siness Day

The New York Times

MONDAY, APRIL 5, 1993

Marty Katz for The New York Times

... Augustine, chairman of the Martin ...orporation, which bought General Elec... ...pace division and now must consolidate the two businesses. "There are many tragedies that are yet to happen in our industry," he said. "There may be a million jobs yet to be lost."

...rtin Marietta's Defensive Strategy

...y CALVIN SIMS

...ial to The New York Times

...SDA, Md. — For Norman ...ne, chairman of the Martin ...Corporation, signing up to ...General Electric Corpora... ...space division for $3 billion ... was far easier than the ...tal task he now faces in ...ing the two businesses un... ...oof.

...ill mean laying off thou... ...workers, closing production ...nd selling mediocre opera... ...achieve the economies of ...t Mr. Augustine promised ...mber when he agreed to the ...ch creates the world's larg... ...ry electronics company.

... will certainly be more lay... ...o much caused by the merg... ...y the fact that the defense ... in free fall," Mr. Augustine ... recent interview at the con... ... headquarters here.

...y time they cut $1 million out ...fense budget, about 50 people ...r jobs," Mr. Augustine said. ...are many tragedies that are yet to happen in our industry. There may be a million jobs yet to be lost."

An acquisition to guarantee a slice of a shrinking military pie.

Yet the merger is seen by analysts as a necessary step to guarantee Martin Marietta a cut of what military contracting remains. "A normal part of Martin and G.E.'s life will be layoffs because of the great opportunity to cut overhead," said Phil Friedman, a military industry analyst for Morgan Stanley. "There will be some pain for employees, but Norm Augustine has positioned the company well in terms of the diversified programs it has."

The United States weapons industry, hurt by dwindling Pentagon orders, has entered a new age of consolidation in which military contractors are buying businesses in areas where they can dominate and divesting themselves of the rest.

The Justice Department's approval of the combination last week puts the 57-year-old Mr. Augustine in charge of the largest such consolidation to date. With General Electric's aerospace business, Martin Marietta grows to 94,000 employees, 27,000 of whom are scientists and engineers. Its sales nearly doubled to about $11 billion, including $3 billion in sales from commercial and civil government contracts; its backlog increases to more than $28 billion. Before the merger, Martin Marietta ranked eighth among military contractors, with $6 billion in revenues.

Job Cutbacks Ahead

Weapons industry analysts predict that Mr. Augustine will impose cutbacks of at least 10 percent over the next year, as the company eliminates duplicative administrative, research and production costs. That could put another 10,000 aerospace workers — many of them mid-level managers —

Continued on Page D2

Antitrust Signal Sent To Airlines

Stricter Stance Seen In Northwest Case

By MARTIN TOLCHIN

Special to The New York Times

WASHINGTON, April 4— The Clinton Administration has signaled to the nation's airlines that it plans to vigorously enforce Federal antitrust laws, in contrast to the previous Republican administrations.

But Administration officials say that they are not planning to reverse the course of airline deregulation under which carriers have operated since 1978.

The White House's signal came last week when the Transportation Department forced Northwest Airlines to abandon plans to start three routes in competition with a new airline.

Of the change, the Secretary of Transportation, Federico F. Peña, said: "This Administration has a much different view than the previous Republican administrations about the anti-competitive behavior of airlines in a deregulated environment. Our view is to be more watchful about anti-competitive behavior and to take action on a case-by-case basis whenever appropriate."

Competition to Be Fostered

"This does not mean that we are returning to a reregulated environment," Mr. Peña continued in a telephone interview recently. "We would like to see as many U.S. carriers as possible, and we will take action to foster competition, particularly where we see anti-competitive behavior aimed at eliminating U.S. carriers."

The Administration acted after Reno Air, a Nevada-based line that started flying last July, complained that Northwest was seeking the routes to destroy Reno. Northwest had planned to compete with Reno on four routes, from Minneapolis to Reno and from Reno to Seattle, Los Angeles and San Diego. Northwest dropped its plan for the three routes from Nevada to the West Coast.

The Transportation Department cannot prevent a domestic airline from starting a domestic route. But Mr. Peña told Northwest officials that he would strongly recommend that the Justice Department take antitrust action if it flew the new routes. Northwest demurred.

Antitrust Enforcement Urged

Alfred E. Kahn, the economist who was the architect of airline deregulation during the Administration of President Jimmy Carter, said: "I have been insisting for years that enforcing the antitrust laws is not inconsistent with deregulation. On the contrary, once you deregulate, it becomes more important than ever to preserve competition."

But some Congressional leaders fear that the Administration may go to the point of stifling genuine competition. Representative James L. Oberstar, Democrat of Minnesota, said that Northwest's action was so egre-

Continued on Page D6

...ina's Newest Partner: South Korea

...NICHOLAS D. KRISTOF

Special to The New York Times

...CUN, China — Four decades ...ttling each other in a fero... ...ar, China and South Korea are ... a wave of investment and ...greements that provide the ...r an important new economic ...ship in East Asia.

...uld be a formidable alliance. ...le South Korea engineered an ...ic miracle with its skill in ...cturing and marketing, its ... has slowed in the last few ...in part because of rising labor ...China offers just the kind of $3-

GATT Chief

of $1,045,000, or 3 cents a share, from extinguishment of debt.

Thermwood Corp. (A)

Qtr to Jan 31	1993	1992
Sales	3,331,886	2,204,457
Net inc	b204,271	c281,479
Share earns	.04	-
Shares outst	5,053,712	4,862,046
6mo sales	4,936,800	4,208,199
Net loss	b375,327	398,735
Shares outst	4,957,879	4,862,046

b-Included proceeds from sale of Digital Sky avionics division to King Radio Corp.

c-Net loss

Trans-Lux Corp. (A)

Qtr to Dec 31	1992	1991
Revenue	6,482,000	5,979,000
Net inc	74,000	63,000
Share earns	.06	.06
Shares outst	1,249,876	1,248,841
Yr rev	24,130,000	22,133,000
Net inc	345,000	321,000
Share earns	.28	.25
Shares outst	1,249,431	1,304,781

Tranzonic Cos. (A)

Qtr to Feb 28	1993	1992
Sales	29,306,500	28,093,600
Net inc	605,200	734,500
Share earns	.17	.20
Shares outst	3,558,153	3,546,189
Yr sales	119,951,400	110,717,600
Net inc	4,214,000	4,576,300
Share earns	1.19	1.29
Shares outst	3,554,560	3,536,299

Trico Products Corp.

Year to Dec 31	1992	1991
Sales	265,423,000	228,690,000
Net inc	b2,421,000	c14,583,000
Share earns	1.31	-

b-After a pretax gain of $4,054,000 on the sale of marketable securities, and included extraordinary tax-loss carryforward of $805,000, or 44 cents a share.

c-Net loss and after a pretax charge of $8,250,000 for restructuring expenses.

Tristar Corp.

Qtr to Feb 28	1993	1992
Sales	12,838,161	11,711,495
Net inc	238,905	1,252,559
Share earns	.03	.18
Shares outst	6,905,040	7,104,079
6mo sales	29,262,810	25,389,279
Net inc	1,760,220	2,436,751
Share earns	.26	.35
outst	6,883,968	7,057,389

Tristar said that net income for the latest periods were decreased by $376,383, or 5 cents a share, in the quarter and $506,407, or 7 cents a share, in the 6 months, for continued legal and professional expenses associated with events that led to the recent internal investigation of the board by a special committee.

United-Guardian Inc. (A)

Year to Dec 31	1992	1991
Revenue	6,296,030	5,008,823
Net inc	569,364	458,782
Share earns	.12	.10

The latest year's results included gain of $182,765, or 4 cents a share, compared with gain of $160,700, or 4 cents a share, in 1991, both from tax credits.

The 1991 period was comprised of 10 months. The company changed its fiscal year-end to December from February.

United Stationers (NMS)

Qtr to Feb 28	1993	1992
Sales	378,818,000	260,445,000
Net inc	5,573,000	3,414,000
Share earns	.30	.22
Shares outst	18,555,082	15,532,666
6mo sales	744,139,000	507,701,000
Net inc	10,684,000	6,168,000
Share earns	.58	.40
Shares outst	18,547,061	15,526,665

Unitel Video Inc. (A)

Qtr to Feb 28	1993	1992
Sales	19,727,000	11,088,000
Net inc	b246,000	21,000
Share earns	.12	.01
Shares outst	1,688,891	1,574,693
6mo sales	40,460,000	23,778,000
Net inc	b1,323,000	818,000
Share earns	.73	.52
Shares outst	1,685,691	1,562,339

b-Included results of Editel, which the company obtained control of in March 1992.

Vernitron Corp. (NMS)

Year to Dec 31	1992	1991
Sales	74,267,000	79,511,000
Net inc	102,000	251,000
Share earns	-	.07
Shares outst	5,182,000	3,461,000

There were no share earnings in the latest year after payment of preferred stock dividends of $258,000. In 1991, share earnings were after payment of $24,000 in preferred stock dividends.

Wainwright Bank

Qtr to Dec 31	1992	1991
Net inc	41,000	b4,077,000
Per share	.01	-
Yr net inc	618,000	b11,599,000
Per share	.22	-

b-Net loss

Williams-Sonoma (NMS)

Qtr to Jan 31	1993	1992
Sales	128,977,000	116,571,000
Net inc	7,742,000	b3,421,000
Share earns	.69	.31
Shares outst	11,155,000	11,100,000
Yr sales	344,944,000	312,654,000
Net inc	1,799,000	b1,611,000
Share earns	.16	.14
Shares outst	11,117,000	11,129,000

b-Included a $2 million restructuring reserve for California Closets, in the quarter and year.

bean — will be American banana eaters.

with a punitive duty of roughly 180 percent.

Latin American growers, with their low labor costs and large expanses of flat tropical land near port cities, grow bananas at half the cost of growers favored by the European Community.

"It's absurd to take measures to protect expensive and inefficient banana producers," said Sergio Hugo Amaya Córdoba, president of Colombia's largest banana exporting company, Uniban. "It makes us angry. We open all our borders to Europe's industrialized products and then our agricultural products are blocked because they are competitive."

Growers here hope that the European plan will cause a consumer backlash against high-priced, poor-quality bananas. And there has already been dissent in Europe.

Germany and Belgium are suing to overturn the decision in the Euro[illegible] Court of Justice in Luxembourg. And Spaniards, faced with eating stubby, expensive bananas from the Canary Islands, cherish Colombian bananas like a forbidden fruit. In three raids since January, Spanish authorities have confiscated 37 tons of Colombian bananas, and news reports use

U.S. Move on Northwest Air Is Seen as Antitrust Signal

Continued From First Business Page

gious that it deserved the Government's response but that the Clinton Administration should be wary about its application of antitrust laws.

