. Although we did feature the Senator’s threat – “I am trying to eliminate him” – on the FTC’s web site on April 15, 2002, he did not expand on how he proposed to do away with me.

Congress could unify merger and conduct investigations within the FTC and continue the DOJ's criminal jurisdiction, a result that would provide for maximum efficiency, fully utilize the FTC's independent antitrust purpose and structure, and continue to take advantage of DOJ's role as the federal government's criminal prosecutor.<sup>14</sup>

In other words, his preference was that the FTC should handle *all* mergers. During Chairman Pitofsky's tenure, Commissioner Thompson went so far as to engage the staff in considerable discussions for his plan for the FTC to assert jurisdiction over banking mergers, despite the fact that, at best, the FTC has uncertain jurisdiction and no experience in this area. To put it mildly, Commissioner Thompson's position was not helpful during 2002, although there were enough other critics of the Agreement that Senator Hollings probably would have acted as he did in any event.

## **VI. The Future**

Resolution of the clearance problem will require congressional consultation, as well as overcoming the opposition of the two agencies' natural constituencies (their alumni) and the indifference of the business community.

Because of Senator Hollings' opposition in 2002, the agencies likely will feel it necessary to consult Congress before any global resolution regarding clearance. (If someone in Congress is likely to object, it would be better for the agencies to know before they go through the long and difficult process of agreeing on the terms for resolution of future clearance disputes.) There are at least three problems. First, the necessary consultations would be with six Congressional committees, involving some commitment of time and resources. Second, the process probably would require additional consultations after the global resolution was obtained, increasing the

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<sup>14</sup> Statement of Commissioner Mozelle W. Thompson Concerning the March 5, 2002 Clearance Agreement Between the Department of Justice and the Federal Trade Commission (Mar. 5, 2002), *available at* <http://www.ftc.gov/opa/2002/03/clearancemwt.htm>.

likelihood of an objection. Third, one or more of the six committees may request that the agencies support one of its initiatives in return.

In many ways, the opposition of the alumni, and the related problem of the business community's indifference, may be more difficult obstacles to resolution. Most agency heads are antitrust practitioners, who would naturally not relish the criticism of their peers especially in a cause that must seem quixotic, especially after the events of 2002. Moreover, I believe that alumni criticism was related to the lack of business support. Businesses naturally would turn to their lawyers for guidance, and many, perhaps most, of those giving such advice would be the very alumni who were so hostile to the 2002 Agreement.

That said, this Committee could perform an important service through documentation of the clearance problems and a strong recommendation in support of a resolution. I urge you to so act.