IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civil Action No. 95-1211(CRR)
v.	)	
AMERICAN BAR ASSOCIATION,	)	
Defendant.	)	

UNITED STATES' RESPONSE TO PUBLIC COMMENTS

Pursuant to the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), the United States is filing this Response to public comments it has received relating to the proposed Final Judgment in this civil antitrust proceeding. The United States has carefully reviewed the public comments on the proposed Final Judgment. Entry of the proposed Final Judgment, with some limited modifications, will be in the public interest. After the comments and this Response have been published in the Federal Register, under 15 U.S.C. § 16(d), the United States will move the Court to enter the proposed Final Judgment.

This action began on June 27, 1995 when the United States filed a Complaint charging that the American Bar Association ("ABA") violated Section 1 of the Sherman Act, 15 U.S.C. § 1, in its accreditation of law schools. The Complaint alleges that the ABA restrained competition among professional personnel at ABA-approved law schools by fixing their compensation levels and

working conditions, and by limiting competition from non-ABA-approved schools. The Complaint also alleges that the ABA allowed its law school accreditation process to be captured by those with a direct interest in its outcome. Consequently, rather than setting minimum standards for law school quality and providing valuable information to consumers, the legitimate purposes of accreditation, the ABA acted as a guild that protected the interests of professional law school personnel.

Simultaneously with filing the Complaint, the United States filed a proposed Final Judgment and a Stipulation signed by the defendant consenting to the entry of the proposed Final Judgment, after compliance with the requirements of the APPA.

Pursuant to the APPA, the United States filed a Competitive Impact Statement ("CIS") on July 14, 1995. The defendant filed a Statement Of Certain Communications on its behalf, as required by Section 16(g) of the APPA, on July 12, 1995, and amended its statement on October 16, 1995. A summary of the terms of the proposed Final Judgment and CIS, and directions for the submission of written comments relating to the proposal, were published in The Washington Post for seven days from July 23, 1995 through July 29, 1995. The proposed Final Judgment and the CIS were published in the Federal Register on August 2, 1995. 60 Fed. Reg. 39421-39427 (1995). The 60-day period for public comments began on August 3, 1995 and expired on October 2,

1995.[1] The United States has received 41 comments, which are attached as Exhibits 1-41.

I. BACKGROUND

The proposed Final Judgment is the culmination of a year-long investigation of the ABA. The Justice Department interviewed numerous law school deans, university and college presidents, and others affected by the ABA's accreditation processes. Twenty-seven depositions were conducted pursuant to Civil Investigative Demands ("CIDs") the Department issued. In addition, the Department reviewed over 500,000 pages of documents in connection with this investigation.

At the conclusion of its investigation, the Department determined that the ABA accreditation process and four specific rules arising from that process violated the Sherman Act. The Department challenged the four rules and, more importantly, the accreditation process itself, and it negotiated a proposed Final Judgment with the defendant that adequately resolves its competitive concerns. The ABA indicated its willingness to reform its accreditation process before the Complaint was filed. After preliminary discussions with the Department, the ABA began to implement the reforms. The Department, however, insisted that the elimination of anticompetitive behavior should be subject to the terms of a court-supervised consent decree.

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[1] The United States has treated as timely all comments that it received up to the time of the filing of this Response.

The focus of this case was the capture of the ABA's law school accreditation process by those who used it to advance their self-interest by limiting competition among themselves and from others. The case was not based on any determination by the Department of Justice as to what, specifically, most individual accreditation rules should provide. The Department is not particularly qualified to make such an assessment and has not attempted to do so. The Department concluded that the process that had produced the present rules was tainted. The appropriate solution - and the relief imposed by the proposed decree - was to reform the process, removing the opportunity for taint, and then to have the cleansed process establish new rules.

II. THE LEGAL STANDARD GOVERNING THE COURT'S PUBLIC INTEREST DETERMINATION

A. General Standard

When the United States proposes an antitrust consent decree, the Tunney Act requires the court to determine whether "the entry of such judgment is in the public interest." 15 U.S.C. § 16(e) (1988). As the D.C. Circuit explained, the purpose of a Tunney Act proceeding "is not to determine whether the resulting array of rights and liabilities `is one that will best serve society,' but only to confirm that the resulting settlement is 'within the reaches of the public interest.'" U.S. v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir. 1995) (emphasis in original); accord, United States v. Western Elec. Co., 993 F.2d 1572, 1576 (D.C. Cir.), cert. denied, 114 S. Ct. 487 (1993); see also United

States v. Bechtel, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975).[2] Hence, a court should not reject a decree "unless 'it has exceptional confidence that adverse antitrust consequences will result -- perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency.'" Microsoft, 56 F.3d at 1460 (quoting Western Elec., 993 F.2d at 1577). Congress did not intend the Tunney Act to lead to protracted hearings on the merits, and thereby undermine the incentives for defendants and the Government to enter into consent judgments. S. Rep. No. 298, 93d Cong. 1st Sess. 3 (1973).

Tunney Act review is confined to the terms of the proposed decree and their adequacy as remedies for the violations alleged in the Complaint. Microsoft, 56 F.3d at 1459. The Tunney Act does not contemplate evaluating the wisdom or adequacy of the Government's Complaint or considering what relief might be appropriate for violations that the United States has not alleged. Id. Nor does it contemplate inquiring into the Government's exercise of prosecutorial discretion in deciding whether to make certain allegations. Consequently, a district court exceeds its authority if it requires production of information concerning "the conclusions reached by the

[2] The Western Elec. decision involved a consensual modification of an antitrust decree. The Court of Appeals assumed that the Tunney Act standards were applicable in that context.

Government" with respect to the particular practices investigated but not charged in the Complaint, and the areas addressed in settlement discussions, including "what, if any areas were bargained away and the reasons for their non-inclusion in the decree." Id. at 1455, 1459. To the extent that comments raise issues not charged in the Complaint, those comments are irrelevant to the Court's review. Id. at 1460. The Court's inquiry here is simply whether the accreditation process set in place by the proposed decree will cure the taint of self-interest that, the Complaint alleges, had infected the process.

In addition, no third party has a right to demand that the Government's proposed decree be rejected or modified simply because a different decree would better serve its private interests in obtaining accreditation or being awarded damages. For, as this Circuit has emphasized, unless the "decree will result in positive injury to third parties," a district court "should not reject an otherwise adequate remedy simply because a third party claims it could be better treated." Microsoft, 56 F.3d at 1461 n.9.[3] The United States--not a third party--represents the public interest in Government antitrust cases. See, e.g., Bechtel Corp., 648 F.2d at 660, 666; United States v. Associated Milk Producers, 534 F.2d 113, 117 (8th Cir.), cert.

[3] Cf. United States v. Associated Milk Producers, Inc., 534 F.2d 113, 116 n.3 (8th Cir.) ("The cases unanimously hold that a private litigant's desire for [the] prima facie effect [of a litigated government judgment] is not an interest entitling a private litigant to intervene in a government antitrust case."), cert. denied, 429 U.S. 940 (1976).

denied, 429 U.S. 940 (1976). The decree is intended to set in place a fair process that will produce fair results for those seeking accreditation. It is not designed to transfer to the Department the process of accreditation itself and require the Department to determine who should or should not be accredited.

Moreover, comments that challenge the validity of the Government's case and assert that it should not have been brought are beyond the scope of this Tunney Act proceeding. It is not the function of the Tunney proceeding "to make [a] de novo determination of facts and issues" but rather "to determine whether the Department of Justice's explanations were reasonable under the circumstances" for "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." Western Elec., 993 F.2d at 1577 (internal quotations omitted). Courts have consistently refused to consider "contentions going to the merits of the underlying claims and defenses." Bechtel, 648 F.2d at 666.