"The question is: How far will they go with this policy?" said Mr. Oberstar, chairman of the aviation subcommittee of the House Public Works and Transportation Committee. "I think they would be well advised to consider the action as appropriate to the Northwest-Reno situation and not a harbinger of a new policy of wide-ranging protection of new entrants."

Secretary Peña, asked to speak to this concern, said that if two carriers sought to reduce prices on established routes in a manner not considered predatory competition, the Government would applaud this as a boon to consumers but that it would not countenance such action if the intent was to destroy a competitor.

"We will allow competitive market forces to apply, but not overbearing, anti-competitive behavior," the Secretary said. "The previous Republican administrations had a totally hands-off policy, and that's what caused some of the problems in the airline industry today."

Many experts agree that the Reagan and Bush Administrations did not vigorously apply the antitrust laws to the airline industry.

24 Mergers Permitted

"Antitrust was minimally enforced during the Reagan years, and that was particularly true of the airlines," said Prof. Robert Pitofsky of the Georgetown University Law Center, an expert on antitrust law. "There may have been a few cases during the Bush years, but under Reagan and Bush the Departments of Transportation and Justice let 24 airline mergers go through."

Not long after Mr. Clinton was elected, the Justice Department filed its boldest antitrust action in years.

"The major enforcement action we took," said Mark C. Schechter, who was in charge of transportation issues at the antitrust division, "is the price-fixing case we brought last December against the major airlines."

Getting the Message Across

The case involved the computerized exchange of the carriers' pricing intentions, which the department said let the major airlines reach agreements to fix prices. It proposed a consent decree under which a carrier would be required to set prices for future travel but offer those tickets immediately.

The Transportation Department hopes that the airline industry gets the message from its intervention in the Northwest-Reno Air case.

"It was an important change in policy, an important decision," said Patrick Murphy, acting assistant secretary of transportation for policy and international affairs.

"For a long, long time, there has been very little coming out of this department on anti-competitive review of how the airlines behave," Mr. Murphy said, adding, "Even the Justice Department has been pretty inactive."

"The academics have complained that we deregulated without enforcing the antitrust laws," he said. "They say we allowed the law of the jungle. From now on, we're not going to allow certain kinds of behavior to go unexamined."

Deal on Radio Stations

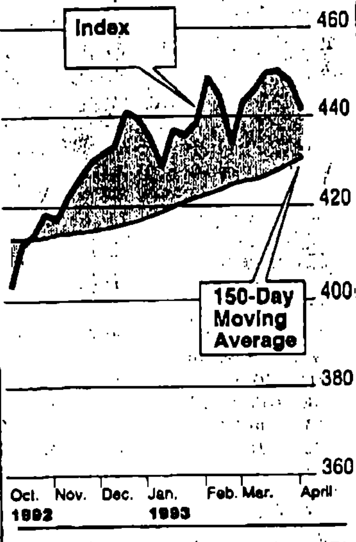
SEATTLE, April 4 (AP) — Fisher Broadcasting Inc. said Friday that it had reached an agreement in principle to buy two Seattle radio stations, KVI and KPLZ, from Los Angeles-based Golden West Broadcasters. Terms were not disclosed. KVI is an AM news-talk station and KPLZ is an FM contemporary-hits station. Golden West's chairman, Gene Autry, bought KVI in 1959. Fisher, which already owns Seattle's KOMO-AM radio and television stations, said it would ask the Federal Communications Commission for permission to assume the stations' licenses.

Tracking the Markets

Surprising large upward revisions in employment numbers sent inflationary [illegible]
and pushed the yield on the 30-year Treasury bond up to 7.05 percent. Sto[illegible]
from the employment news, were hit hard instead by Philip Morris's plan to [illegible]
to depress the earnings of a premier growth company. The Dow closed do[illegible]

Stocks

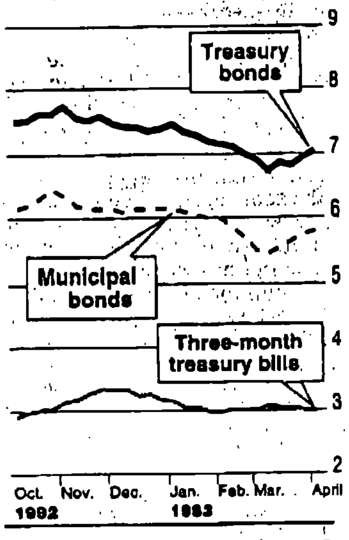
Standard & Poor's 500-stock index.



	Friday	Week Change	Yr.-to-Dt. Change
S.&P. 500	441.38	–1.43%	1.30%
Dow Ind.	3370.79	–2.01	2.11
Nasdaq	669.85	–1.72	–1.05
Amex	417.52	–0.46	4.58

Interest Rates

In percent.



	Friday	Week Change	Yr.-to-Dt. C[illegible]ge
30-Yr. Treas.	7.05%	0.11%	–0.35%
Municipals*	5.60	0.05	–0.35
3-Mo. T-Bills	2.97	–0.02	–0.92

*Thursday close of 30-year general obligation bonds.

Price/Earnings Ratio

Based on earnings of stocks in the Dow Jones indexes for the most recent four quarters.

	Friday	4 Wks. Ago	Year Ago
Industrials	34.93	37.14	57.53
Utilities	14.79	14.76	13.46
Transportation	N.A.	N.A.	N.A.

Yields

Interest on AAA corporate bonds, dividends on the Dow industrials and the difference between them.

	Friday	4 Wks. Ago	Year Ago
AAA Bonds	7.60 %	7.25 %	8.47 %
Dow Ind.	3.04	2.99	2.84
Yield Spread	4.56	4.26	5.63

Block Activity

Percentage of total volume accounted for by trades exceeding 10,000 shares.

	Week's Daily Average	50-Day Average
N.Y.S.E.	48.96%	47.67%
Nasdaq	42.20	39.82

Percentage of block trades executed above the previous trade (uptick) and below (downtick). A preponderance of upticks is considered bullish.

N.Y.S.E. Up	19%	20%
N.Y.S.E. Down	23	21
Nasdaq Up	32	32
Nasdaq Down	35	36

Data from Salomon Brothers Inc.

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As Antitrust Chief

Probe of Microsoft Symbolizes Anne Bingaman's Activist Course

By Sandra Sugawara
Washington Post Staff Writer

Grumbling was heard last winter when Anne Bingaman's name began circulating as President Clinton's choice to be assistant attorney general in charge of the antitrust division. Opinions were implied in a question: "Anne who?"

As the wife of Sen. Jeff Bingaman (D-N.M.) and an acquaintance of Hillary Rodham Clinton, she was known in Democratic political circles. But in the insular, world of antitrust law, Anne Bingaman was an outsider. Those who had heard of her knew of her as a tenacious litigator rather than as an antitrust expert.

Bingaman was absent from the law journals, expert panels and American Bar Association (ABA) committees where lawyers usually make their reputations among their colleagues. And she represented plaintiffs—the people and companies that sued corporations for antitrust violations—not the wealthy corporations that the big-name attorneys usually represent.

"She was not part of the old-boy, old-girl network," said Bob Lande, a professor at American University Law School.

But in the two months that she has been the nation's top antitrust chief, Bingaman has refocused the spotlight on antitrust. In quick succession, she revoked Reagan administration guidelines that allowed manufacturers to fix prices with distributors, she took on a controversial investigation of Microsoft Corp., and she announced that the department was going to be redouble its efforts in fighting mergers that are anti-competitive.

See BINGAMAN, H4, Col. 1

Antitrust Chief Wins Plaudits After First Two Months on Job

BINGAMAN, From H1

She plans to travel to Brussels, Tokyo and France in the fall to continue an effort started under the Bush administration to target the anti-competitive activities of foreign cartels.

"We want to be pro-active," she said. "The cases we should bring should be those that will have a major impact" on large numbers of consumers or on the economy. She said she will be looking for cases that are "too hard, too expensive" for companies, associations or individuals to bring.

Bingaman also said she planned to run a "leaner, meaner, more effective" litigation operation to try to win more cases. "We must gear up earlier to litigate if we think there is a case," she said. "We need to focus on litigation at a much earlier stage in the process."

Already, Bingaman seems to have won converts in the antitrust legal establishment. She gave what some attorneys described as "a bravura performance" before 400 members of the antitrust section of the ABA earlier this month.

"She was remarkably candid and forthright in a manner that past assistant attorney generals have not been in that stage of her tenure," said Caswell Hobbs, a Washington antitrust attorney and chairman-elect of the antitrust section.

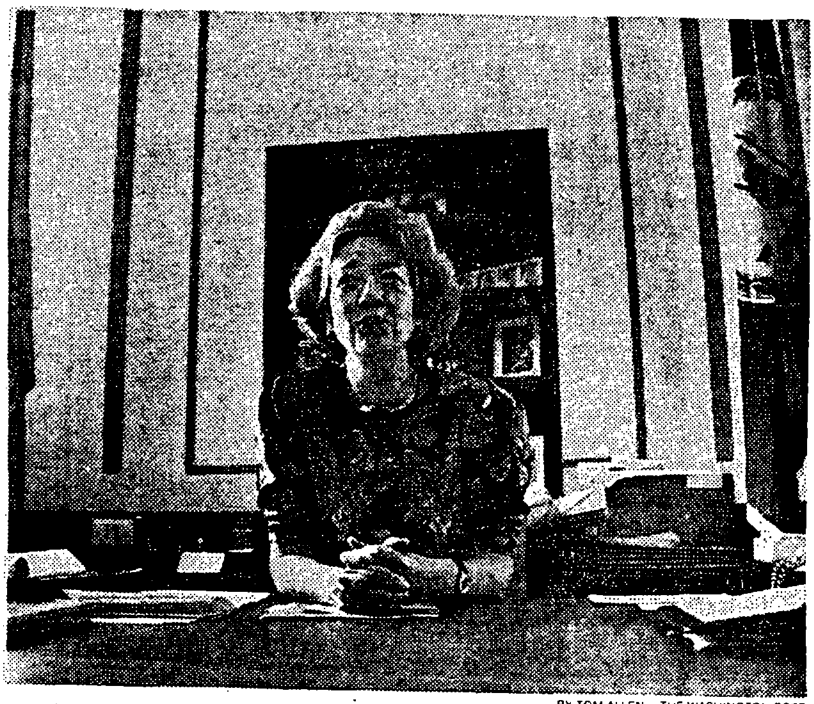
"She talked for about 20 minutes and then opened it up to questions. . . . It shows remarkable confidence and candor that she would be ready to take on the hard questions from 400 tough litigators," Hobbs said. "The quality of the answers were far higher than the quality of the questions, but I think that's because she caught everybody by surprise."

