Testimony of David A. Balto,
Senior Fellow, Center for American Progress Action Fund

"On the Nomination of Christine Anne Varney as Assistant Attorney General for the Antitrust Division of the Department of Justice"

Before the Senate Judiciary Committee

Tuesday, March 10, 2009

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Introduction

I welcome the opportunity to submit this testimony for the confirmation hearing of Christine Anne Varney as the Assistant Attorney General of the Antitrust Division of the Department of Justice. Ms. Varney is eminently qualified to become the chief antitrust enforcer in the Department of Justice. Her experience as a FTC Commissioner and a private practitioner with a sophisticated antitrust practice gives her the breadth of experience necessary to lead the talented and committed public servants in the Antitrust Division. I am confident that Ms. Varney will receive the strong approval of this Committee.

I am providing this testimony so the Committee recognizes the significant challenges that the next Assistant Attorney General and the Antitrust Division face. Antitrust enforcement is the cornerstone to a competitive marketplace and when that enforcement is docile or misdirected consumers will suffer. Unfortunately, during the past administration the Antitrust Division embraced a minimalist course, largely trying to reduce the scope of enforcement and the use of antitrust in private litigation. This minimalist approach was based in significant part on the "Chicago School" theory that antitrust enforcement more often makes mistakes and markets almost always lead to the best result. When there are abuses by firms that use market power to exclude competition, Chicago School proponents argue, the market will self-correct because market power is temporary, and entry barriers are minimal.

[1] I am a Senior Fellow at the Center for American Progress Action Fund. This testimony is submitted on my behalf and on behalf of the Consumer Federation of America. CFA is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior citizen, low income, labor, farm, public power and cooperative organizations, with more than 50 million individual members.

Even if this belief had some theoretical support, recent changes in the economy have severely undermined its proscriptive value. This belief in the near-perfect market was severely shattered by the economic downturn. The assumptions that markets are self correcting and regulation is inferior have fallen to the wayside. As Republican FTC Commissioner Tom Rosch said in a recent speech "if not dead [the Chicago School] is on life support…. [M]arkets are not perfect; imperfect markets do not always correct themselves; and business people do not always behave rationally."

The facts of the minimalist approach to enforcement need to be clear. Over the past eight years, the Division brought no enforcement actions against dominant firms; went more than five years without bringing a merger challenge in federal court; adopted an amicus program that sought almost exclusively to narrow the scope of antitrust law; and adopted an unnecessarily adversarial attitude toward other enforcement officials, especially its sister antitrust agency, the FTC.[2] The results in many markets are not surprising. A lack of merger enforcement has led to oligopolistic market structures which foster coordination, higher prices and diminished services. Moreover, the lack of merger enforcement has created many entities that are "too big to fail" and thus, candidates for government bailout. A lack of dominant firm enforcement has led to less innovation and economic growth. The general lack of enforcement may lead business to believe the cop has left the beat, perhaps leading to greater efforts at coordination and price fixing as well as predatory conduct.

That has to change. The economic downturn makes competition enforcement even more vital as consumers have suffered from higher prices, lower output, and fewer services in increasingly concentrated markets. Lax antitrust enforcement has weakened the economy as markets have become more concentrated, leading to higher prices and less service.

What are the key challenges for the new head of the Antitrust Division?

Create a Progressive Antitrust Enforcement Program Tailored to the Economic Downturn.

Some may suggest that antitrust enforcement should be minimalized because of the economic downturn. Those people believe that competition is a burden too

[2] Antitrust Division officials were openly critical of the FTC's patent settlement and standard setting enforcement efforts. As a former government official, I believe these statements were unprecedented and improperly weakened the FTC's enforcement efforts.

great to bear when the market is suffering. They could not be more wrong. Antitrust enforcement is even more vital when markets are shrinking, prices are rising, and market opportunities are falling. History tells an invaluable lesson. In the aftermath of the depression, the Temporary National Economic Committee ("TNEC") found that the lack of antitrust enforcement in the 1930s harmed the economic recovery as business concentration and monopoly behavior constricted production and pegged prices too high; the result was diminished investment, production, employment, and income that had prolonged the Depression and triggered the 1937 and 1938 recession.

So where should the renewed focus on enforcement be placed?