B. Special Commission

Finally, the fact that the consent decree includes a condition that will occur after its entry is not a bar to its entry now. Many courts have approved consent decrees requiring defendants, after entry of the decree, to take actions that must be approved by the Government or the court. For example, courts have entered consent decrees with provisions requiring defendants

to divest assets within a certain time period after entry of the decree to a company approved by the Government and requiring the court to oversee divestiture by a trustee if the defendant did not meet the divestiture deadline. In United States v. Browning-Ferris Industries, 1995-2 Trade Cas. (CCH) ¶ 71,079 (D.D.C. 1995) (Richey, J.), this Court entered a decree requiring the defendant to divest assets within 90 days after entry, unless the Government agreed to a partial divestiture. The decree gave the Government authority to determine whether the buyer was a viable competitor. Moreover, if Browning-Ferris did not meet the 90-day deadline, the Court would appoint a trustee whose activities the Court would oversee. Id. at pp. 75,166-67. Several courts have entered very similar decrees. E.g., United States v. Baroid Corp., 1994-1 Trade Cas. (CCH) ¶ 70,572 (D.D.C. 1994); United States v. Outdoor Systems, Inc., 1994-2 Trade Cas. (CCH) ¶ 70,807 (N.D. Ga. 1994); United States v. Society Corp., 1992-2 Trade Cas. (CCH) ¶ 68,239 (N.D. Ohio 1992) (similar decree provisions); United States v. General Adjustment Bureau, Inc., 1971 Trade Cas. (CCH) ¶ 73,509 (S.D.N.Y. 1971); United States v. Mid-America Dairymen, 1977-1 Trade Cas. (CCH) ¶ 61,509 (W.D. Mo. 1977) (mandating divestiture within two years after entry and allowing Government to object to proposed sale in court).

Other decrees have included conditions that must be implemented after their entry. In United States v. Baker Commodities, Inc., 1974-1 Trade Cas. (CCH) ¶ 74,929 (C.D. Cal. 1974), the district court entered a decree requiring each

consenting defendant, within 90 days after entry, to independently re-establish its prices and to file with the court and the United States an affidavit stating that they have complied. Moreover, within two years after entry, defendant Baker was required to divest certain interests to a person approved by the Government or the Court upon a proper showing by Baker. Id. at pp. 96,160-61. Finally, if the Government objected to certain future acquisitions, then the court would decide the matter, with Baker having to show that the acquisition would not substantially lessen competition. Id. This is akin to the hearing that could ensue here if the Government challenged the Special Commission's revisions as antitrust violations.[4]

In other cases, decrees have required defendants, after entry of the decree, to eliminate from their bylaws or codes any sections that are inconsistent with the decree. E.g., United States. v. American Inst. of Architects, 1990-2 Trade Cas. (CCH) ¶ 69,256 (D.D.C. 1990) (Richey, J.); United States v. Hawaii Island Contractors' Ass'n, 1988-1 Trade Cas. (CCH) ¶ 68,021 (D. Hawaii 1988); United States v. Society of Authors' Reps., 1982-83 Trade Cas. (CCH) ¶ 65,210 (S.D.N.Y. 1982). In addition,

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[4] See also United States v. Primestar Partners, L.P., 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994) (decree prohibited defendant, after entry, from taking programming actions without prior Government approval); United States v. Pilkington PLC, 1994-2 Trade Cas. (CCH) ¶ 70,842 (D. Ariz. 1994) (defendants forbidden after entry to assert certain patent claims except upon proper showing to Government); United States v. Industrial Electronic Engineers, 1977-2 Trade Cas. (CCH) ¶ 61,734 (C.D. Cal. 1977) (decree required defendant, within 90 days after entry, to write a policy statement approved by Government).

defendants have been ordered to independently re-establish their prices after the decree is entered and to file statements with the Government explaining their basis. E.g., United States v. Brownell & Co, Inc., 1974-1 Trade Cas. (CCH) ¶ 74,945 (W.D. Tenn. 1974); United States v. First Washington Net Factory, Inc., 1974-1 Trade Cas. (CCH) ¶ 74,941 (N.D. Ala. 1974); United States v. Capital Glass & Trim Co., 1973-1 Trade Cas. (CCH) ¶ 74,388 (M.D. Ala. 1973).

III. ENTRY OF THE DECREE IS IN THE PUBLIC INTEREST

Entry of the proposed decree is clearly well within the reaches of the public interest under the standards articulated in Microsoft and other decided cases. It prevents the ABA from fixing faculty compensation and from enforcing its boycott barring ABA-approved law schools from offering transfer credit for courses completed at state-accredited law schools and enrolling in their LL.M. programs graduates of state-accredited law schools and members of the bar. Most important, the proposed consent decree ends the capture of the accreditation process.

Much as in most cases, the decree here requires subsequent action that does not necessitate delay in its entry. The problem identified in the Complaint - the capture of the ABA's accreditation process - has been eliminated. Absent that capture problem, the ABA should be allowed to set standards in areas principally involving educational policy. This Court retains jurisdiction to ensure that the ABA's Special Commission does not

produce standards that are the product of capture. Nothing more is legally required.

We received over 40 comments, which we have divided into seven categories: other accrediting agencies; faculty; university administrators; law schools not approved by the ABA; graduates and students at non-ABA approved law schools; practicing attorneys; and the general public.

A substantial number of the comments raise educational policy questions and are directed to issues outside the allegations in the Complaint. For example, they propose the ABA require additional clinical education, modify the rules about required seating in the library, or use bar passage rates to assess law school quality. Such comments, while relevant to educational policy, go beyond the allegations in the Complaint. Hence, they are not relevant to the Tunney Act proceeding. Other comments criticize the Government for bringing suit or argue that the Complaint is not justified. For example, the former ABA Consultant on Legal Education contends that the ABA has not conspired to fix faculty salaries. But comments about the underlying merits and defenses are irrelevant in a Tunney Act proceeding, as explained above. In addition, some commentators complained about state rules requiring approval from an ABA-accredited law school prior to taking the bar examination. Others complain about other state government activities. Under Parker v. Brown, 317 U.S. 341 (1943), such state actions are exempt from antitrust prosecution. Some state-accredited law

school students and graduates complained about ABA-approved law schools denying them transfer credit or refusing to admit them to LL.M. programs. The decree stops the ABA from forbidding law schools from offering such credit or enrolling these students. But the individual decision of whether to do so remains up to the individual school.

Furthermore, some commentators worried that the decree prevents accrediting agencies from assessing the quality of educational institutions engaging in legitimate accreditation activities. The decree is directed only at the activities of the ABA. By preventing the ABA from violating the antitrust laws, the decree ensures that the ABA will engage in the legitimate accreditation activity of assessing the quality of legal education programs. Four accrediting agencies argued that the proposed decree is inconsistent with the Marjorie Webster decision and that there may be an implied repeal of antitrust enforcement because accreditation is regulated by the Department of Education. Marjorie Webster Junior College Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc., 432 F.2d 650 (D.D. Cir.), cert. denied, 400 U.S. 965 (1970). But Marjorie Webster itself held that antitrust laws would apply to restrictions with a commercial motive and practices that fix compensation and enforce a boycott have. In addition, the agencies' Marjorie Webster argument goes directly to the merits of the underlying claims and defenses, an inquiry that is irrelevant in a Tunney Act proceeding, as noted above.

Furthermore, under the case law, there is no implied repeal and the Department of Education has specifically deferred to the Justice Department on the antitrust issues.