The Early Years

Bingaman, who was born in a small mining town in Arizona, graduated from Stanford Law School. She taught at the University of New Mexico School of Law for four years in the 1970s, but most of her professional life has been spent practicing in New Mexico and Washington.

Last winter, before she was identified as the Clinton administration choice for antitrust chief, the inside-the-Beltway favorite was Robert Pitofsky, a Georgetown University professor and noted antitrust scholar.

Now many of Pitofsky's biggest supporters say that Bingaman's background as a litigator, rather than as a theoretician, probably will be an asset to a department strug-



BY TOM ALLEN—THE WASHINGTON POST

Bingaman said she will be looking for cases that are "too hard, too expensive" for companies, associations or individuals to bring.

sition of McCaw Cellular Communications Inc., which would enable the long-distance carrier to create a formidable national wireless system, and Mattel Inc.'s and Fisher-Price Co.'s plan to merge and create one of the country's top two toy companies.

President Clinton's health care plan and how much latitude it gives health care providers to merge without fear of antitrust prosecution will be another important indicator of how Bingaman plans to treat merger cases, according to Alan Silberman, a Chicago antitrust attorney who is chairman of the ABA's antitrust section.

Health care officials have been lobbying for antitrust exemptions, arguing that mergers could eliminate excess capacity and lower costs. Similarly, defense industry executives have been asking for merger exemptions, arguing that it is better for employees and communities if companies are sold to competitors rather than allowed to go bankrupt.

Bingaman said she is opposed to blanket exemptions for industries. "Every industry wants an exemption and wants every other industry to be competitive," she said.

High technology—the industry that the Clinton administration hopes will help lift the nation's quality of life by creating more high-paying jobs—is another group seeking special treatment. Some high-tech executives have argued that activities that might be anti-competitive

development and antitrust enforcement.

In her speech to the ABA, Bingaman said she does "not subscribe to the view that the increased complexity and internationalization of our economy makes antitrust policy less important. Indeed, I believe the converse is true. It is precisely because the United States is faced with strong foreign rivals that we need vigorous antitrust enforcement" to keep firms competitive.

High Praise, Heavy Odds

Bingaman has raised expectations. Even attorneys who defend corporations praise her activist stance, privately confiding that their clients won't listen to them or even seek their advice if they feel that the federal government is not serious about antitrust.

But in trying to carrying out her agenda, Bingaman faces some formidable odds, including the preponderance of conservative judges appointed during the Reagan and Bush administrations. That has made merger cases more difficult to win these days than in the 1970s, because prosecutors can no longer make arguments based mainly on market concentration. Courts increasingly have been requiring more complex economic analysis, with proof of harm to consumers.

Shenefield said his friends who remain at the antitrust division told him Bingaman has spent consider-background as a litigator, rather [illegible] as a theoretician, probably will be an [illegible] to a department struggling to overcome a dismal record for winning antitrust cases.

Bingaman vows to bring a litigator's eye to assessing potential cases. "Antitrust enforcement really is fact-specific," she said. "You can't say every person in a car accident is at fault."

Antitrust attorneys said they are closely watching several key decisions to get a closer fix on how Bingaman will operate. "The Microsoft c[illegible] will be very important to watch. If she files a [suit], it will mean she is not afraid to go after big fish if they step over the line, even if it means a major case that could take awhile,' said Lande.

"It's the kind of antitrust case that the [Reagan and Bush administrations] would shy away from," said Gene Crew, a plaintiffs' antitrust attorney in San Francisco. The Reagan administration largely adopted a live-and-let-live attitude about mergers, market concentration cases and agreements between producers and distributors.

In addition, many Justice Department staff attorneys were demoralized by the decision to declare defeat and close a 13-year case against International Business Machines Corp. in 1982, some legal experts said. "It was like the antitrust division's Vietnam," said John Shenefield, the antitrust chief in the Carter administration. "Like the military, the division didn't want to go into anything unless they were going to win and then with overwhelming force."

The Bush administration took pains to distance itself from the Reagan administration's free-market approach to antitrust. Both the Federal Trade Commission, the other agency charged with enforcing antitrust law, and the Justice Department stepped up their actions against mergers and price-fixing cases.

In 1990, the Justice Department challenged more mergers than in any year since 1973, according to Bingaman's predecessor, James F. Rill. The Bush administration increased the Justice Department's antitrust staff from 500 people to 600 people, although it still has 100 fewer lawyers on the staff than the 400 the division had in 1980.

The Justice Department, however, has had a poor record of winning those merger cases that were challenged, lagging behind the FTC. Bingaman has singled out mergers as an area where she would like to be more active and win more cases.

Cases to Watch

Two high-profile mergers—which may provide an indication of her approach to these cases—are soon to [illegible] over her desk. They are AT&T's planned $12.6 billion acqui-

special treatment. Some high-tech executives have arg[ued] that activi[ties] that might be anti-competitive domestically—such as mergers or joint ventures—should be allowed if they will help firms compete more effectively abroad and create more jobs. They have warned that otherwise, the nation's lead in software and biotechnology will go the way of consumer electronics and manufacturing.

Disputes over antitrust enforcement could prove one of the stickiest areas for the Clinton administration if the argument comes down to jobs. But Bingaman said she sees no conflict between the goals of economic

Shenefield said his friends who remain at the antitrust division told him Bingaman has spent considerable time meeting with staff attorneys and trying to rechannel their activities into high-impact cases while giving them the tools they need to win. He said the staff attorneys he has talked to are impressed.

"She's a note taker and a hall walker," Shenefield said. "I think her style of leadership will be to summon forth the energies of an institution which has historically been pretty aggressive."

"She comes to this with a sense of mission," said Hobbs. "She clearly intends to make her mark."

10/1/93 Washington Post
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Senate Delays Vote On Antitrust Bill

Associated Press

The Senate Judiciary Committee backed away yesterday from voting on a bill that would strip baseball of its antitrust exemption, saying it wants to hold more hearings.

Committee chairman Joseph Biden (D-Del.) did not set a date for the hearings and said a vote on the bill might be put off until early next year.

Biden admonished the owners for not hiring a commissioner in the year since Fay Vincent's forced resignation last Sept. 7.

"Baseball better get the message," he said, speaking strongly on this subject for the first time. "Unless baseball gets its act together in a way that is monumentally different from where they are now, this committee will be back with the votes that will change the status of baseball."

A 1922 U.S. Supreme Court decision exempted baseball from antitrust laws, and the high court said in 1972 it was up to Congress to change that decision. Prodded by Florida congressmen who were angered that owners prevented the San Francisco Giants from moving to St. Petersburg, Sen. Howard Metzenbaum (D-Ohio) held hearings with his antitrust subcommittee last December and sponsored the bill this year.

Baseball owners have lobbied senators to keep the exemption, claiming its removal would allow teams to move from city to city at will and would devastate the minor leagues. Major league teams spend about $6 million each on their minor league systems.

"There will be chaos if the antitrust exemption is removed," said Sen. Arlen Specter (R-Pa).

Baseball officials said they were pleased the committee took no action, but Milwaukee Brewers president Bud Selig, chairman of the ruling executive council, was guarded with his remarks.

"We're very sensitive to the thoughts of the Senate Judiciary Committee," Selig said in Milwaukee. "We feel that this year has been a very constructive year as we move to the conclusion of many important subjects."

Times Herald
Dallas, Texas

JUN 14 1991

Richards takes insurance fight to Congress

196

By Richard S. Dunham
TIMES HERALD WASHINGTON BUREAU

WASHINGTON — A week after signing a sweeping state insurance reform bill into law, Gov. Ann Richards took her crusade to the nation's capital, where she asked Congress to offer similar protections to consumers.

Appearing at a House hearing, Richards endorsed legislation authored by House Judiciary Committee Chairman Jack Brooks, D-Beaumont, that would strip away some of the antitrust protections enjoyed by the insurance industry for 46 years.

The new Texas law, adopted after a contentious debate, repealed insurance companies' exemption from state antitrust laws. It also created a ratepayer advocate's office and opened an insurance fraud division at the Texas Department of Insurance.

Richards called the 527-page law "one of the strongest pieces of consumer protection legislation that has ever come out of the Texas Legislature."

After repeating consumer horror stories about insurance companies, Richards urged Congress to make similar changes that give states more power to regulate insurers.

"In Texas, we could find no justification for allowing an industry to fix prices and carve up markets and restrict coverage — all under the guise of an antitrust exemption," she said. "No justification exists, either at the state or national level."

Brooks said soaring insurance rates and a spate of policy cancellations are evidence the insurance industry should no longer remain "immune from both competitive forces and effective regulation."

Although a sizable bloc of House members favor repealing the 1945 McCarran-Ferguson law that allows insurance companies to engage in anti-competitive practices barred in most industries, Brooks favors a watered-down bill that would limit the antitrust exemptions without outright elimination of the provisions.

But the Judiciary Committee's senior Republican, Rep. Hamilton Fish of New York, said Brooks' proposal would "lead to more litigation and confusion." The current system, he said, results in "lower and more accurate" rates.

Richards effectively used the insurance issue in her victory over Republican nominee Clayton Williams. At Thursday's hearing, Richards borrowed a line from Williams' "busting rocks" commercial when she said of the insurance industry, "These are people who need to learn the joys of competition."

There was an unmistakable subtext of Texas politics running through the hearing. Rep. John Bryant, D-Dallas, praised Richards for pushing "the most dramatic" insurance reforms in Texas history.

E3

ONE HUNDRED SECOND CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

M E M O R A N D U M

DATE: June 24, 1991

TO: Members
Committee on the Judiciary

FROM: Jack Brooks, Chairman JB.

RE: June 25, 1991 Markup of H.R. 1470 and H.R. 1604

The Committee will meet tomorrow, Tuesday, June 25, 1991, at 10:00 a.m., in Room 2141 Rayburn House Office Building, to mark up two pieces of antitrust legislation which both the Committee and the House passed last Congress. The legislation scheduled for markup is H.R. 1470, the "Price Fixing Prevention Act of 1991," and H.R. 1604, the "National Cooperative Research Amendments Act of 1991."

I. H.R. 1470, the "Price Fixing Prevention Act of 1991"

A. Purpose and Summary

H.R. 1470 was developed by this Committee over the past four Congresses as a legislative response to two overlapping developments that threatened to eliminate, or severely restrict, remedial action under the antitrust laws against an entire category of anticompetitive conduct known as resale price maintenance ("RPM"), or vertical price fixing.

The first development is one of long standing and involves the continuing failure of the Department of Justice to enforce the per se prohibition against resale price maintenance. Through a combination of inaction, public statements, amicus filings and purported "guideline" writing, the Department has undercut the vitality of the RPM stricture despite contrary Congressional and Supreme Court consensus on this point. With not a single RPM action brought in 10 years time, the use of private enforcement takes on added importance as the last remedial tool to end RPM violations, which harm consumers by raising prices and diminishing the range of available goods and services.