First, cartel enforcement will be even more important as the economic downturn drives some firms to seek the easy life by arranging treaties with their rivals. Second, firms may attempt to use the difficult economic times as a justification to consolidate with competitors in ways that would not have been imaginable under a more robust economy. This threatens to create entities with excessive market power that far outlasts the recession. Third, the temptation for dominant firms to gain market share by unlawfully excluding competitors may be greatest when they view it as a shortcut to preserving shareholders' profit expectations in tough times.

Moreover, one key to reversing the economic downturn is increased competition. As the TNEC report found, antitrust enforcement can play a vital role in removing market barriers and permitting new firms to enter markets, thereby increasing job opportunities and leading to economic growth.

Reverse the Constriction of the Antitrust Laws.

During the past Administration, the Antitrust Division was a cheerleader for the belief that antitrust law would do more harm than good and should be exercised sparingly if at all. In its amicus program, the past Administration always argued on behalf of defendants (with one exception). It aggressively attacked the role of private antitrust enforcement. Moreover, before the Supreme Court it declined to support the efforts of its sister agency, the Federal Trade Commission, to attack problematic pharmaceutical patent settlements. In some cases the Supreme Court took an even more minimalist approach than that suggested by the Antitrust Division.

The result? Antitrust law has been severely weakened as a device to protect

the market from anticompetitive conduct.

The Antitrust Division should work actively to reverse the past constriction of the law. There are three tools to remedy this problem.

First, the Antitrust Division can begin to reverse this constricted review of the law through its own enforcement actions. For example, early in the past Administration, the Republican leadership eliminated the Division's civil task force. Established during the Clinton Administration, the task force established a record of litigation admired throughout the Justice Department. The Division brought major civil enforcement cases against Microsoft, American Airlines, Visa, MasterCard, and numerous other prominent companies. These cases eliminated exclusionary practices that harmed competition and millions of consumers. The Division should reestablish the Civil Task Force and make civil enforcement a major priority.

Second, the Division should actively seek opportunities, through its amicus program, to clarify the law in a fashion that expands the ability of private parties to augment public enforcement and protect competition through antitrust litigation. The government has limited enforcement resources and private antitrust litigation is important to identify and attack anticompetitive conduct. The Division should actively participate in lower courts providing guidance on issues in which the courts are inconsistent or the law is unclear. Examples include issues such as antitrust injury, the standards for motions to dismiss under *Twombly*, proof of conspiracy, structuring the rule of reason analysis, market definition, class certification, and demonstrating a violation with proof of actual anticompetitive effects. And, in those cases in which the Division supports defendants, it should do so in a way that articulates a balanced statement of what the law should be, keeping open the potential for the development of the law to promote competition.

Finally, where the courts have gone too far in narrowing the antitrust law, the Division should work with Congress to reverse that trend. There is no better example than the Supreme Court's decision two years ago in *Leegin Creative Leather Products v. PSKS,* which abandoned the rule that resale price maintenance was per se illegal. The results have been increased obstacles for discounters, especially Internet-based discounters, to aggressively compete. Fortunately, Senator Herb Kohl has introduced legislation to reverse *Leegin*, and the new Administration should actively support that legislation.

Abandon the Justice Department's Dominant Firm Report.

The culmination of the Bush Administration's antitrust non-enforcement was the issuance of a report on dominant firm conduct last year, which attempted to provide de facto rules of per se legality for dominant firms. The effort to address the concerns of dominant firm conduct began promising with the FTC and DOJ agreeing to a series of joint hearings. But rather than arriving at a consensus with its sister agency, the DOJ chose to go it alone and issue its own report at the close of the Administration.

The Report articulates alleged rules that would basically permit exclusionary conduct by monopolists unless the small firm can demonstrate that the anticompetitive effects are "disproportionately" greater than the procompetitive potential of the exclusionary conduct. The report articulates an extremely narrow view of the law, one in which dominant firm cases would be brought rarely if ever and would almost never succeed. As Jon Jacobson, a former Commissioner of the Antitrust Modernization Commission observed:

> Monopoly power can cause great harm to the national economy through higher prices, lower output, reduced choice, and stunted innovation. The premise underlying the disproportionality test is that monopoly is not really harmful. That premise is unsupported and, in any event, contrary to the fundamental purposes underlying Section 2.