The Massachusetts School of Law ("MSL"), a private plaintiff in antitrust actions in Pennsylvania and Massachusetts, recommends altering the decree, delaying its entry, and requests the production of documents from the Government's files. The Government opposes the modifications and recommends no delay in entering the decree. Some of MSL's comments go beyond the allegations in the Complaint. While MSL may believe that its recommended changes are the ones that will "best serve society," the issue in a Tunney Act proceeding is only whether the settlement is "within the reaches of the public interest." Microsoft, 56 F.3d at 1460. No third party may demand that the proposed decree be rejected or modified just because a different decree would better serve its private interests. We further oppose MSL's discovery request, as we believe it is improper to grant discovery collaterally in a Tunney Act proceeding to a party whose discovery requests have been denied in its own case.

The parties' agreement that the Special Commission should have the first opportunity to report on issues that involve education and antitrust policies is a reasonable accommodation. That the Special Commission's report, ABA Board approval, and a possible Justice Department challenge will occur after entry of the decree is no bar to entry of the decree now. The decree prohibits a number of practices for which there were no apparent

educational policy justifications. The accreditation standards on which the Special Commission will report do not on their face constitute naked antitrust restraints, but the Government seriously questioned the process by which these standards were administered. The defendant had taken measures to reform its accreditation process before agreeing to the consent decree and affording it the first opportunity to address the remaining issues is a reasonable compromise. The public has had the opportunity to comment on the process and on the subject matter of these issues, although only a few chose to do so. The Special Commission's report will be made public and third parties will have the opportunity to provide the Justice Department with possible objections.[5]

Because the proposed decree is within the scope of the public interest, the Court should enter it after the Government's responses to the public comments are published in the Federal Register and the Government certifies compliance with the APPA and moves for entry of judgment.

IV. RESPONSE TO PUBLIC COMMENTS

This case has generated a large number of comments, despite the absence of any apparent organized effort to solicit comments. Because of the number of comments, the Government has organized

[5] Additionally, as part of its supervisory powers, the Court could, after entry of the decree, require the parties to report on the Special Commission's report.

its Response based on the categories of those who submitted comments.

A. Other Accreditation Agencies

The Department received five comments from other accrediting agencies and one from an individual who has headed an accrediting agency since 1973. These comments are generally critical of the severity of the proposed Final Judgment and are concerned with its possible effect on the practices of other accrediting agencies.

1-2. The Association of Specialized and Professional Accreditors ("ASPA") (Exhibit 1), and National Office for Arts Accreditation in Higher Education (Exhibit 2)

ASPA is an umbrella organization with a membership of 40 specialized accrediting agencies (one of which is itself an umbrella agency for 17 allied organizations). The National Office for Arts Accreditation in Higher Education consists of four separate accrediting agencies for schools of art and design, music, theater, and dance. ASPA believes that the consent decree could produce "unintended consequences" for other accrediting agencies by equating the presence of expertise in an accreditation area with its automatic capture by a vested interest and criticizes the data collection and other limitations imposed by the consent decree as unnecessarily restrictive or unnecessarily prescriptive. ASPA fears that the requirements of the consent decree will create a climate in which fraudulent

institutions may use "antitrust terrorism" against accrediting agencies.

We share ASPA's concern that this action should not be used to diminish accreditation's legitimate role as a guarantee of quality and a source of information to the public. The requirements of the proposed Final Judgment apply only to the defendant and only for the duration of the decree. The terms of the decree are designed to remedy the defendant's anticompetitive practices. They are not meant to be a generalized prescription for other accrediting agencies.

The limitations in the decree on the collection and use of certain data are directed only to remedy the defendant's conduct. The ABA required law schools to respond to detailed annual and site inspection questionnaires that included providing extensive salary data. The defendant used the data to raise the salaries of law school deans, full-time faculty, and professional librarians during the accreditation process. Because of this abuse, the proposed consent decree prohibits the defendant from conditioning accreditation on the compensation paid professional personnel or collecting salary data that could be used to determine individual salaries.

Nor does the Government seek to discourage the participation of individuals with "professional expertise" in the accreditation process and the consent decree will not have that effect. The defendant permitted its accreditation activities, however, to be captured by legal educators who used it to advance their own

personal interests. The proposed consent decree remedies the defendant's abuses. The Government is not suggesting it apply to other accrediting agencies whose accreditation processes promote quality rather than the self-interest of a group that controls the process.[6]

ASPA's concern that the proposed consent decree may promote "antitrust terrorism" against accrediting agencies by institutions seeking accreditation is unwarranted. This is the first Justice Department antitrust case brought against an accrediting agency in the 105-year history of the Sherman Act. The Government cannot prevent the filing of meritless or harassing actions by private institutions, but does note that such actions are costly to the plaintiff, and meritless actions are subject to court sanctions.

Finally, ASPA points out that some of the requirements of the proposed Final Judgment may conflict with the requirements of the Higher Education Act. The Justice Department consulted with the Department of Education concerning this objection. Sections VI(C)(1), (D)(1) and E(1) of the decree require that elections and appointments to the Council, the Accreditation Committee, and the Standards Review Committee of the Section of Legal Education and Admission to the Bar ("Section of Legal Education") must be subject to the approval of the ABA's Board of Governors ("Board")

[6] ASPA questions other specific consent decree provisions, not because they are unwarranted in this proceeding, but because their application to other accrediting agencies would produce bad results. The provisions of the proposed Final Judgment, of course, apply only to the ABA.

for a period of five years. This provision appears to conflict with 20 U.S.C. § 1099b, requiring accrediting agencies to be "separate and independent" of related trade associations. The Department of Education recognizes the Section of Legal Education as a specialized accrediting agency for law schools and has determined that the ABA is a related trade association from which the Section must be "separate and independent." Giving the ABA's Board power to "approve" elections and appointments to the Section's Council and Committees thus may breach the "separate and independent" requirement of § 1099b. Consequently, the United States and the ABA have proposed to modify the decree by substituting a notification requirement in Section VI for the approval requirement.[7] The parties intended that these and other requirements in the proposed consent decree would assist in the ABA's oversight of the Section of Legal Education's accreditation activities. Changing the approval requirement should not impair the ABA's oversight while simultaneously ensuring that the requirement of 20 U.S.C. § 1099b is not offended.

The National Office for Arts Accreditation joins in ASPA's comments. The National Office is particularly concerned that the Justice Department may be setting an inappropriate precedent or providing loopholes that may prevent accrediting bodies from working effectively with problem institutions. While we are sympathetic to the National Office's concern, the Justice Department believes that the remedies in the proposed consent

[7] The proposed modification is attached as Exhibit 42.

decree are directed just to the facts in this case, not to the activities of other accrediting agencies. The Department does not believe that effective antitrust enforcement - which requires entry of the relief in this case - is at all incompatible with quality accreditation.

3. Association of Collegiate Business Schools and Programs ("ACBSP") (Exhibit 3)

ACBSP has 500 business school members and is one of two accrediting agencies in the business school area. ACBSP commented that a number of States require that their state business schools must obtain accreditation from the other business school accrediting agency, thereby locking out ACBSP. The actions of States are exempt from the antitrust laws under the "state action" doctrine announced in Parker v. Brown, 317 U.S. 341 (1943), and its progeny. Consequently, the activities ACBSP complains of are beyond the reach of antitrust enforcement and outside of the matters in the Complaint.

4. American Library Association ("ALA") (Exhibit 4)

The ALA commented on two points: the size and composition of accreditation site inspection teams; and the proposed consent decree's effect on accreditation agencies' functions. Without citing specific examples, the ALA believes that the remedies in the consent decree are overly prescriptive and may promote a bureaucratic and regulatory environment antithetical to the analysis and accreditation of higher education. The consent

decree should not affect the composition of ALA accreditation teams or its accreditation practices. The decree is designed to ensure that the accreditation process proceeds on the basis of legitimate academic concerns; the decree does not confine or constrain the process in any other way.