Yet, the private enforcement remedy has suffered a series of setbacks as well. In the 1984 Monsanto v. Spray-Rite Corp. decision, 465 U.S. 752 (1984), the Supreme Court, while affirming the per se nature of the RPM offense, also made statements about the evidentiary standard to be applied in dealer termination cases that has spawned confusion in the lower courts, effectively constricting the ability of plaintiffs to receive a jury trial in such cases.

Even more disturbing was the Supreme Court's decision in Business Electronics Corp. v. Sharp Electronics Corp., 108 S.Ct. 1515 (1988). There, the Court held that a conspiracy between the manufacturer and a dealer to terminate a competing dealer who was price cutting was insufficient to invoke the per se rule absent an agreement by the conspirators to set a specific resale price. The effect of Sharp has been to set up an almost impenetrable barrier for terminated dealers to redress antitrust injury since rarely do conspirators engage in such simplistic practices as actually entering into an explicit agreement to set specific prices.

H.R. 1470 thus has two major provisions: First, it sets out the burden of proof that is sufficient but not necessary to reach a jury trial in a dealer termination situation. If the elements of substantial causation required in section 2(a) are shown by the plaintiff, an inference of illegal "concerted action" is raised; and a jury will then decide whether the antitrust laws have been violated. Where these requirements are not met, a defendant's ability to obtain a grant of summary judgment under the Federal Rules of Civil Procedure remains unaffected. Second, H.R. 1470 states plainly, and beyond dispute, that minimum resale price maintenance is illegal per se under the antitrust laws.

B. Background

H.R. 1470 is designed to end confusion about the proper evidentiary and substantive treatment of vertical price fixing claims. Since at least 1911, vertical price fixing (or resale price maintenance) has been illegal per se under the antitrust laws for the simple reason that price fixing conspiracies between a manufacturer and a retailer to drive a competing retailer out of business create an intolerable restraint of trade in an open and free-moving economy. This prohibition went unquestioned for 70 years until 1981, when the Justice Department -- for "theoretical" reasons -- deemed the practice "procompetitive" and abandoned enforcement activity in the area, failing to bring a single resale price maintenance ("RPM") action in the past 10 years. Even more troubling, the Department in the early 1980's began to intervene in private actions, filing amicus briefs in support of defendant-manufacturers charged with vertical price fixing offenses.

When Congress, led by this Committee, voted to cut off funds for any Department amicus intervention seeking to overturn the per se rule, the Department responded by issuing a set of "informal" guidelines ("the Vertical Restraints Guidelines") outlining its theoretical positions on vertical price fixing, including the novel idea that only if there was proof that conspirators fixed a specific price or price level could a price fixing violation be found. Both Houses of Congress then adopted a resolution condemning the DOJ Guidelines as being inconsistent with congressional intent. When this action had no effect on the Department's enforcement policy, a legislative response was developed.

Led by the House Committee on the Judiciary, the House passed H.R. 585 in the 100th Congress and H.R. 1236 in the 101st Congress to remedy these problems and to reaffirm congressional policy in this important area. H.R. 1470 is identical to H.R. 1236 as passed by the House last year, incorporating the carefully crafted compromises of the Committee's efforts in the 100th and 101st Congresses. Opponents have been reassured that the bill in no way seeks to undercut the unilateral right of businesses to deal with whomever they wish and on whatever terms they desire -- provided that they do not engage in conspiracies to drive competitors out of the marketplace for reasons of price competition. To reiterate some of the compromise features of the bill that were clarified in the last Congress:

1. The evidentiary standard set out in H.R. 1470 is identical to that in the 100th Congress' H.R. 585 except that maximum price fixing is excluded from its scope. Setting a maximum price on goods -- as opposed to a minimum price -- rarely, if ever, hurts consumers or competing businesses since the freedom to sell at lower costs is not impeded. This distinction has been noted in the jurisprudence for 20 years.

2. The evidentiary section of the bill preserves the compromise offered by Congressman Feighan in the 100th Congress to make clear that nothing in the legislation would prevent a defendant from receiving summary judgment if the evidentiary standard was not met by a plaintiff.

3. The codification of the per se rule makes clear -- as we did in the 99th Congress by passing the Vertical Restraints Resolution (H. Res. 303) -- that vertical price fixing does not require that a specific price be set by the conspirators. This addition is particularly necessary since the Sharp decision has now created confusion on that precise question. I have attached a copy of H. Res. 303, which at the bottom of page 2 states prior congressional intent that vertical price fixing does not require an "explicit agreement as to the specific price[s]."

4. The legislative report accompanying H.R. 1236 also makes clear the Committee's intent that when a manufacturer receives a price complaint from a retailer about a competitor and proceeds to investigate, a subsequent termination of the discounter by the manufacturer for reasons unrelated to his pricing policies will not be a target of this bill, and is completely lawful under the Colgate doctrine.

5. The report accompanying H.R. 1236 also makes clear that the requirement that a manufacturer have terminated a discounter "in response to" a complaint from a full-price retailer means that the complaint must have been a "substantial contributing cause" of the termination.

H.R. 1604 - The "National Cooperative Production Amendments of 1991"

A. Purpose

H.R. 1604 seeks to clarify the treatment of production joint ventures under the antitrust laws and to eliminate unnecessary obstacles to their formation. Properly structured, cooperative ventures may produce important gains in technology innovation without leading to a dampening of competition.

The legislation would amend the National Cooperative Research Act of 1984, to reduce the potential antitrust liability for properly noticed joint ventures entered into for the purpose of producing a product, process, or service. It is designed to address the misperception held in some quarters of the business community that such joint ventures are generally disfavored under the antitrust laws. H.R. 1604 is identical to H.R. 4611, which passed the House in the 101st Congress.

B. Background

Production joint ventures are an important tool to help American businesses respond to a number of challenges now facing them in an increasingly competitive international marketplace. First, the costs of developing new technology and bringing it to the marketplace may exceed the resources of any single firm. Second, the economics of high-tech manufacturing have shifted to short product life-cycles and the need for rapid response time to consumer demands for variety and customization. Third, because competing products may now give a technology innovator no more than six months to a year of exclusivity, American firms must develop and initiate production strategies and scheduling with much greater dispatch than in the past.

H.R. 1604 reflects the Committee's judgment last Congress that the antitrust laws can co-exist with properly structured cooperative efforts to enhance innovation and be the spur to greater manufacturing success as in the past. Correctly understood, the antitrust laws prohibit only anticompetitive production joint ventures. The paucity of adverse case law and the relatively few enforcement actions by either the antitrust agencies or private parties demonstrate that the antitrust statutes are already permissive and facilitating to such ventures. Nevertheless, there appears to be an overdrawn - yet real -- misperception in the business community that the antitrust laws generally discourage all collaborative activity, irrespective of the procompetitive benefits achieved.

H.R. 1604 addresses these concerns by providing necessary clarification while avoiding unnecessary substantive changes. The legislation extends to production joint ventures the coverage and requirements of the National Cooperative Research Act of 1984 ("NCRA"), legislation that provided similar antitrust clarification for research and development joint ventures. Consistent with the NCRA, H.R. 1604 creates no exemption to the antitrust laws; nor does it change existing legal standards.

The NCRA has three operative provisions which H.R. 1604 would make applicable to production joint ventures. The first codifies the consensus view found in existing law that properly structured production joint ventures will be judged under a rule of reason standard, which would prohibit courts from condemning them under the antitrust laws without first considering their potential competitive benefits. The second provision would establish a voluntary notification system whereby parties to a joint venture may disclose the nature of the venture to the antitrust enforcement agencies and thereby receive reduced damage exposure from civil suits which are based on the activities disclosed. Compliance with the reporting procedures would not result in a "certification" that the venture is legal under the antitrust laws; thus, even with disclosure, a venture later shown to be anticompetitive could still be challenged though the traditional dual system of private and public enforcement and be subject to single damages. The third provision would award costs, including a reasonable attorney's fee, to the substantially prevailing party.

H.R. 1604 contains one provision not found in the NCRA that will apply only to production joint ventures reported to the antitrust agencies under the established notification system. For any production joint venture seeking the protections of NCRA, there is a limitation that no more than 30 percent of the beneficial ownership of the voting securities and equity of such venture be controlled by foreign entities. There is also a requirement that all the facilities of such joint venture be located within the United States or its territories. This provision creates no special substantive antitrust treatment for American-dominated production joint ventures over those with dominant foreign ownership. The only advantage received by a qualifying venture is that its participants will receive reduced liability exposure if their disclosed activities are found to be anticompetitive. Given that the stated justification for the legislation is to increase American competitiveness in the international marketplace, such a provision should spur American business participation without unduly foreclosing the ability of foreign controlled firms to conduct joint venture activity with American partners.

Consumers Union

Publisher of Consumer Reports

WHY CONSUMERS NEED H.R. 1470, THE PRICE FIXING PREVENTION ACT OF 1991

What is Vertical Price Fixing?

The illegal practice of vertical price fixing, sometimes referred to as resale price maintenance, is illustrated by the following example:

Sturdy Sole Shoes sells its goods to both Pricey Shoe Salon and Shoestring Footwear, competing retailers in Smallville. Pricey does not like the price competition from Shoestring and complains to Sturdy that "Shoestring's prices are killing me." Because Pricey is a more important customer, Sturdy terminates Shoestring. Smallville's consumers now have but one choice of where to buy men's, women's and children's shoes. They must shop at Pricey and pay Pricey's high prices.

A Short History of Vertical Price Fixing

In 1911, the Supreme Court held that vertical price fixing, agreements to maintain price between sellers on different levels of the chain of distribution, is a *per se* (automatic) violation of the Sherman Act.[1] The Court applies the *per se* rule to activities which have been shown to be inherently anticompetitive and lacking in any countervailing competitive benefits.

During the 1980's, an anti-consumer theory of economics gained a foothold at the Department of Justice (DOJ), the Federal Trade Commission (FTC) and even the Supreme Court. Known as the Chicago School, this theory advocates a hands-off approach to antitrust enforcement and argues that vertical price fixing does not deserve *per se* treatment. Proponents of the theory contend that higher prices will ensure better service, ignoring the fact that many low income consumers do not have the ability to pay higher prices for the luxury of more service. In addition, this school of thought asserts that intrabrand competition (*e.g.* one store's selling Sony 19 inch T.V.s for $299.99 and another retailer offering the same set for $350.00) is not worthy of protection, and that only interbrand competition is necessary to safeguard consumer welfare. As a result of the influence of the Chicago School, not one vertical price fixing case was brought by either DOJ or the FTC in over 8 years.