Fortunately, three FTC Commissioners including a Republican and current Chairman Jon Leibowitz issued an 11-page statement resoundingly rejecting the report. The Commissioners identified two "overarching concerns" with the report. First, "the U.S. Supreme Court has declared that the welfare of *consumers* is the primary goal of the antitrust laws. However, the Department's Report is chiefly concerned with firms that enjoy monopoly or near monopoly power, and prescribes a legal regime that places these firms' interests ahead of the interests of consumers. At almost every turn, the Department would place a thumb on the scales in favor of firms with monopoly or near-monopoly power and against other equally significant stakeholders." Second, the Commissioners observe that the report "seriously overstates the level of legal, economic, and academic consensus regarding Section 2." In addition, the Commissioners noted that they were "concerned that voices representing the interests of consumers were not adequately heard," and that the report relied too heavily on economic theory in the consideration of applying antitrust law.[3] Thus, the Commissioners caution that the DOJ's approach if

[3] I note that no small businesses or representatives of consumer organizations were invited to testify at the hearings.

"adopted by the courts, would be a blueprint for radically weakened enforcement of Section 2 of the Sherman Act."

As an antitrust practitioner who was invited to testify before the hearings, I found the report a bit stunning. Certainly there are areas of antitrust enforcement that need reform, and markets that are not behaving entirely competitively. But the area of dominant firm conduct is not one of them. There is barely any evidence that uncertainty in antitrust law has dampened the ability of dominant firms to compete aggressively. The report articulates an extremely narrow view of the law, one in which dominant firm cases would be brought rarely if ever and would almost never succeed. Not only are the standards inconsistent with the law and sound antitrust and economic policy, but these rules would give monopolists free rein to crush new or existing rivals.

The first action of the Clinton Administration's Antitrust Division was to abandon the Reagan Administration's vertical restraint guidelines. Now, the Obama Antitrust Division should abandon the Bush Administration's dominant firm report.

Restore the Ability to Litigate Mergers.

During the past Administration, the Division went to court in far fewer mergers cases, it won only once, and it failed to ascend the courthouse steps for more than five years. Since the Division and the FTC typically would litigate three or four merger cases a year, the lack of merger litigation was truly remarkable. Merger litigation is critical for consumers. To give just one example -- if the Clinton Administration had failed to block the Staples/Office Depot merger, millions of consumers would have paid higher prices for the past 12 years.

The problem with a lack of litigation, of course, is that it weakens the ability to litigate and secure meaningful relief in merger enforcement matters. Moreover, failing to litigate makes each potential case seem ever more daunting. (Fortunately at the close of the Bush Administration, the Division went to court in two merger cases.)

This timidity in merger litigation must be reversed. The Division, like every other part of the Justice Department, prides itself as being the best litigators in Washington, but without the experience, it is difficult to effectively litigate.

And there are certainly areas where litigation may be warranted. As

Presidential candidate Obama observed, enforcement in health insurance was particularly lax, permitting almost all markets to become highly concentrated, leading to higher prices. In telecom, the Division permitted massive consolidation as the baby bells have devoured almost all of their siblings. The Division never challenged a merger based on the loss of potential competition. Similarly, the Division failed to challenge any vertical merger. Vertical arrangements such as those raised in the Ticketmaster-Live Nation merger should receive considerable attention from the Division.

Besides litigation, the Division, along with the FTC needs to both ramp up enforcement and provide guidance in areas left underenforced in the prior Administration. Although the agencies conducted hearings on horizontal mergers, they overlooked many areas of merger enforcement including potential competition, vertical mergers, and mergers raising buyer power concerns. The Guidelines addressing potential competition and vertical mergers were last revised in 1984 and are clearly out of date. These Guidelines need to be revised to recognize the potential anticompetitive concerns in all three of these areas.

Restore the Balance in Healthcare Antitrust Enforcement.

Healthcare is a major priority for the government enforcement agencies accounting for a greater portion of enforcement resources than any other industry. Healthcare antitrust enforcement can play a productive role in the efforts to control healthcare costs and enhance innovation in these markets. Central to sound health care antitrust enforcement is establishing a balance among these important principles: (1) enforcement should focus on the sectors of the healthcare system with the greatest impact on consumers; (2) both monopoly and monopsony power can harm consumers; and (3) enforcement must be balanced with clear guidelines and advice to permit procompetitive conduct.