5. Bernard Fryshman (Exhibit 5)

Dr. Fryshman has headed a nationally-recognized accrediting body since 1973 and has been very active in the accreditation field.[8] Dr. Fryshman's principal point is that the cooperative nature of higher education is intended to produce different bottom-line results than commercial enterprises. Accordingly, Dr. Fryshman believes that higher education should not be judged under antitrust standards. In his wide-ranging comment, Dr. Fryshman appears to question the applicability of the antitrust laws to any of the defendant's practices challenged in this action, including the imposition of higher salaries. Dr. Fryshman suggests a review of the corrective actions in the proposed consent decree.

Admittedly, higher education differs in some important respects from commercial enterprises; but it is a significant and growing part of the national economy. While this Circuit has held that the antitrust laws do not apply to the "non-commercial" aspects of post-secondary accreditation, Marjorie Webster, 432

[8] We believe that Dr. Fryshman's agency accredited rabbinical and Talmudic schools.

F.2d at 650, the efforts of an accrediting agency to fix the salaries and perquisites of professional staff and engage in other guild activities unrelated to quality assurance are clearly commercial activities that restrain trade. We agree with Dr. Fryshman that it is "inappropriate for government to determine how lectures are to be delivered, what books are to be read and what facilities are appropriate," but disagree that antitrust enforcement has no role in eliminating anticompetitive distortions of the process.

6. Accrediting Bureau of Health Schools, Accrediting Council of Continuing Education & Training, Accrediting Council for Independent Colleges and Schools, and National Accrediting Commission of Cosmetology Arts & Sciences ("Four Agencies") (Exhibit 6)

These Four Agencies have filed a joint comment and request a hearing concerning possible modification and entry of the proposed Final Judgment. The Four Agencies suggest that the proposed consent decree is inconsistent with the Marjorie Webster decision and that there may be an "implied repeal" of antitrust enforcement in this area because accreditation is regulated by the Department of Education. The Four Agencies request that Section XI(C) of the proposed Final Judgment be amended by adding: "Nothing in this judgment shall be construed to modify any of the provisions of the Higher Education Act of 1965, as amended, or any of the regulations adopted pursuant thereto, or any existing law concerning the recognition of private

accrediting agencies, or the activities of such agencies relating thereto."

This Circuit's decision in Marjorie Webster does not prevent the Court from finding entry of this proposed consent decree is in the public interest. In Marjorie Webster, the Court held that an accrediting agency's refusal to accredit a junior college solely because it was organized as a for-profit corporation did not violate the antitrust laws because the Sherman Act does not apply to the noncommercial aspects of the liberal arts.[9] The Court noted that antitrust policy would be applicable to restrictions that had a commercial motive. 432 F.2d at 654-55.[10]

An institution's form of organization should not be the basis for totally excluding it from an industry, including the provision of a legal education. Significantly, the ABA eliminated its Accreditation Standard 202, which denied the accreditation of for-profit law schools, during the Justice Department's investigation. In its enforcement activities in industries in which some competitors are organized as not-for-profits and some as for-profits (e.g., hospitals), the Antitrust

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[9] In reaching its decision, the Court doubted that Marjorie Webster "will be unable to operate successfully . . . unless considered for accreditation," 432 F.2d at 657; Marjorie Webster has since passed from existence. The Court also noted that the defendant did not possess monopoly power over accreditation, something the ABA clearly possesses in the 42 States where graduation from an ABA school is a prerequisite to taking the bar examination.

[10] In fact, in a civil antitrust action, liability may be shown by proof of either an unlawful motive or an anticompetitive effect. United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13 (1978).

Division does not find that an entrant's particular form of organization is of decisive significance in antitrust analysis. Nor do courts. See United States v. Rockford Mem. Corp., 898 F.2d 1278 (7th Cir. 1990), cert. denied, 498 U.S. 920 (1990); FTC v. University Health, Inc., 938 F.2d 1206, 1214-16 (11th Cir. 1991). Since the ABA has already abandoned Standard 202, since its "market power" is significantly greater than that of the defendant in Marjorie Webster, and since entry into the law school field should not be unreasonably restricted, the Four Agencies' comment that the relief in the proposed Final Judgment is inconsistent with Marjorie Webster is incorrect and, therefore, no bar to the Court's finding that entry is in the public interest.

Subsequent to Marjorie Webster, the Supreme Court held that the Sherman Act applies to all anticompetitive restraints, regardless of the non-profit status of the defendant. Goldfarb v. Virginia State Bar, 421 U.S. 773, 787-89 (1975). To the extent Marjorie Webster suggests a "liberal arts" exemption from the antitrust laws, that suggestion has been rejected. As one district court observed, "Marjorie Webster is of questionable vitality after Goldfarb, to the extent that it draws a bright lines between education and business or accreditation policy and commerce." Welch v. American Psychoanalytic Ass'n, 1986-1 Trade Cas. (CCH) ¶ 67,037 (S.D.N.Y. 1986).

The Four Agencies also contend that there is an "implied immunity" from the antitrust laws for the activities of

accrediting agencies because they are subject to Department of Education oversight. The implied immunity doctrine is not nearly so broad as the Four Agencies would suggest. The leading case on this point is the Supreme Court's decision in National Gerimedical Hospital v. Blue Cross, 452 U.S. 378 (1981). Prior to Gerimedical, the Supreme Court had held that antitrust repeal was implied only if necessary to make the regulatory statute work, and even then only to the minimum extent necessary. Silver v. New York Stock Exchange, 373 U.S. 341 (1963). In Gerimedical, the Supreme Court clarified this standard, holding that: "Implied antitrust immunity is not favored and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." 452 U.S. at 390-91 (emphasis added). The Four Agencies have not, and cannot, make this clear showing.[11] Indeed, in the Department of Education's "Staff Analysis of the ABA's Section of Legal Education's Interim Report on its Standards to DOE and Massachusetts School of Law's Complaint," the staff noted:

> One aspect of MSL's complaint against the Council that is totally outside of the Department's purview is the charge that the Council has violated federal anti-trust laws for the economic benefit of law professors, law deans, and law librarians but to the detriment of

[11] In an advisory opinion, the Federal Trade Commission informed another accrediting agency, the Accrediting Commission on Career Schools and Colleges of Technology, that the 1992 Higher Education Act Amendments, specifically, 20 U.S.C. § 1099b(a)(5), relied upon by the Four Agencies, conveyed no implied repeal of the antitrust laws, finding no broad or inherent conflict between the antitrust laws and the Department of Education's regulatory regime. January 19, 1995 FTC Advisory Opinion, File No. P94 4015; see 5 Trade Reg. Rep. (CCH) ¶ 23,755.

students. That matter is currently before the Justice Department.[12]

Amending the proposed consent decree in the manner requested by the Four Agencies is unnecessary. While the comment claims that the Government and the ABA are asking the Court to approve "a broad, in-depth intrusion of the Sherman Act . . . that will have a chilling effect on the entire accreditation process . . ." (comment, p. 5), the proposed Final Judgment addresses three specific practices (it prevents the ABA from fixing salaries and engaging in a boycott). The decree does not interfere with the day-to-day accreditation process that determines whether law schools offer quality educations. The decree simply ensures that the process rests on legitimate educational principles. Nor does it conflict with controlling precedent in this Circuit or the doctrine of "implied immunity." The decree binds only the parties to it. The Four Agencies fail to show how it will prevent the defendant from carrying out its accrediting obligations under the Higher Education Act or how it will prevent other accrediting agencies from doing so.