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1 *Dr. Miles Medical Co. v. John D. Park and Sons Co.*, 220 U.S. 373 (1911).

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The detrimental impact of the *Sharp* decision is illustrated by subsequent lower court decisions applying the new rule. The facts in *Toys "R" Us, Inc. v. R.H. Macy & Co., Inc.* [4] represent a classic resale price maintenance agreement. Two manufacturers of children's swimwear were selling their goods to Macy, a full price retailer, and to Kids "R" Us, a discounter. Macy had a policy of meeting any competitor's retail price for children's apparel. Macy became worried that in order to meet Kids "R" Us prices it would have to lower its own "keystone" (double the wholesale price) prices. Macy's buyer for children's wear complained to the two suppliers that it would be very difficult for Macy to meet Kids "R" Us prices. He reminded the two manufacturers of the size of Macy's purchases and told them that Macy might reduce or eliminate future purchases if the suppliers sold to Kids. The two suppliers subsequently informed Kids that they could not sell to Kids and explained they were reacting to complaints about price from Macy. The court found that the evidence could support a finding that Macy and either manufacturer agreed to deny merchandise to Kids. However, as there was no additional agreement on a specific price or price level that Macy would charge following the termination, the court found there was no *per se* price fixing liability.

The facts of the case in *Kids "R" Us* demonstrate the absurdity of requiring an additional agreement on specific price. Macy made clear that it planned to continue to charge "keystone" prices after eliminating the price competition from Kids "R" Us. "Keystone" is a pricing standard known throughout the retail clothing industry to mean a retail mark-up that doubles the wholesale price. Such standards are common in most industries. Another example is in the furniture industry where the "mark" is understood to mean doubling the wholesale price for retail sale. Because of industry pricing standards, retailers can effectively maintain prices without directly discussing specific price or price level and avoid *per se* antitrust liability. It makes little sense, however, to hold liable retailers who say "let's get rid of Kids and charge $39.95 for Backflips swimsuits," and not those who instead agree to "get rid of Kids because they are under 'keystone' for Backflips swimsuits." Yet this is the effect of the Supreme Court's decision in *Sharp*.

The consequences for consumers of the elimination of Kids "R" Us from the children's swimwear market is plain. Parents wishing to purchase high quality swimwear for their children are left with one option: buying from Macy at Macy's "keystone" price. The fact that Macy and the two manufacturers did not articulate a specific price does not change the fact that consumers are forced to pay 20-25% more for the same merchandise and are able only to purchase the merchandise at Macy. Despite

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[4] 1990-1 Trade Cases 68,890 (S.D. N.Y. 1990).

What Would H.R. 1470 Not Do?

Manufacturers have the power to make unilateral business decisions. For example, suppliers who wish to develop or maintain a certain image for a product are free to refuse to sell to discounters. This right unilaterally to refuse to deal or even to terminate current customers is protected by the Supreme Court's decision in *United States v. Colgate and Co.*[5] This right to make unilateral business decisions would not be affected in any way by H.R. 1470.

Furthermore, H.R. 1470 would not alter the rule of reason treatment accorded to agreements involving non-price vertical restraints such as territorial agreements or location restrictions. The Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*[6] would continue to govern treatment of non-price restraints.

There can be no violation of the Sherman Act section 1 without proof that the defendant entered into an illegal contract, combination or conspiracy. Section 4 of H.R. 1470 makes it clear that this requirement would not change.

Why is H.R. 1470 Necessary?

H.R. 1470 would restore the remedy for resale price maintenance. Today, discounters who are driven from the marketplace have virtually no recourse against those manufacturers and high priced retailers who conspire to eliminate the competition created by discounters. In addition, law enforcement agencies do not have the tools they need to effectively prosecute and deter anticompetitive conduct. This type of activity appears to be becoming more common, driving small discounters out of business and limiting the merchandise to which larger discounters have access. For consumers, particularly low-income consumers and those on fixed incomes, the result is higher prices and fewer choices. In sum, H.R. 1470 is needed to make the American marketplace function the way Congress intended when it passed the Sherman Act in 1890--as a free and open marketplace infused by vigorous competition.

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[5] 250 U.S. 300 (1919).

[6] 433 U.S. 36 (1977).

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503

January 21, 1994

LEGISLATIVE REFERRAL MEMORANDUM

LRM #I-1893

TO: Legislative Liaison Officer -

OMB - Only, See Distribution Below - ( ) - -

FROM: JAMES J. JUKES (for) J
Assistant Director for Legislative Reference

OMB CONTACT: **Jeffrey WEINBERG (395-3457)**
Secretary's line (for simple responses): 395-3454

SUBJECT: JUSTICE Proposed Testimony RE: HR 3626, Antitrust Reform Act of 1993

DEADLINE: **4 PM January 24, 1994**

COMMENTS: Here is an advance draft of the testimony. We are still waiting for Justice's okay to formally circulate the testimony.

OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or receipts for purposes of the the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:
Greg Simon
Tom Kalil
Mike Nelson
C. Cerda
C. Walden
Jonathan Baker, CEA
Bob Damus
Ken Schwartz
Harry Meyers
Jonas Neihardt
Adrien Silas
Bruce McConnell
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LRM #I-1893

RESPONSE TO LEGISLATIVE REFERRAL MEMORANDUM

If your response to this request for views is simple (e.g., concur/no comment) we prefer that you respond by faxing us this response sheet. If the response is simple and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a secretary.

You may also respond by (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); (2) sending us a memo or letter; or (3) if you are an OASIS user in the Executive Office of the President, sending an E-mail message. Please include the LRM number shown above, and the subject shown below.

TO: Jeffrey WEINBERG
Office of Management and Budget
Fax Number: (202) 395-3109
Analyst/Attorney's Direct Number: (202) 395-3457
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FROM: ______________ ______________ (Date)
______________ (Name)
______________ (Agency)
______________ ______________ (Telephone)

SUBJECT: JUSTICE Proposed Testimony RE: HR 3626, Antitrust Reform Act of 1993

The following is the response of our agency to your request for views on the above-captioned subject:

______ Concur

______ No objection

______ No comment

______ See proposed edits on pages ______

______ Other: ______________

______ FAX RETURN of ______ pages, attached to this response sheet

Advance Draft

Draft: 1/21/94-8 AM
Fax Comments To R. Litan: 616-2645

Testimony of Anne K. Bingaman[1]

before the

House Judiciary Committee

January 26, 1994

I am pleased to be here today to testify on behalf of the Administration on H.R. 3626, authored by Chairmen Jack Brooks and John Dingell.

This Administration is grateful to both Chairmen for their hard work in crafting legislation that will help accelerate the telecommunications revolution and the completion of the National Information Infrastructure (NII).

The job of building the NII -- or more specifically, infrastructure that will permit broadband, interactive communication between all members of our society -- has been aptly compared to the building of the nation's interstate highway system. Like the construction of the highway system, the construction of the NII will create hundreds of thousands of jobs. And just as roads have enhanced this nation's productivity and living standards, the completion of the NII will make firms and individuals more productive. The NII will also enhance the quality of our lives by creating new ways to educate adults and their children, improve our health care, give us better and cheaper ways

[1]Assistant Attorney General, Antitrust Division, Department of Justice.

of buying products and services, and entertain us at home.

There is a key difference, however, between the nation's roads and its information infrastructure. Our roads have been built by government. Our NII is being built by private enterprise.

But that does not mean that government has no role in promoting the development of the NII. To the contrary, just as in any other sector of the economy, government is needed to set and enforce rules of fair play.

In a word, government is needed to ensure competition. For it is only through vigorous competition in all phases of the telecommunications business -- in the construction of the various information highways and their access roads, wired or wireless; in the operation of those highways; and in the provision of content over the highways -- that the nation can be assured of having the highest quality telecommunications service at the lowest cost. Thus, it is appropriate that this Committee -- which oversees the enforcement of the nation's antitrust laws -- is where we begin consideration of legislation that we hope this year will finally set the ground rules for the completion and operation of the NII.

I will concentrate in my remarks today on the role of competition in key parts of the NII effort: the provision of telephone services (both voice and data) and the manufacture of telecommunications equipment. H.R. 3626, which builds upon H.R. 5096 authored by the Chairman of this Committee an pass by the Committee last year, represents an important step toward ensuring the prominence of competition in the telecommunications industry.

The new bill would enable the Regional Bell Operating Companies (RBOCs) that are now barred from competing in long-distance telephone services to enter that market, but only if the telephone companies satisfy both the Federal Communications Communication (FCC) and the Justice Department that their entry will not harm competition in other markets. In addition, the proposal would permit the RBOCs to research, develop, and manufacture telecommunications equipment unless the Justice Department challenges such activity for posing undue threats to competition.

The Administration endorses these objective and applauds the authors of H.R. 3626 for identifying a constructive mechanism for achieving them. In particular, the Administration believes the time has come to move telecommunications policy out of the courts and into the statute books so that Congress, as representatives of the public, can establish the far-reaching and comprehensive framework for governing the telecommunications world of the future that the nation deserves.

In the balance of my testimony, I would like to do the following:

--To put the discussion we are having today in a useful framework, by explaining how we got here and, in particular, how the nation has benefitted from the competition in telephone markets that has occurred thus far;

--To suggest why providing even greater competition in both local and long-distance telephone markets is critically important for American consumers and industry;

--To identify the fundamental challenges policymakers face in bringing about this result; and

--To discuss how the Administration's NII proposal builds upon the valuable foundation constructed by H.R. 3626 to address these challenges.

The Origins Of The Current Telecommunications Revolution

This Committee is now considering legislation to make the nation's telephone markets more competitive in significant part because two decades ago, the Department of Justice decided to sue AT&T for impeding competition in all significant aspects of the telephone business. Assistant Attorneys General in both Democratic and Republican Administrations vigorously prosecuted this case. My antitrust law professor, William Baxter, then resolved the matter in 1982 by obtaining a consent decree that effectively broke up AT&T -- splitting the local telephone companies from AT&T's long-distance and manufacturing businesses. That decree, or the Modified Final Judgment (MFJ), has now been in effect for ten years. The nation owes enormous gratitude to Judge Harold Greene, who has devoted his enormous energies and legal talents to administering the MFJ.

It is no understatement that the MFJ was one of the most important and beneficial developments affecting the telecommunications industry in this century. It was the MFJ that enabled the United States to become the first nation in the world to introduce competition as the main principle for governing the development of telecommunications services.