Yet there are serious concerns about how the agencies' healthcare enforcement resources are utilized. In assessing the federal health care antitrust enforcement program, the American Antitrust Institute observed in its transition team report that "[t]he priorities of the health care enforcement agenda need to be realigned to areas with the greatest impact on consumers. Unlike in prior Administrations, there is a significant imbalance in enforcement priorities between anticompetitive activity by health insurance companies and healthcare providers. In the seven years of the Bush Administration, all non-merger enforcement actions

have involved health care providers, with no enforcement involving health insurers."[4]

Enforcement in the past Administration focused almost entirely on doctors and ignored the problems posed by health care intermediaries, such as health insurers, Group Purchasing Organizations (GPOs), and Pharmacy Benefit Managers (PBMs). All of the 31 Bush Administration enforcement actions against anticompetitive conduct were brought against physicians. There is little evidence that these actions produced significant competitive benefits. Almost 40% of these cases were brought in rural markets, exacerbating the existing challenge of retaining and attracting qualified professionals to those underserved areas.[5] Even the Antitrust Section of the American Bar Association has counseled that the area of enforcement against physicians "is a controversial and relatively murky area."

One might suggest that the significant number of enforcement actions might be evidence of a significant competitive problem. Relying on the number of enforcement actions would be very misleading. Only one of the over 31 cases was litigated. Provider groups rarely have the resources to battle with the government agencies and may find signing a consent a far less costly solution than trying to seek vindication, even if they have not violated the law. And in none of the 31 cases have insurance companies sued for treble damages, suggesting that the insurance companies did not believe they were injured or that the injury was not substantial enough to seek damages. Moreover, there is no evidence of whether the actions enabled health insurers to secure lower rates from providers, or if these lower rates resulted in lower premiums for consumers.

At the same time the Antitrust Division brought no meaningful enforcement actions against anticompetitive or fraudulent conduct by intermediaries, including insurers, GPOs, and PBMs. Much of this lack of enforcement was picked up by state enforcement officials who brought several cases securing significant penalties. The structural problems in these markets became even more severe because of a lack of merger enforcement. As a candidate, President Obama singled out health insurance mergers as a major culprit in undercutting efforts to address increasing healthcare costs. He specifically criticized the Justice Department for taking a lax attitude toward health insurance mergers:

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[4] The complete report is available online at www.antitrustinstitute.org/Archives/transitionreport.ashx.

[5] *See* letter from Beth Landon, President, National Rural Health Association to the Honorable Patrick Leahy and the Honorable Arlen Specter (March 4, 2009)(urging the need for a balanced enforcement agenda in rural health care issues).

> The consequences of lax [antitrust] enforcement for consumers are clear. Take health care, for example. There have been over 400 health care mergers in the last 10 years. The American Medical Association reports that 95% of insurance markets in the United States are now highly concentrated and the number of insurers has fallen by just under 20% since 2000. These changes were supposed to make the industry more efficient, but instead premiums have skyrocketed, increasing over 87 percent over the past six years.

This merger wave hurt small businesses, consumers and healthcare providers. Practically every metropolitan health insurance market is now highly concentrated. A similar trend occurred for PBMs in which three PBMs dominate the market. What has been the result? Near record profits for health insurers and PBMs. And as health insurers have used their market clout to reduce reimbursement for healthcare providers, those providers have increasingly been forced into offering assembly-line health care.

This concentration has led to higher prices, more anticonsumer insurance provisions, greater payment delays, less coverage and poorer service. Increasingly, consumers have appropriately rebelled at the actions of insurers that restrict coverage, manipulate claims processing systems, and find other ways of either refusing to pay or delaying payments. Efforts to regulate health insurers are left to the states, as there is no federal approach to assuring both choice and transparency in these markets.