B. Law School Faculty

The Justice Department received nine comments from administrators and faculty at ABA-approved law schools.[13] The

[12] December 5-6, 1994 Staff Analysis appended as Exhibit 43.

[13] One of these comments is from the Clinical Legal Education Association, an organization of more than 400 clinical teachers who "have a dual identity as law teachers and practicing

substance of these comments vary enormously, but all recommend some modification of the proposed Final Judgment.

1. Clinical Legal Education Association ("CLEA") (Exhibit 7)

CLEA maintains that, because the accreditation process has been dominated by legal academics (i.e., research scholars) and deans, it has not served the function of insuring that law school graduates are adequately prepared to practice law. CLEA claims that the proposed consent decree will further entrench the power of legal academics and will interfere with the ability of accreditation to improve the quality of lawyers. CLEA further believes that requiring a university administrator not affiliated with a law school on each site inspection team will entrench legal academics since university administrators are concerned that law schools are not sufficiently "academic," i.e., research-oriented. Additionally, according to CLEA, the proposed consent decree will not change the ABA standards that favor legal academics over clinicians with respect to tenure and law school governance. CLEA also believes that the proposed Final Judgment is not "final" because of the pendency of the report of the Special Commission and because the Government retains authority to review changes in the accreditation process.

Whether legal education is better served by emphasizing legal scholarship or practical clinical instruction is neither an

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lawyers." Comment, p. 1. Four of the nine faculty comments were from clinical instructors.

antitrust issue nor an issue addressed in the Complaint. CLEA raises an issue of educational policy, not antitrust policy, that should not be governed by the consent decree. Furthermore, to the extent that these comments raise issues not alleged in the Complaint, they are outside the scope of a Tunney Act review. Microsoft, 56 F.3d at 1448, 1459. The inclusion of non-law school university administrators on site inspection teams is intended to reduce the likelihood that accreditation will be used to advance the narrow economic interests of law school faculty and administrators.

CLEA supports the provision in the proposed consent decree requiring the ABA to reconsider its standards regarding student-faculty ratios, but is concerned that the Special Commission is scheduled to make its report after entry of the consent decree. The Special Commission's August 3, 1995 preliminary report noted the wide-spread dissatisfaction with the past manner in which student-faculty ratios were computed for accreditation purposes and will report on this issue. CLEA also claims that the proposed consent decree gives the Government authority to review all changes in the ABA's accreditation process. This seems to be an unduly expansive reading of the Government's rights under Section VIII(D) and Section X of the proposed Final Judgment.

2. Howard B. Eisenberg (Exhibit 8)

Mr. Eisenberg is dean of Marquette Law School and a former dean at the Arkansas-Little Rock law school. Dean Eisenberg

expresses concern that the Government's law suit was "commenced and settled without input from legal educators or consumers of legal education." He is also dissatisfied that Section VII of the proposed consent decree "leaves open for future determination five issues of extraordinary importance to legal education." Dean Eisenberg believes that leaving these matters to the Special Commission strikes him "as a guarantee that the Court will be involved in protracted and difficult litigation in the future over these matters." Consequently, Dean Eisenberg urges that entry of the proposed consent decree now is premature and not in the public interest, or that Section VII should be deleted entirely.

We believe hat Dean Eisenberg has vastly overstated the likelihood of protracted and difficult litigation, or the possibility of any litigation at all, and also has exaggerated the breadth of the Government's involvement in the remaining five issues. The decree simply sets in place procedures to ensure that the accreditation requirement of paid sabbaticals, the computation of student-faculty ratios, and other standards should not manipulated by a control group to further its own interests. The Special Commission may make recommendations that, as difficult questions of educational policy, can be fairly disputed, but the Government does not anticipate that the Special Commission and the Board will fail to resolve our antitrust policy concerns or that the Special Commission's analysis will spark litigation.

3. John S. Elson (Exhibit 9)

Mr. Elson is a professor at Northwestern Law School. He has been on the Section of Legal Education Accreditation Committee, is a former chair of the Section's Skills Training Committee, and has served on about 15 site inspection teams since 1986. Professor Elson sees the proposed Final Judgment as offering a "unique opportunity" to return ABA accreditation to its only proper purpose, "the adequate preparation of law students for competent and ethical legal practice."

Professor Elson, therefore, proposes adding the following injunctive provision to Section IV of the proposed consent decree:

> The ABA is enjoined and restrained from:....
>
> (E) adopting or enforcing any standard, interpretation, rule or policy that is not needed in order to prepare law students to participate effectively in the legal profession.

Professor Elson is also concerned that the proposed consent decree will leave law school academics in control of the process. They will continue to emphasize the production of scholarship as a priority and relegate clinical training to a lesser role. Professor Elson also expresses his dissatisfaction with the Special Commission's initial report, which he believes affirms the priority given to legal scholarships and its explicit rejection of proposals emphasizing practical training. Professor Elson believes that his proposed modification will fairly and effectively protect the public interest in having adequately

prepared law graduates without denying market entry to those who can satisfy that public interest.

While criticizing the provision of the proposed Final Judgment that seeks to open participation in the accreditation process, Professor Elson does not specifically address what procedures he would prefer. We agree that, in law school accreditation, just as in accreditation in other areas, participation in the process is more apt to come from people within the discipline and who have a stake in the effect of accreditation. The proposed consent decree makes reasonable efforts to include more outsiders. For example, no more than 50% of the membership of the Council, Accreditation Committee or Standards Review Committee may be law school deans or faculty. The term limitation will also produce greater turnover among those participating in the process.

Professor Elson plainly thinks that legal education should give a higher priority to practical training. This is a matter of educational, not antitrust, policy and it is outside the limits of the Complaint and proposed consent decree.

4. Jeffrey L. Harrison (Exhibit 10)

Mr. Harrison is the Chesterfield Smith Professor of Law at the University of Florida College of Law. His principal hope is that the Antitrust Division will devote further study to the issues of the proposed market definition, competitive harm, and the appropriate remedy. Other than the prohibition against price

fixing in Section IV(A) of the proposed consent decree, Professor Harrison recommends abandoning all of the other prohibitions in the decree, at least until there is data showing that the ABA's accreditation process has unreasonably restricted entry. In the alternative, Professor Harrison believes the decree should be modified to permit the collection and dissemination of "past" compensation data because it "can be critical" in diagnosing the problems of a law school. Professor Harrison also recommends dropping the 50% membership limitation of legal academics on the Council, its Accreditation Committee, and the Standards Review Committee, describing them as "counter-productive."

While perhaps useful as an academic exercise, Professor Harrison's objections to the alleged theoretical weaknesses of the Government's case are not appropriate for a review of whether entry of the proposed Final Judgment is within the reaches of the public interest. The Court should assume that there is some basis to the allegations in the Complaint and determine whether the proposed consent decree sufficiently remedies the alleged violations. A value of the consent decree process is that it releases the Court and the parties from the time and expense of a Rule of Reason inquiry into all of the issues raised in the Complaint.[14]

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[14] We do not wish to "try" the issue of output restriction but do question the manner in which Professor Harrison uses statistics. Rather than the 30-year comparison in his comment (p. 3), a more appropriate period would be from when the current Standards were made applicable (1975) and when the Consultant's office regularized the ABA's current accreditation regulatory regime (late 1970s). Roughly halving the 30-year

The Government strongly disagrees with Professor Harrison's suggestion that "past" compensation data can be used as a surrogate for measuring quality. Observations of outputs are a more reliable measure of quality.