Before AT&T was split up, it was assumed that all aspects of the telephone business were a natural monopoly in need of regulation. But technology proved this assumption wrong. Upstarts like MCI proved that competition could survive in long-distance, if only government could prevent AT&T from refusing to interconnect other long-distance providers to its local telephone networks. Similarly, other manufacturers of telephone equipment wanted to sell equally, if not more, innovative products but were frustrated by AT&T from doing so because of the telephone company's incentives to buy such equipment only from its wholly owned subsidiary, Western Electric.

By unleashing competition in various segments of the telephone industry, the MFJ has delivered the benefits that competition everywhere else guarantees: innovation, better products and services, greater efficiency, and lower prices. Consider that since the MFJ:

--interstate long distance prices in real terms (adjusted for inflation) have fallen by more than 50%;

--there has been a virtual explosion in the types of telephones and services that consumers can choose from;

--competition has stimulated the development of hundreds of innovative voice and data services (such as call waiting and voice mail);

--spurred by MCI and Sprint, all three major long-distance providers (including AT&T) now have laid fiber optic cable throughout much of the country and thus have already built much of the backbone for the NII; and

--competition in the telephone equipment market has opened whole new markets and spawned the development and sale of new products.

In short, the MFJ has enabled the United States to maintain its technological leadership in telecommunications. Nations that have stuck to the old monopoly model of telephone services have fallen behind. That is why many are now trying to emulate us, rather than the other way around.

The Need For And Benefits Of Even Greater Competition

While the MFJ has unleashed powerful competitive changes that have benefitted American consumers and business, its job -- and our job -- is not yet complete. There is still room and need for even more competition in all three markets affected by the MFJ: local telephone service, long distance telephone service, and equipment research and development and manufacturing.

Local telephone markets are in greatest need of added competition for they are still monopolized by the vestiges of the Bell System, the RBOCs. Although divestiture and "equal access" rules have brought a measure of competition to long distance and to the provision of information services, the Bell Operating Companies (BOCs) in most areas of the country still have a lock on local telephone traffic, carrying more than 99% of all local calls.

In time, there is hope that technology ultimately will erode this monopoly, as long as the government facilitates rather than obstructs such progress. While expensive, cellular and specialized mobile radio services -- which can transmit calls through the air rather than by wire -- are growing rapidly throughout the country. Shortly, the FCC will auction off additional spectrum for Personal Communications Services (PCS), yet another form of wireless communication. And hopefully, cable television systems will be successful soon in adding the transmission of telephonic communications to their networks, providing perhaps the most powerful source of competition to existing providers of local telephone services.

Second, while several competitors certainly have made significant inroads in long-distance telephone markets, that market may still not be as competitive as it could be. AT&T still has about 60% of long-distance traffic and thus remains the dominant provider of long-distance services. In addition, there is evidence indicating that AT&T behaves very much like a price leader: the prices of other long-distance companies has consistently moved in lock-step with AT&T's. In a more competitive market we would expect to see less regular pricing patterns and thus more vigorous pricing competition. The fact that the RBOCs seem to want into long-distance so much provides further evidence from the marketplace that the long-distance market could benefit from more competition.

Third, while telephone equipment is now probably the most competitive of the three markets dealt with by the MFJ, even the equipment market could use additional competition. Here, too, AT&T continues to be a dominant force, although it faces stiff competition from numerous other providers, domestic and foreign. Given their expertise in the industry, some or all of the RBOCs may be natural entrants into research and manufacturing telecommunications equipment, especially for the network, but are precluded from entry by the MFJ. Under the right conditions, entry by the RBOCs into these activities could help spur innovation and bring down prices for telecommunications equipment. In the process, it is also possible that the RBOCs could help displace foreign telecommunications providers who have cracked our market and thus create more skilled jobs for Americans here at home.

Policy Challenges Ahead

A key challenge now for all telecommunications policymakers -- whether in Congress, in the Executive branch, and the states -- therefore could not be clearer: To encourage greater competition in all facets of the telecommunications industry in a way that does not distort the marketplace or pose dangers to consumers.

This Committee has a crucial role in bringing this result about because of its jurisdiction over any legislation dealing with the MFJ. In particular, the important task is to subject the RBOCs, which now have monopoly power in local telephone service, to much greater competition while at the same time specifying conditions that would permit the RBOCs to engage in the other activities from which they are now precluded by the MFJ, notably long-distance service and telecommunications R&D and manufacturing.

Several straightforward steps would open up local telephone markets. Existing local and state restrictions against entry must be superseded, while RBOCs must be required to "unbundle" their services and provide interconnection to other firms that want to use the "local loop" to provide local telephone services. In addition, cable television and telephone companies should be permitted to engage in each business in the same service territory (although to preserve competition, each type of firm should be prohibited from acquiring the other in the same service area for a minimum of five years).

Fortunately, there appears to be a consensus supporting such measures. In the House, Representatives Markey and Fields have authored legislation (H.R. 3636) that would broadly authorize these steps. In the Senate, Senators Danforth and Inouye have introduced similar legislation (S. 1086). The Administration strongly supports the basic thrust of these legislative initiatives. Moreover, we applaud the announcements by MCI to enter the local telephone business and by various RBOCs and cable companies to upgrade their telephone and cable networks to enhance competition in their video and local telephone markets, respectively.

The more controversial, but equally important, issue is to specify the conditions under which the RBOCs may be allowed to offer long-distance service and engage in manufacturing and R&D. A minimum condition, of course, is opening up the local loop to competition in order to reduce, and eventually eliminate, the ability of the RBOCs to cross-subsidize and discriminate. Indeed, it is critical that any legislation authorizing RBOC entry into any other line of business not be enacted in isolation. It must be paired with legislation sweeping away existing restrictions against entry into local telephone markets.

Nevertheless, even if the law allows greater competition in the local loop, RBOC entry into other lines of business remains problematic for two simple reasons. As long as they have a monopoly over local phone service, the RBOCs -- as did AT&T -- will continue to have incentives to charge their regulated local activities with the costs of engaging in other unregulated businesses which they are permitted to enter. If they can do that, the RBOCs will be able to make customers of local telephone service pay for long-distance and other activities, whether they use them or not. In addition, as long as they have market power in the local telephone business, the RBOCs have incentives to discriminate, perhaps in subtle ways, against competitors in long-distance and manufacturing if the RBOCs are allowed into these other activities.

These are not just abstract concerns. The General Accounting Office reported in February, 1993 that the FCC had continuing problems in detecting cross-subsidization by the RBOCs.[2] In addition, many state regulatory commissions do not have the staff or the resources to be able to adequately detect cross-

[2] [citation needed].

subsidization as long as all RBOC activities are housed within the same corporation (and not divided into separate companies or affiliates).

There are two basic ways to address the problems posed by RBOC market power. One is to wait for local telephone markets to become fully competitive before relaxing the line of business restrictions. This option avoids the dangers of RBOC abuses, but sacrifices the potential gains in added competition that the RBOCs would bring to long-distance and manufacturing if they could enter these activities quickly.

The other broad option is to accelerate permission for the RBOCs to enter the other businesses as long as they are subjected to post-entry safeguards that minimize the danger that they could harm competition. This approach has the potential of realizing the gains from enhanced competition provided by the RBOCs more quickly, but depending on the nature of the safeguards, may run more risk of RBOC abuses.

H.R. 3626 blends both of these approaches. On the one hand, it conditions RBOC entry into long-distance generally, after some initial waiting periods (18 months for reselling and five years for facilities-based services), on findings by the DOJ and FCC that such activity will not harm competition and will serve the public interest, respectively. In addition, the RBOCs would be allowed into manufacturing and R&D after one year, but only if the DOJ decides not to challenge such entry as posing undue competitive risks.

On the other hand, H.R. 3626 would permit immediate RBOC entry into reselling long-distance service nationwide once a key safeguard is satisfied: namely, that the RBOCs allow consumers to choose any carrier for such service and dial 1 to use it ("dial 1 parity"). In addition, DOJ would still have an opportunity to challenge such entry on antitrust grounds. H.R. 3626 applies no federal safeguards, however, to the permission it provides for immediate entry by RBOCs into intrastate long distance if the states allow it.

The Administration strongly endorses the provisions in H.R. 3626 giving both the FCC and DOJ authority to approve RBOC entry into long-distance. The FCC is the expert agency charged with broad governance of the telecommunications industry and so is appropriately given entry authority. At the same time, the Department of Justice has developed extensive experience and expertise over the past two decades since the filing of the AT&T case with respect to the role of competition in the telephone industry. In particular, the administration of the MFJ has involved the Department in substantial measure in the very issue now before this Committee, namely under what circumstances to permit the RBOCs to enter other lines of business. It is only appropriate, therefore, that any legislation designed to replace the MFJ fully involve our Department.

With respect to the entry conditions set forth in H.R. 3626, the Administration understands the hard work that went into striking the right balance between promoting competition and avoiding potential RBOC abuses. We believe that H.R. 3626 provides an excellent foundation for achieving this balance. We want to work with this Committee and the entire Congress to build on this foundation.

Suggested Amendments

Toward this end, we urge the Congress to incorporate a number of additional ideas in any final legislation. The exact language will be contained in a comprehensive telecommunications reform package to be introduced in Congress shortly. We also are prepared to negotiate this language with this and other Committees. For now, I would like to describe in general terms the most important concepts.

Long-Distance: We propose giving the RBOCs a choice of DOJ entry tests into long-distance, depending on the safeguards to which they would agree to be subject (The "public interest" entry test for FCC approval would be the same under both options). In either case, we would shorten the waiting period to six months (from the current 18 months for reselling and five years for facilities-based services). A six month period should be sufficient to allow DOJ and the FCC to write rules to administer the applications process and to organize personnel to address those applications. In addition, with the exception to be noted shortly, we would remove the provisions in H.R. 3626 that now allow RBOC entry into certain aspects of long-distance without prior approval from either DOJ or the FCC and under a different model than is found elsewhere in the bill.

Under the first option, RBOC entry into long-distance would be permitted if the RBOCs can meet the existing competitive standard in the MFJ (the so-called "8(c)" test): namely, by proving that their entry would entail "no substantial possibility" of harm to competition.[3]

Alternatively, the RBOCs' applications for long-distance permission would be judged by a more permissive entry test (similar to the existing test for mergers under Section 7 of the Clayton Act) if they agree to place their local "bottleneck" facilities -- or those in which they have clear monopoly power -- in a separate affiliate. Such a requirement is similar to the proposal recently made by Rochester Telephone Corporation to divide its wholesale telephonic transmission activities from its marketing of telephone and other services. I want to emphasize that the establishment of such an affiliate would be optional; the RBOCs would only be required to set one up if they want to take advantage of the more liberal entry test.[4]

A separate affiliate requirement represents an important

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[3]As a result, we would propose deleting the "clear and convincing" language now applicable to this entry test in H.R. 3626.