We do not know about the reasons for the imbalance in enforcement priorities. One reason may be an assumption that the interests of health insurers are coincident with that of consumers. Such a view would be misguided especially when dealing with for-profit insurers that are responsible to their shareholders. Lower rates from providers may simply be pocketed as higher profits, especially where health insurers have market power. And the evidence is indisputable that almost all metropolitan health insurance markets are highly concentrated. Moreover, health insurers are not true fiduciaries for insurance subscribers. Plan sponsors may have a limited concern focusing on the cost of the insurance, and not the quality of care. Consequently, health insurers can increase profits by reducing the level of service and denying medical procedures that physicians would normally perform based on professional judgment. Providers are critical as advocates for the patient, and play a central role in advocating for patient care. Health insurers also prohibit providers from advising patients about medically

necessary procedures that may be covered under other plans through physician "gag" clauses. That is why there have been countless consumer protection actions taken against health insurers. If competition among insurers diminishes, patients are more likely to pay for these procedures out-of-pocket or forego them entirely.

Vital to the functioning of health care markets is the ability of providers to collaborate. The key guidance in this area is joint FTC/DOJ *Statements of Antitrust Enforcement Policy in Health Care*, which were issued in 1996, twelve years ago. The Guidelines are clearly out of date. When the 1996 Guidelines were issued, then FTC Commissioner Varney wrote: "[t]he health care marketplace is undergoing rapid change, and it is primarily through an open dialogue with all involved in the health care industry that the Agencies can continue to provide appropriate and relevant antitrust guidance." Yet that dialogue and the willingness to respond to a rapidly changing marketplace was lost in the past Administration, which seemed to believe the best investment of the taxpayers' enforcement resources was in pursuing a single minded prosecution of health care providers.

Besides the failure to revise the Guidelines the agencies became even more restrictive in granting approval to physician collaborations, approving only three collaborations in the past eight years, substantially less than in the Clinton Administration. In order to meet the agencies' standards for sufficient integration, groups often have to form increasingly large entities of several hundred physicians. That narrow approach dampens procompetitive collaboration and innovation.

How can the imbalance in healthcare enforcement be corrected?

First, the DOJ with the FTC should revise the 1996 Guidelines after a meaningful dialogue with healthcare providers. There is significant room to provide more opportunities for health care providers to collaborate, and the Guidelines need to be revised to facilitate greater forms of collaboration. They can start by permitting efforts to collaborate to improve systems of health IT.

Second, there should be a renewed attention to potentially anticompetitive actions by insurers and other intermediaries such as PBMs. There are various practices by insurers such as most favored nations provisions, all products clauses, and silent networks that deter competition leading to higher prices for consumers. Similarly PBMs have been engaging in various activities such as exclusivity provisions that have led to higher drug prices. Enforcement should focus on the types of conduct which, if challenged, can have the most significant impact on improving competition.

Third, enforcement against healthcare providers should focus on those instances of clearly egregious conduct with a significant impact on consumers. Case selection should be based on evidence of an adverse effect on competition and consumers. That is not to suggest that illegal activity should be given a free pass; rather there should be a focus on those matters with a clear impact on competition.

Finally, the lack of health insurance merger enforcement must be reversed. At the beginning of the Bush Administration, antitrust enforcers faced a similar situation with a failure to successfully challenge hospital mergers. In response the FTC conducted a retrospective study of several consummated hospital mergers to both identify mergers that had led to anticompetitive effects and "to update [the FTC's] prior assumptions about the consequences of particular transactions and the nature of competitive forces in health care." Based on the retrospective, the FTC successfully challenged one consummated merger and more importantly revised and strengthened the approach to litigating these cases. The DOJ should follow the FTC's example and conduct a thorough study of consummated health insurance mergers.

Strengthening Enforcement in Agriculture Markets.

Perhaps in no other market has the lack of enforcement impacted producers as severely as in agriculture markets. Increasingly the lack of merger enforcement means that farmers and other agricultural producers pay more for inputs, such as grain, feed and fertilizer, and receive less when they sell their goods to processors. Food prices may be increasing but economic evidence suggests that today's farmers are not benefitting from those higher prices.

Moreover, agricultural processing markets are a fertile territory for deceptive and exclusionary practices. Often agricultural processors are vertically integrated and their ability to control supply permits them to manipulate the price for food products. In addition, the conduct in processing markets is opaque, providing the opportunity for processors to engage in deceptive or unfair practices.