5. Gary H. Palm (Exhibit 11)

Mr. Palm is Clinical Professor of Law at the University of Chicago Law School. Professor Palm currently serves on the Council of the Section of Legal Education, was a member of the Accreditation Committee from 1987 to 1994, is a past member of the Clinical Education and Skills Training Committee, and served on 14 ABA site inspections from 1984 to 1994, nine of which were in Europe. Professor Palm believes that the proposed consent decree does not recognize that "the real conspiracy" involved just law school deans and academics, not other faculty, and that the proposed consent decree "will likely result in a lessening of vigorous enforcement of accreditation standards." Professor Palm makes a number of proposals in his comprehensive comment. He recommends that another section of the ABA or some other entity should perform law school accrediting, claiming that the ABA has been a "paper tiger" with respect to ensuring adequate training in legal skills and values.

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period used by Dr. Harrison, comparing 1980-81 statistics with those of 1994-95, the number of ABA-approved law schools increased only from 171 to 177 (+3.4%) and total J.D. enrollment in ABA-approved schools increased only from 119,501 to 128,989 (+7.9%).

Finding a substitute for the Section of Legal Education would not be easy since a new agency will have to obtain Department of Education and state certifications. Additionally, the ABA initiated accreditation reforms before the consent decree discussions started. The Justice Department seldom, if ever, seeks to eliminate an entrant as antitrust relief and, unlike monopoly or merger cases, partial divestiture here is not a realistic remedy.

Professor Palm's comment, and those of other clinicians, are critical of the ABA accreditation requirement with respect to skills training. This is essentially a question of education, not antitrust, policy. Professor Palm believes that there is a need for substantial, additional diversification in the accreditation process, particularly the continued or greater involvement of clinicians on site inspection teams or as part of the law faculty representation on the Council and committees. Again, whether clinicians should be included among faculty appointments to site inspection teams and governing committees is not an antitrust issue.

Professor Palm also criticizes procedural difficulties with respect to the report of the Special Commission. He urges either that the public be given a chance to comment on the report or that the consent decree not be entered until after the Special Commission makes its report.

Professor Palm also makes specific comments with respect to several of the subjects on which the Special Commission will

report. He criticizes the current computation of student-faculty ratios for excluding as "faculty," adjuncts and part- and full-time skills teachers who have short-term employment contracts.

He defends the current application of the facilities standards. The precise contours of the facilities standard are not challenged by the Department nor are they before the Court.

The Department does not intend to constrain the setting of legitimate educational standards. Because the facilities standards raise issues of legitimate educational policy that are within the Special Commission's expertise, the Department believes the Commission should have the first opportunity to reconcile the issues of antitrust and educational policy. Professor Palm also argues that the "adequate resources" standard should be applied to reallocate greater resources for skills instruction. This is neither an antitrust issue nor one raised in the Complaint. Professor Palm has suggested an appointment, as an amicus curiae, of a representative for the public interest. The Justice Department represents the public interest in this proceeding and Professor Palm has shown no breach of that representation. Most of Professor Palm's suggestions seem intended to advance clinical training at law schools. This is an educational policy issue that is irrelevant here and certainly one that does not call for a court-appointed representative.

6. Millard H. Ruud (Exhibit 12)

Former ABA Consultant on Legal Education Millard Ruud submitted an extensive comment criticizing the proposed consent decree.[15] He doubts that the ABA violated the antitrust laws. He believes that the ABA accreditation process is not a guild and that it has not been captured by legal educators. He also doubts that there was an agreement to ratchet up law teachers' salaries. Professor Ruud does not believe that deans want the ABA to impose unreasonably high salary requirements for full-time faculty and argues that deans only want to meet the competition set by market forces. He contends that leading law schools must compete with major law firms for highly-qualified faculty, and must offer competitive salaries to retain and recruit these faculty.

Professor Ruud also comments that the ABA has not "monopolized" accreditation through its own actions because state supreme courts and bar admission authorities gave the ABA the

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[15] Professor Ruud was the ABA's first Consultant on Legal Education, serving from 1968 to 1973; was the Executive Director of the American Association of Law Schools which conducts joint law school accreditation inspections with the ABA; has participated in numerous law school site inspections; and has extensive experience in ABA and AALS law school accreditation. Professor Ruud was involved in drafting the Standards under which the ABA operated for many years. These include the Standards fixing faculty compensation. Professor Ruud has conducted over 40 site inspections, although all but three of these were before 1979. He is currently a professor at the University of Texas.

University of Texas Provost and its former law dean Mark Yudof has a somewhat different view of the consent decree than Professor Ruud. "'Yahoo!' was the first response from Mark Yudof" after he was told of the consent decree, the Texas Lawyer reported. Provost Yudof called the ABA's process an "accreditation hammer" that did not recognize diverse models of legal education. Texas Lawyer, July 3, 1995 at 7 (Lexis, News Library).

power to approve law schools. He notes that there are competitive disadvantages for unapproved law schools because these schools are considered to be lower in quality. ABA-approved schools have an advantage in recruiting quality students and faculty. Professor Ruud also questions the meaning of the phrase "state-accredited" law schools in the decree and correctly points out the decree only prohibits the ABA from requiring ABA-approved law schools not to accept credit for work at state-accredited schools.

Professor Ruud questions the decree's requirement that a university administrator who is not affiliated with a law school be included on site evaluation teams. He claims that it is present ABA practice to include university administrators when the law school is affiliated with a university. He asks why university administrators should be included in evaluating law schools that are not part of a university.

Professor Ruud further believes that the consent decree is an excessive intrusion into ABA governance and questions some specific decree provisions. He asserts that the issues the Special Commission is to examine go beyond antitrust. He further believes that the decree should not set term limits for membership on the Council, Accreditation Committee, or Standards Review Committee. Finally, Professor Ruud describes the basic purpose of accreditation: ensuring that the school meets the basic requirements of quality and informing other schools that a degree from an accredited school should be recognized by them.

The purpose of this proceeding is not to evaluate the merits of the Government's case. To the extent comments challenge the Department's decision to bring this case, they are beyond the scope of this decision.

7. Roy T. Stuckey (Exhibit 13)

Mr. Stuckey is a professor in the Department of Clinical Studies at University of South Carolina Law School. Professor Stuckey served on the Council of the Section of Legal Education from 1988 to 1994 and the Standards Review Committee from 1990 to 1995. He has been a member of about 11 site inspection teams since 1982.

Professor Stuckey objects to entry of the proposed Final Judgment unless it is modified:

> 1) to allow the ABA to continue gathering data about faculty compensation; 2) to allow the ABA to continue considering compensation as one factor in determining the quality of a law school's program of education; and 3) to allow the ABA to permit some people to serve at least six years on the Standards Review Committee.

Professor Stuckey believes that compensation is related to quality, knows of no data showing that law school faculty are compensated disproportionately to similarly qualified judges and lawyers, and points out that the ABA's data collection was reliable but will now have to be done by someone else.

The ban on salary data collection is for only the 10-year term of the decree and is intended as a prophylactic. The defendant's practice, compiling a "peer group" salary comparison prior to a site inspection and pressuring the law school (or,

more frequently, university administrators) to raise salaries without a finding that the law school was unable to attract and retain competent faculty, was an anticompetitive practice that artificially inflated law school personnel salaries. The consent decree prevents the defendant from collecting salary information to reduce the likelihood that the behavior alleged in the Complaint will recur. During the time that the consent decree limitations apply, site inspectors will be able to use such direct measurement of faculty quality like classroom instruction, scholarly production, and bar and practical skills preparation. The ABA is not enjoined from continuing to collect and disseminate other law school data.