[4]Under this second alternative, five "bottleneck" functions initially must be placed in the local loop affiliate: connections to end users, key switches, inter-office transport facilities, system signalling functions, and assignment of telephone numbers. After three years, the FCC would be authorized to remove any of these functions from the affiliate upon a finding that these activities face effective competition.

structural safeguard. Because the separate affiliate would have its own accounting records and personnel, regulators would find it easier to prevent cross-subsidization and other abuses. In addition, by limiting the local loop affiliate to the business of carrying signals on the same terms for all who seek to interconnect, the Administration's proposal creates a level playing field for all companies -- and not just the marketing arm of the RBOC -- desiring to market local telephone services. At the same time, by establishing such an affiliate, any RBOC would be free to configure its offering of any unregulated services and products: in just one or many affiliates of the local loop entity.

Finally, we urge the Committee to consider permiting the Department to proceed somewhat less formally in considering any applications for entry into long-distance. Specifically, while we agree that DOJ should permit public comment and provide a written explanation of any of its decisions, we propose that the Department only be authorized, but not required, to conduct hearings on RBOC applications. Excessively formal procedural requirements could unduly delay the Department's consideration of applications.

Manufacturing: The Administration supports the provisions in H.R. 3626 that allow RBOCs into manufacturing, subject to DOJ challenge, while subjecting the RBOCs to post-entry safeguards to prevent cross-subsidization and discrimination.

A significant reason why the government sued AT&T in the first place was that AT&T excluded competitors to Western Electric from selling network equipment to the operating companies that AT&T

itself owned. In addition, AT&T prohibited attachment of competitors' equipment to the network except through protcotive connecting arrangements, or PCA's, which were often unnecessarily restrictive.

While the divestiture of Western Electric from the RBOCs and the subsequent proliferation of competition in the equipment market have reduced the potential for future abuses by RBOCs in the event they are allowed into manufacturing, certain safeguards remain necessary. In particular, without appropriate safeguards, the RBOCs could provide unequal access to network information, impeding other manufacturers from designing equipment that will work with the network. Similarly, the RBOCs could favor the products of their manufacturing affiliates, to the detriment of competing manufacturers. In addition, the RBOCs could be tempted to use their regulated local monopoly to cross-subsidize their manufacturing activities, sticking local ratepayers with the tab.

For all these reasons, it is essential, as H.R. 3626 provides, that the DOJ be given more explicit authority to obtain information from the RBOCs about their manufacturing plans, and if necessary, to challenge these activities in court. H.R. 3626 also correctly requires the RBOCs to conduct any manufacturing activities in a separate affiliate (from the RBOC or its "local loop" activities, as the case may be), to disclose network information, and to refrain from tying and cross-subsidization. In addition, we would require the RBOCs to refrain from discriminating against competing manufacturers and, if they buy any equipment from their manufacturing affiliate, to do so on terms no less favorable than the terms offered by that affiliate to other purchasers. Similar requirements were included in legislation previously sponsored by Sen. Hollings and previously passed by the Senate (S.173).

We also urge the adoption of certain other provisions related to RBOC entry into manufacturing. Specifically, we propose a specific procedure for the Attorney General to request additional information from BOCs submitting notifications of an intent to manufacture, the establishment of a specific standard by which an injunctive action brought by the Department will be judged, a provision to clarify the nature of the separation required where a BOC has separated itself from the key elements of its local exchange bottleneck monopoly, and the elimination of any domestic content restrictions.

I do not want to leave the subject of manufacturing, however, without also stressing that the risks of RBOC entry into this activity are likely to be less significant than in the case of long-distance service for several reasons. For one thing, there are fewer facilities used jointly by local exchange service and manufacturing, reducing the opportunities for cross-subsidization. In addition, at least with respect to some of the larger, more complex switches, economies of scale are such that an RBOC manufacturer would also have to attract other purchasers, providing a benchmark against which to measure the price it is paying itself. Moreover, no single RBOC enjoys substantial market power in the purchase of any type of equipment. As a result, the RBOCs have less ability to distort competition in the equipment market than in long-distance, where carriers need access to all regions (and thus must do business with all RBOCs).

"Incidental" Services: Finally, H.R. 3626 requires the DOJ and FCC will establish procedures and standards for permitting the RBOCs to provide long-distance incidental to certain other services. The Administration proposes to build on this concept by allowing the RBOCs to engage in certain limited long-distance activities without having to pass an entry test. These additional activities include the provision of long-distance service incidental to the provision of cable television, wireless telephonic communications, electronic publishing and certain signalling functions. These services were neither subjects of the AT&T lawsuit nor the MFJ that settled it.

Conclusion

In conclusion, the Administration is grateful for the introduction of H.R. 3626. We are eager to work with this Committee to enact this legislation, together with the suggestions I have advanced here. We believe that in doing so we will lay a solid legal foundation to promote the competitive construction and operation of the NII.

Thank you.

Keep the promise

Border Patrol needs 600 more agents

Is the federal government planning to renege on its pledge to hire 600 new Border Patrol agents to help staunch the flow of illegal immigrants into California?

It looks that way.

White House officials recently said the Clinton administration has decided to hire only 350 new agents and 171 support personnel, who supposedly would free up agents now performing backup work and office duty. The administration said that would mean an increase of 542 agents on the border.

That's not the same as hiring 600 new border agents, and it's not acceptable.

The administration needs to stick to its pledge of 600 additional agents. What's more, most of them should be assigned to the San Diego sector, where half of all illegal immigrants in the nation cross the border.

Some of the agents promised for the San Diego sector have apparently been rerouted to El Paso, Texas, where the illegal immigration problem is a trickle compared to our flood.

The way the federal government has ignored for years the illegal immigration problem in San Diego County is a national disgrace. Despite being terribly underfunded and lacking sophisticated equipment, the Border Patrol in the San Diego sector arrested 500,000 illegal crossers last year. But at least that same number get through.

It seemed last year that the federal government had finally awakened to its responsibility on the border. The House of Representatives approved an amendment by Reps. Duncan Hunter, R-El Cajon, and Lynn Schenk, D-San Diego, to spend $60 million to hire 600 new agents. The Senate approved a similar amendment by California D cratic Sen. Dianne Feinstein for $52 million.

In a House-Senate conference committee, that amount was cut to $45 million, but only after administration offi as- sured California lawmakers that ount would be enough to hire, train, equip and deploy 600 agents within a year.

Not only is the San Diego sector overwhelmed by illegal immigrants, but the Border Patrol here is under increasing pressure to take stronger action, without having adequate resources and staffing to do so.

The Border Patrol has been called on to replicate the results of the border blockade in El Paso. The focus of that effort has been to prevent illegal immigrants from crossing rather than just arrest them after they do.

But the terrain is far rougher and more varied in San Diego County than in El Paso, and the number of illegal cr s is far higher. Another difference is t crossers in El Paso are usually daily commuters, while those in San Diego usually have made a long journey from the interior of Mexico and are headed to other parts of the United States. That means they're more determined to make it across the border.

If the San Diego sector had enough properly equipped Border Patrol agents, it could choke off most of the flow of illegal immigrants.

That's why it's imperative for the Clinton administration to stick to its original promise to provide 600 new agents for the border, with most of those sent to California. Not only would that go a long way toward controlling the illegal immigration problem, but it also would help quell the immigration backlash that's rising around the country.

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CRS Report for Congress

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General Overview of United States Antitrust Law

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SUMMARY

There are two basic antitrust laws in the United States -- the *Sherman Act* and the *Clayton Act*, enforceable by the Antitrust Division of the Department of Justice, the Federal Trade Commission or private persons alleging economic injury caused by violation of either of them. In addition, the *Federal Trade Commission Act and* the *Robinson-Patman Act* may also be utilized by the Commission and private persons (only the Commission may enforce *its Act, however*). Together, they spell out the conduct and activities prohibited in economic, market transactions. There are also some statutes directed to specific industries or types of transactions which indicate the likely antitrust consequences for economic conduct in those areas.

DISCUSSION

The following material presents brief summaries of (1) the primary United States antitrust statutes, and (2) some of the activities which are generally considered to be violations of those laws. There is also some reference to the prohibition against unfair competition and the "unfairness" jurisdiction of the Federal Trade Commission (FTC). There is not, however, any discussion of the extraterritorial reach of the United States antitrust laws. Further, the laws whose descriptions follow do not constitute all of the statutes which are applicable to antitrust issues, but rather, constitute those which are most often utilized.

In reading the information presented, readers should bear in mind that the antitrust laws are concerned with the functioning of the marketplace -- *i.e. competition* and *not* the protection of *any individual competitor*.

I. THE PRIMARY LAWS

A. ***Sherman Act*** (15 U.S.C. §§1-7)

SECTION 1 (15 U.S.C. §1) prohibits contracts or conspiracies in restraint of trade, which phrase has been, since at least 1911, judicially interpreted as meaning *unreasonable* restraints of trade.[1]

SECTION 2 (15 U.S.C. §2) prohibits monopolization or attempted monopolization; it is sometimes used in conjunction with section 7 of the *Clayton Act* (15 U.S.C. §18), which prohibits mergers or acquisitions which may tend to lessen competition.

Violation of either provision is a felony, and fines for violation are currently set at $100,000 for individuals and $1 million for corporations.

B. ***Clayton Act*** (15 U.S.C. §§12-27)

SECTION 4 (15 U.S.C. §15) contains the damage provisions of the antitrust laws. 15 U.S.C. §15(a) permits "any person ... injured in his business or property by reason of anything forbidden in the antitrust laws [to] sue therefor [and to] recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." After the Supreme Court interpreted the words "any person" to include foreign governments,[2] the provision was amended in 1982 to restrict foreign states' recovery of monetary antitrust damages to "actual damages sustained" plus costs and reasonable attorneys' fees (15 U.S.C. §15(b)). The limitation to actual damages was also applicable, until late 1990, to monetary injuries sustained by the United States (15 U.S.C. §15a)); that limitation was removed by the 101st Congress in H.R. 29 (P.L. 101-588), following much hearing testimony to the effect that the damage limitation made the federal government the "antitrust victim of choice."

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1 *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1, 60 (1911): "And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which would be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus ... it follows that it was intended that the standard of reason ... was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided." *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231, 238 (1918): "But the legality of an agreement cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress of even destroy competition." *See also, Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344, 359-60 (1933); *The Sugar Institute, Inc.* v. *United States,* 297 U.S. 553, 597-98; *White Motor Co.* v. *United States,* 372 U.S. 253 (1963); *GTE Sylvania, Inc.* v. *Continental T.V., Inc.,* 433 U.S. 36 (1977).

2 *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978).

Treble damage recovery is now available to the United States, as it is to private antitrust plaintiffs pursuant to 15 U.S.C. §15.