Not surprisingly, in no other area have there been as many Congressional hearings in the past 12 years on competition issues as in agriculture. There clearly is a significant disconnect between the expectations of Congress and farmers and enforcement. As Professor Peter Carstensen noted in testimony on the JBS/National merger that attempted to combined two of the largest beef

processors: "there are serious problems of market failure in agriculture directly related to the high and increasing levels of concentration in the industries buying from and supplying farmers and ranchers."

The lack of merger enforcement is critical. With the exception of last year's JBS/National merger, the DOJ has not challenged any agricultural processing mergers in ten years. In the past 12 years, there has been no enforcement against anticompetitive practices and no criminal enforcement actions in the agricultural industry. Moreover, in a recent dairy merger, the Division did not require a consent decree, but rather allowed the parties to create a private agreement. There is evidence today that those parties have violated this agreement, which could have serious implications for small dairy producers in the future.

How can the lack of enforcement be reversed?

First, the DOJ should convene a task force on competition issues that should include representatives of the Department of Agriculture, and the FTC to provide a broad assessment of competitive problems in agriculture markets. This task force should take evidence and hold hearings on the current state of competition in agriculture markets. A key priority of the task force should be to determine if the agencies have the statutory powers under the antitrust laws, the Agricultural Marketing Agreement Act (the source of USDA's milk market regulatory authority), and the Packers and Stockyards Act to challenge effectively the full range of competitively harmful practices. These practices include price manipulation in commodity markets affecting transaction prices (e.g., the price of the very small quantity of cheese sold on the Chicago Mercantile Exchange directly controls the price of all milk purchases in the United States), refusals to deal on equal terms with all willing sellers, use of exclusive buying arrangements to foreclose market access, and tacit (or perhaps even express) collusion to allocate markets among buyers.

Second, the DOJ should conduct a retrospective study of consummated agricultural mergers. In particular, the DOJ should monitor recent mergers approved in the past Administration such as Monsanto/Delta Pine and JBS/Smithfield to determine if the mergers resulted in higher prices or other anticompetitive effects.

Third, the DOJ should take a stricter approach to mergers in agricultural input markets and mergers that may lead to the exercise of buyer power in

processing markets. This includes developing and using market definitions appropriate to buyer-side market analysis.

Fourth, the DOJ should take a much more proactive, investigative role in examining the exclusionary and exploitive conduct of the major buyers of agricultural commodities especially in dairy, livestock, and poultry. In doing so it should take account of the fact that buyer power exists at lower market shares and in geographically more circumscribed markets. Hence, buyer power in agriculture may present more pervasive risks of anticompetitive conduct.

Returning Enforcement in Telecom Markets.

In the telecommunications sector, consumers and competitors have fallen into a black hole between antitrust and regulation. On the one hand, antitrust authorities have allowed a long series of mergers that resulted in the effective resurrection of the Ma Bell monopoly on a regional basis. At the same time the FCC's implementation of the Telecommunications Act of 1996 has failed to open the local market to effective competition. On the other hand, the courts have said that the existence of regulation precludes claims of anticompetitive conduct. While the DOJ cannot address the failure of regulation to prevent exclusionary conduct by the dominant telecommunications companies, it can address the anticompetitive results of the past eight years.

The DOJ has relied on theories of intermodal competition to allow incumbent local exchange carriers to acquire contiguous dominant local carriers and well as large, head-to-head competitors. Moreover, the DOJ created a theory of a "dynamic duopoly" that suggests that two competitors are sufficient for competition in any telecom market. Unfortunately, intermodal competition has proven to be far less effective than head-to-head competition in disciplining market power. The DOJ has also failed to recognize the potential harmful effects of vertical market power in an industry with strong complementarities in product markets.

The economic theory that allowed these mergers to occur must be abandoned to avoid further harm in this and other sectors. Moreover, recognizing the failure of this lax merger policy and admitting the dramatic increase in market power that has resulted from these mergers will enable the antitrust authorities to begin to take action against anticompetitive and anti-consumer practices under different sections of the antitrust laws. Thus, a return to traditional values and

models in the merger space is a key pillar on which broader reform and reinvigoration of antitrust enforcement should be based.

At the same time, the Supreme Court has weakened the potential for antitrust enforcement through decisions like *Trinko* that eliminate antitrust litigation as a solution because of the existence of a regulatory structure. Unfortunately, these decisions fail to understand how lax regulation has become. The DOJ should work with Congress to overturn those decisions.