The Standards Review Committee has in the past been totally dominated by law faculty. In addition to proposing new Standards, the Committee also adopted Interpretations that were not fully subject to public and Board review and were, at times, protective of law school professional personnel in an anticompetitive manner. The Standards Review Committee has staggered terms so that it will have varying levels of experience. The one-term limitation on service on the Standards Review Committee is a reasonable prophylactic provision designed to get more individuals involved in law school accreditation.

8. Lawrence A. Sullivan and Warren S. Grimes (Exhibit 14)

Mr. Sullivan and Mr. Grimes are professors at Southwestern University School of Law. Professors Sullivan and Grimes fear

that the proposed consent decree may lead to a relaxation of accreditation standards that will be particularly harmful in California. They also oppose the prohibition against the defendant's collecting and disseminating salary data.

California has 16 ABA-approved law schools, 19 state-accredited law schools, and 37 uncertified law schools, according to the comment. Professors Sullivan and Grimes note that, while, admittedly, the ABA-approved schools are able to attract better qualified students, the August, 1994 California bar results for first-time takers show that the average pass rate for each of the ABA-approved schools was higher than those for any law school in each of the other two categories. The comment suggests that this raises consumer protection issues since students at non-ABA-approved schools are investing much time and money with a diminished likelihood of passing the bar or finding legal employment.[16] This case is not intended to inhibit in any way

[16] We have the 1992 and 1993 California bar results, but not for 1994. The results do not show what percentage of graduates of each law school ultimately passed the California bar. We agree with the comment's observation that better qualified applicants generally will choose to attend an ABA-approved school because, among other reasons, graduation from an ABA-approved school is a bar prerequisite in most States. The range of pass rate in 1992 and 1993 for July first-time takers and all takers in February is:

	ABA-approved	state-accredited
July 1993	69-92%	0-89%
February 1993*	40-87%	0-75%
July 1992	63-90%	25-75%
February 1992*	54-85%	5-61%

* Most takers in February are repeaters and the results are for all takers.

the setting of legitimate educational standards and the proposed Final Judgment does not do so. Accreditation is a consumer protection service. It informs students that an accredited school meets appropriate educational standards. The proposed Final Judgment leaves in place a process to provide this service.

The comment also fears that the consent decree will relax standards in two areas - student-faculty ratios and library facilities - permitting new schools to be accredited, thereby injuring the 12 "second-level" ABA-approved schools in California. The consent decree, however, does not address library facilities, and simply requires that student-faculty ratio standards be reassessed by an unbiased group.

Professors Sullivan and Grimes also believe that the collection of salary data serves a number of legitimate and important functions. We agree, but believe it should be kept separate from ABA accreditation because of past abuses.[17] A school that attracts a higher-quality faculty at a lower cost should be rewarded in the marketplace and not punished in an accreditation inspection. Consequently, the proposed consent decree restricts the ABA from this activity for its 10-year duration. The comment properly points out that other organizations, without the incentives of this one, should be able to collect this information.

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[17] The dean of one very high salary law school criticized the ABA's persistence in obtaining his school's salary data, stating that obviously his law school's salaries were adequate and the ABA was using the salary data to "ratchet up" salaries at lower paying law schools.

9. Bardie C. Wolfe, Jr. (Exhibit 15)

Bardie C. Wolfe, Jr. is a professor of law and the law library director at St. Thomas University School of Law in Miami, Florida. Professor Wolfe submitted comments about the ABA annual questionnaire and Standards. The ABA sends out a questionnaire each year seeking law school operations information. Professor Wolfe believes that the annual questionnaire section on library resources should include computerized, not just paper, collections. Otherwise, the ABA, in effect, forces law schools to purchase expensive books and other paper publications that are available in electronic form. Professor Wolfe also is concerned about the ABA Standards for law libraries. He advocates law school libraries sharing electronic resources through networks and the Internet. This would enable libraries to share expensive but little used titles. He would also like to see electronic resources held by other parts of the university counted as part of the law schools' resources.

It may be a laudable goal to decrease library expenses by sharing electronic information. But the issue of what resources libraries must have for student and faculty research implicates issues of educational policy, not antitrust issues and is outside the ambit of this case and the Tunney Act proceeding.

10. Marina Angel (Exhibit 16)

Ms. Angel is a professor of law at Temple Law School. Her comment was transmitted on October 16, two weeks after the close of the comment period.

Professor Angel complains that Section IV(A) of the proposed consent decree, prohibiting the collection of salary data, may prevent the enforcement of ABA Accreditation Standards 211-213 that prohibit discrimination. While Professor Angel does not state it, salary data showing apparent discrepancies between protected and other groups may be a basis for pursuing discrimination claims. The consent decree does not prevent law schools, however, from maintaining that data. Additionally, as Professor Angel has noted, Section V of the decree notes that nothing in the proposed decree prohibits the ABA from conducting a bona fide investigation of whether a law school is complying with its accreditation standards.

C. University Administrators

1. Bernard J. Coughlin, S.J., President of Gonzaga University (Exhibit 17)

Gonzaga University President Bernard J. Coughlin, S.J., believes that 40% of a site inspection team should be people who are not law school deans or law faculty. He further believes that the consent decree should mandate the Special Commission to consider whether to revise ABA practices regarding control of financial resources. Father Coughlin is concerned that the ABA gives law school deans and faculty too much control of financial

resources contributed to or generated by the law school. Father Coughlin also expressed concern that the ABA's proposed decree notification did not identify the officer to whom comments should be sent.

The ABA accreditation process was captured by legal educators. Section VI of the decree is designed to remedy this problem. The decree requires that site teams include a university administrator not affiliated with the law school and other public members. It also requires that law faculty make up no more than 50% of the Accreditation Committee and Council. Together, these provisions will significantly open up the process. Requiring site teams to include more people who are not law faculty may make it difficult to fill the teams. Being a member of a site team involves a substantial amount of work.

Intra-university resource allocation raises issues of educational policy. The resources standard will be initially addressed by the Special Commission.

Finally, Father Coughlin expressed concerns about notification by the ABA. In accord with the Antitrust Civil Process Act, the Justice Department published the proposed Final Judgment and CIS in the Federal Register and newspapers, informing members of the public that they may submit comments to the Antitrust Division of the Justice Department. The ABA, on its own, individually notified presidents of universities with ABA-approved law schools of the proposed Final Judgment. The

legal education community is now well acquainted with this case and the proposed Final Judgment.

D. Law Schools Not Approved By The ABA

The Department received three comments from law schools not approved by the ABA.[18] They are generally critical of the limited scope of the Final Judgment.

1. University of La Verne (Exhibit 18)

The University of La Verne ("La Verne") is a law school accredited by the State of California but not approved by the ABA. While the California state court will admit graduates of California-accredited schools to its bar, most state bar admission rules require graduation from an ABA-approved school. First, La Verne believes that the consent decree does not restrain the ABA's support of bar admission or employer requirements that applicants graduate from ABA-approved law schools. Second, La Verne is concerned about the decree provisions relating to the physical facilities Standards and Interpretations. La Verne thinks that the ABA has required costly facilities in the past and is particularly worried that ABA Interpretations will continue to prohibit the leasing of law school facilities. Third, La Verne is opposed to the ABA's requirements about law library seating. Fourth, La Verne wants the Justice Department and Court to carefully review the Special

[18] MSL's comment is responded to in Section IV.H.

Commission's proposals regarding calculating the faculty component of student-faculty ratios. Fifth, La Verne fears that ABA inspection teams will use salary data available from other sources. Finally, La Verne believes that the ABA should ascertain the quality of law schools by measuring such outcomes as bar passage rates.