SECTION 7 (15 U.S.C. §18), as cited above, is probably the most prominent, substantive provision of the *Clayton Act.* Whereas the *Sherman Act* was enacted to prohibit concerted activity which actually restrains trade, this provision is directed at preventing activity in its incipiency which may tend to restrain trade. The *Merger Guidelines* issued by the Department of Justice[3] offer an indication of the ways in which mergers and acquisitions will be analyzed by the Antitrust Division; although they are not binding upon the courts, they are considered to be persuasive.

SECTION 7A (15 U.S.C. §18a) contains the "premerger notification" provisions. It is enforced by both the Department of Justice and the FTC. All merger or acquisition transactions in which either party has nets sales or assets of $10 million and the other party has net sales or assets of $100 million, with certain, enumerated exceptions, are included (15 U.S.C. §18a(a)). The reviewing agency has 30 days from the time of notification (15 days in the case of tender offers) to review the proposed transaction, which may not be consummated during that time unless the reviewing agency grants an early termination of the waiting period (15 U.S.C.§18a(b)). Prior to the conclusion of that time, the reviewing agency may seek a second round of information, which extends the original waiting period by 20 days (10 days in the case of a tender offer) (15 U.S.C. §18a(e)).[4]

C. ***Robinson-Patman Act*** (15 U.S.C. §13)

Broadly, the *Robinson-Patman Act (which is not, "technically," considered an antitrust statute)* prohibits price discrimination: it mandates that two or more purchasers of a commodity from the same seller must be charged identical prices. There are exceptions to the mandate, however, such that the *Act* may be seen to prohibit only *unjustified* price differentiation. There are also jurisdictional limits to the *Act*, the courts having interpreted it so that all the sales in question must be *in* interstate commerce.[5] *Robinson-Patman* applies only to sales of "commodities of like grade and quality" and not to services; and only

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3 The *Guidelines* were first issued in 1962, and revised in 1982 and 1984. The newest version indicates that the Department will consider foreign as well as domestic competition in determining the geographic market for the products or services of a potential merger (section 2.34).

4 Often, the second request for information is perceived by the parties as an indication of the fact that the reviewing agency has "problems" with the transaction, and either the entire proposal will be withdrawn, or it will be restructured so as to meet the objections. During the 101st Congress, there was legislation introduced that would have, in the case of tender offers, lengthened both the original waiting period and the time allowed for review after a second request.

5 *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, 419 U.S. 186 (1974). The *Sherman Act* and the *Federal Trade Commission Act,* for example, each require only that transactions be *in or affecting* interstate commerce.

to goods "sold for use, consumption, or resale within the United States" (15 U.S.C. §13(a)), but not to goods destined for export.[6]

Nonprofit institutions (*e.g.*, schools, colleges, libraries, churches, hospitals) are not subject to the prohibitions of the *Robinson-Patman Act* to the extent that their purchases are made for "their own use" (15 U.S.C. §13c).[7]

D. ***Federal Trade Commission Act*** (15 U.S.C. §§41 *et seq.*)

SECTION 5 (15 U.S.C. §45) is the operative, substantive provision of the *FTC Act*. It prohibits "unfair methods of competition" and "unfair or deceptive acts" in commerce (15 U.S.C. §45(a)(1)).[8] The provision applies to "unfair methods of competition involving commerce with foreign nations (other than import commerce)," however, only to the extent that such "unfair" conduct has a "direct, substantial, and reasonably foreseeable effect" on the foreign commerce in question (15 U.S.C. §45(a)(3)).

II. OTHER APPLICABLE LAWS

A. ***National Cooperative Research Act of 1984*** (15 U.S.C. §§4301-05)

This legislation was enacted in 1984 to meet the perceived problem of a lack of joint research and development projects (believed to adversely impact the United States' international competitiveness) by business, which was said to fear (1) government prosecution of joint ventures which could be viewed as anticompetitive, and (2) private antitrust treble-damage actions. 15 U.S.C. §4302 states clearly that research and development joint ventures will be examined individually and analyzed under a "reasonableness" standard; moreover, provided that a joint venture has notified the Department of Justice and the FTC as to its intended existence and activities, litigants claiming antitrust injury by reason of the venture's "notified" conduct may recover only actual damages (15 U.S.C. §4303(a)), despite the general antitrust damage provisions (see, *supra*, IB, paragraph 1).

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6 *Fimex Corp.* v. *Barmatic Products Co.*, 429 F.Supp. 978 (E.D.N.Y. 1977), *aff'd without published opinion*, No. 7235 (2d Cir. 1977).

7 The phrase, "for their own use" was interpreted by the Supreme Court in *Abbott Laboratories* v. *Portland Retail Druggists Association, Inc.* (425 U.S. 1 (1976)) and *Jefferson County Pharmaceutical Ass'n, Inc.* v. *Abbott Laboratories* (460 U.S. 150 (1983)).

8 "Unfairness" has been defined by the courts as encompassing more than just conduct which would violate the *Sherman Act* or other antitrust statutes; conduct which runs counter to established public policy may also be deemed "unfair." *See, e.g., Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972): unfair practices may extend to "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws"; *Spiegel, Inc.* v. *Federal Trade Commission*, 540 F. 2d 287 (7th Cir. 1976); *Federal Trade Commission* v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986).

B. ***Export Trading Company Act*** (15 U.S.C. §§4001-21)

Export certificates of review are available to persons wishing to act collectively for the purpose of exporting goods or services from the United States. If the Secretary of Commerce, "with the concurrence of the Attorney General," determines that the association will not likely result in a "substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant," and issues a certificate, the recipient of the certificate is immune to any civil or criminal antitrust action based on the conduct covered by the certificate (15 U.S.C. §§4013, 4016).

C. ***McCarran-Ferguson Act*** (15 U.S.C. §§1011-15)

Pursuant to the *Act*, the "business of insurance" is exempt from the prohibitions of the antitrust laws. The Supreme Court has indicated on several occasions that "the business of *insurance*" is not synonymous with "the business of *insurers*."[9]

D. ***Soft Drink Interbrand Competition Act*** (15 U.S.C. §§3591-03)

Enacted in 1980 to permit the owners of trademarked soft drinks to grant exclusive territorial franchises to *e.g.*, bottlers or distributors of those products, the *Act* renders contracts or agreements containing the exclusive rights not subject to the antitrust laws provided that the "product is in substantial and effective competition with other products of the same general class" (15 U.S.C. §3501). Outright price-fixing agreements or other horizontal restraints of trade and group boycotts remain subject to the antitrust laws (15 U.S.C. §3502).

E. ***Local Government Antitrust Act of 1984*** (15 U.S.C. §§34, 35)

The statute prohibits the recovery of monetary damages (injunctive relief is permitted) from "any local government, or official or employee thereof acting in an official capacity" by anyone who challenges the antitrust legality of a local government's conduct.

III. ANTITRUST OFFENSES

A. ***Per Se***

Per se offenses are those for which there is no justification. As the Supreme Court has expressed it:

> ... there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate

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[9] *Group Health & Life Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979); *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119 (1982); *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724 (1985).

inquiry as to the precise harm they have caused or the business excuse for their use.[10]

The kinds of activities which are most generally found to be *per se* antitrust offenses, and are most likely to be criminally prosecuted, include:

1. Horizontal price fixing
2. Vertical price fixing (sometimes referred to as "resale price maintenance")
3. Bid rigging
4. Market division (customer or territorial allocation)
5. Boycotts (concerted refusals to deal)
6. Tying arrangements ("If you want X, you must also take Y")

All of the *per se* offenses, as concerted activity in restraint of trade, are violations of section 1 of the *Sherman Act.*

B. ***Rule of reason***

All antitrust-violative conduct which does not consist of a *per se* offense is judged by the reasonableness of the activity. Even when an otherwise unlawful action is found, if it is also determined that the action is ancillary to some lawful activity, and that its procompetitive consequences outweigh its anticompetitive effects, the action may well be found to be a not unreasonable violation of the antitrust laws. In other words, the rule of reason involves a balancing test.

There is not, for example, any *per se* rule against monopolization, or attempted monopolization. There is no "no fault" monopolization, no situation in which there is some "magic" number beyond which a firm may not increase its size or market share; the determining factors will include the means by which those numbers were reached -- the *reasonableness* of the actions which produced the final entity.

Most rule of reason offenses involve a single entity,[11] and do not usually violate section 1 of the *Sherman Act.*

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[10] *Northern Pacific Railroad Co.* v. *United States*, 356 U.S. 1, 5 (1957). *See also, White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963); *United States* v. *Topco Associates*, 405 U.S. 596, 607-08 (1972); *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9-10 (1979); *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 344 (1982).

[11] Mergers and acquisitions are the exceptions which are most apparent. But even those transactions are most concerned with the antitrust lawfulness and the competitiveness of the resulting entity.

Washington Post 2/25/94 page G2

SPRING TRAINING

Antitrust Hearings to Resume

Associated Press

Senate hearings aimed at stripping baseball of its antitrust exemption will resume March 21 during spring training in Florida.

"Let the baseball owners come and try to explain how destroying the job of the commissioner is in the best interest of the fans," Sen. Howard Metzenbaum (D-Ohio) said yesterday in New York.

The hearings, to be held in the Tampa-St. Petersburg area, will be followed by additional hearings in Washington.

Reds: The man Cincinnati needs the most showed up at training camp in Plant City, Fla.—late as usual. Outfielder Kevin Mitchell walked into the clubhouse after missing his second workout.

There lingers one question: How much does he weigh? Mitchell wore a baggy sweat shirt, but appeared to be a little lighter than last season. Mitchell, listed in the media guide at 244 pounds, was vague about his weight.

Dodgers: Heavy morning rains couldn't cool off Chan Ho Park's fastball as Los Angeles held its workout indoors in Vero Beach, Fla. The 20-year-old Korean right-hander, signed as a free agent last month, threw batting practice and continued to impress the Dodgers with his fastball, clocked in the 95-mph range.

Park also is impressing his teammates with how quickly he is adapting to American customs. Darren Dreifort, a fellow rookie pitcher, has taught Park how to do the high-five and Park walks through the clubhouse saying, "Hey, dude."

Mets: Team president Fred Wilpon addressed the players in Port St. Lucie, Fla., telling them not to be "empty idols" and reminding them that fans pay their salaries.

It was the second time in less than a year that Wilpon talked to the club about its behavior on and off the field. He said anyone not giving 100 percent would be off the team.

Pirates: Left-hander Danny Neagle, the Arundel High product once considered among the most promising young pitchers, says he is going to be more serious about the sport this year. Neagle, 25, has not fared well in comparison to former 20-game winner John Smiley, for whom he was acquired in 1992. Neagle was 3-5 with a 5.31 ERA last season after going 4-6 in 1992.