The problem of mergers leading to excessive concentration and antitrust exemptions afforded to industries that were formerly regulated is not limited to the communications sector and should be addressed in other sectors. One particularly egregious example is in the rail sector, where blatantly anticompetitive conditions called paper barriers have been imposed on short lines when they were spun off from major national railroads. Indeed, the railroad industry is one of the most extreme examples of the creation of market power through mergers without any protection for consumers. There are only two dominant railroads in the east and two in the west, which impose "non-compete" clauses on short lines created by spin offs and refuse to compete on price, yet they are exempt from the antitrust laws. This Committee recently came out in support of eliminating the antitrust exemption in the railroad industry with the approval of S. 146, The Railroad Antitrust Enforcement Act, and that statutory change deserves careful evaluation by Congress.

Legislative Reform to Strengthen Antitrust Enforcement.

The antitrust laws have stood the test of time as general statutes to protect competition. Yet at times it is necessary to reform the law, so that it can better fulfill the Congressional intent to protect competition. Any observer of recent Supreme Court decisions, which have narrowed the law in 15 consecutive decisions in favor of defendants, must be concerned over the future of antitrust enforcement. As the American Antitrust Institute, the leading advocacy group for antitrust enforcement, noted after last month's *linkLine* decision:

> This decision highlights the need for Congress to resuscitate the antitrust laws, which have been left for dead in the Supreme Court. Otherwise, the

> new administration's plans to reinvigorate antitrust enforcement may well be stymied by a hostile Supreme Court.[6]

This Committee should carefully evaluate the impact of these recent decisions on the antitrust laws. It is worth recalling the guidance of the late Justice Thurgood Marshall that the:

> antitrust laws in general, and the Sherman Act in particular, are the **Magna Carta of free enterprise**. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete - to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

It is difficult to reconcile these recent decisions of the Court with Justice Marshall's vision. This Committee should consider the impact of the recent Supreme Court decisions on the future for antitrust enforcement, competition, and consumers. As discussed earlier, this evaluation should begin by considering the need for legislation to reverse the Court's decision in *Leegin Creative Leather Products.*

This Committee should also consider two more basic reforms that will strengthen antitrust enforcement. First, in 2004 Congress reformed the Tunney Act procedures with the hope and expectation that those reforms would give courts greater ability to evaluate whether a proposed final judgment is in the public interest. Pub. L. 108-237, § 221(b)(1) (2004). As the statute provided, "[I]t would misconstrue the meaning and Congressional intent in enacting the Tunney Act to limit the discretion of district courts to review antitrust consent judgments solely to determining whether entry of those consent judgments would make a 'mockery of the judicial function.'" Pub. L. 108-237, § 221(a)(1)(B). Yet in several Tunney Act proceedings the Antitrust Division argued that the courts' review was limited to whether the proposed remedy fulfilled the competitive issues raised in the complaint. The position of the Division was that courts cannot go beyond the scope of the complaint, and the courts have adopted the restricted view that their review is limited to the "mockery of the judicial function" standard. Congress should amend the Tunney Act to clearly provide for a court to have the complete

[6] "AAI issues Statement on Supreme Court's *linkLine* Decision." (Feb. 27, 2009), available at http://www.antitrustinstitute.org/Archives/linkline_decision.ashx

power to review whether a proposed decree is in the public interest.

Second, Congress needs to extend a provision reducing treble damage liability for those firms participating in the Division's immunity program. The Division's immunity program is the most effective tool in its criminal enforcement program. In 2004, Congress created an additional incentive for firms to disclose illegal price fixing and participate in the Division's Corporate Leniency Policy by limiting any civil damages recovery from a corporate amnesty applicant to "actual damages sustained . . . attributable to the commerce done by the applicant in the goods or services affected by the violation." Pub. L. No. 108-237, § 213, 118 Stat. 661, 666-67 (2004). This provision increases the incentives of firms to disclose illegal conduct. Unfortunately, this provision will sunset on June 23, 2009, five years after its passage, unless Congress renews it. *See id.* § 211(a). Congress should act to renew the damage provision for those firms that participate in the immunity program.