Preliminarily, we note that the consent decree is tailored to remedy the antitrust violations alleged in the Complaint: the ABA's acting as a guild for legal educators, and the resulting competitive distortion of the accreditation process. In addition, the decree is designed to remedy the four ABA accreditation practices that were alleged in the Complaint as Sherman Act violations. This is the purpose of a consent decree: to provide relief appropriate for the allegations in the Complaint. Microsoft, 56 F.3d at 1448, 1459.

La Verne's first concern, whether the ABA has encouraged States to require graduation from an ABA-approved school for bar membership, is outside the scope of charges in the Complaint and, consequently, is not addressed in the proposed Final Judgment. Moreover, in general, an organization's lobbying of state agencies is immune from antitrust liability under Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and its progeny. The fact that individual employers may require graduation from an ABA-approved law school is not itself an antitrust violation and is outside the scope of the Complaint and relief in this case.

Second, La Verne is concerned about the ABA's rules on facilities. As we alleged in the Complaint, while adequate physical facilities is a relevant factor in assessing an educational program's quality, the facilities standards may have been applied inappropriately to enhance working conditions for law faculty. The ABA's facilities standards and practices, like others addressed in Section IV(D) of the Complaint, raise what are, in essence, educational policy issues. Hence, under the decree, they have been initially referred for re-evaluation to the Special Commission.

Third, the issue of library seating is not raised in the Complaint and is, thus, not a part of this proceeding.

Fourth, with regard to the student-faculty ratio issue, the Department has required that this question of educational policy be reconsidered through a process not infected by capture. The Department will carefully review the Special Commission's report.

Fifth, the consent decree expressly forbids the ABA from taking any actions that impose salary requirements or using law school compensation data in connection with the accreditation or review of any law school. Consequently, ABA inspection teams cannot use any such data, regardless of its source, without the defendant risking contempt sanctions.

Finally, outcomes, like bar review passage rates, may be a useful measure of educational quality. This is, however, an issue of educational policy, not an antitrust issue and is outside the matters alleged in the Complaint.

2. Reynaldo G. Garza School of Law (Exhibit 19)

Reynaldo G. Garza School of Law ("Garza") is a Texas law school that is not approved by the ABA. The Texas Supreme Court mandates that bar applicants be graduates of ABA-approved law schools. Garza complains that the proposed consent decree does not deal with the requirement that bar applicants be graduates of ABA-approved law schools and the effect of this Standard on graduates of unapproved law schools. Second, Garza alleges that the consent decree does not address the ABA requirement of a core library collection. Third, the decree does not address the ABA's requirement that law schools have a full time law librarian.

We respond by noting, first, that the decree was tailored to address the antitrust violations alleged in the Complaint. The Complaint does not challenge state requirements that bar applicants must graduate from ABA-approved schools. The actions of States are exempt from the antitrust laws under the "state action" doctrine announced in Parker v. Brown, supra.

The ABA Standards on core library collection and full-time librarian administrators are not challenged in the Complaint as antitrust violations and appear to involve solely questions of educational policy.

E. Graduates Of Unapproved Law Schools

The United States received 13 comments from students and graduates of law schools that are not accredited by the ABA. Among the schools represented are Texas Wesleyan School of Law,

the Commonwealth School of Law in Massachusetts, an unnamed state-accredited law school in Alabama, and five California schools: Western State University in San Diego; West Los Angeles School of Law; Glendale University College of Law; People's College of Law; and an unnamed law school. The majority of these comments describe the consequences of ABA accreditation for graduates of law schools not approved by the ABA.

Ten graduates and students criticized the rules in various States that require bar applicants to graduate from ABA-approved law schools only. They suggested that the consent decree abolish or weaken these rules. These graduates were: Deborah Davy (Western State University) (Exhibit 20); Joel Hauser (People's College of Law) (Exhibit 21); Wendell Lochbiler (West Los Angeles School of Law) (Exhibit 22); Larry Stern (Glendale College of Law) (Exhibit 23); Julie Ann Giantassio (Western State University) (Exhibit 24); Robert Ted Pritchard (enrolled in unnamed non-ABA approved law school) (Exhibit 25); Donald H. Brandt, Jr. (Texas Wesleyan University) (Exhibit 26); David White (Western State University) (Exhibit 27); Bill Newman (an unnamed unaccredited California law school) (Exhibit 28); and Russell R. Mirabile (school not named) (Exhibit 29).

Ms. Davy, Mr. Pritchard, and Mr. Stern suggested that graduates of state-accredited law schools should be allowed to take any state's bar examination. Mr. Mirabile proposed waiving graduates of all unapproved schools into the bar. Mr. Brandt proposed eliminating the ABA's power to accredit law schools.

Mr. Brandt alleges that his school, Texas Wesleyan University, was granted provisional ABA approval on the condition that it graduate its third-year class before receiving that approval. Hence, Mr. Brandt did not graduate from an ABA-approved law school.

The ABA does not itself set state bar admission criteria. Approximately 42 States require graduation from an ABA-approved school as a condition for sitting for the bar. Such state requirements fall within the "state action" immunity from antitrust prosecution recognized by the Supreme Court in Parker v. Brown, supra, and its progeny. Consequently, we did not and cannot address state bar admission requirements in the proposed Final Judgment.

Five comments discuss graduates of unapproved law schools being denied admission into advanced legal degree ("LL.M") programs at ABA-approved law schools. Ms. Davy contends that the ABA intrudes upon the discretion of the law schools and proposes amending the Final Judgement to make all individuals holding a Juris Doctor degree eligible for admission into ABA-approved LL.M. programs. Mr. Lochbiler explained that he was denied admission into a number of ABA-approved LL.M. and J.D. programs; each institution refused to accept a graduate of an unaccredited school. Mr. Stern said that he was denied admission into LL.M. programs because no ABA-approved school would consider him without risking its accreditation. Mr. White was recently denied admission to an LL.M. program at an ABA-accredited Florida law

school. He claimed the school would not change its policy regardless of the consent decree. Mr. Brandt noted that his continued educational options have been limited, but did not describe these options.

Under the consent decree, the ABA may not bar a law school from enrolling a member of the bar or a graduate of a state-accredited law school in an LL.M. or other post-J.D. program. Previously, the ABA Standards had barred law schools from doing so. The decree permits individual law schools the discretion to admit whom they want in their graduate programs.

Five comments focus on the ABA's rules prohibiting approved schools from offering transfer credit for courses at unapproved law schools. The author of one comment, who wished to remain anonymous, graduated from a state-accredited, but not ABA-approved, law school and is a member of the bar (Exhibit 30).[19] He wrote that the dean of an ABA law school in another State refused to grant credit for any of his courses. The dean was aware of the proposed Final Judgment. The author believes that the proposed Final Judgment should be modified to prevent approved schools from refusing to grant credit. Mr. Pritchard described an admissions representative of an ABA-approved California law school who told him that the institution does not accept any credits earned at a non-ABA school. The admissions

[19] The author requested having his name and address withheld from the comment because he has an application pending with an ABA-approved law school. We have redacted this information in the copy of the comment filed with the Court.

representative allegedly stated that the consent decree did not change this. Mr. Pritchard advocates several modifications to the proposed Final Judgment, including requiring all law schools to sign the consent decree and mandating that all state-accredited law schools be automatically granted provisional approval by the ABA.

In his comment, Frank DeGiacomo proposes deleting from the proposed Final Judgment the phrase in Section IV(D)(2) that allows the ABA to require that "two-thirds of the credits required for graduation must be successfully completed at an ABA-approved law school." (Exhibit 31.) Mr. DeGiacomo contends that the provision deters competition from non-ABA law schools. He alleges that ABA-approved schools have few seats for transfer students and that transfer applicants from unaccredited schools are viewed less favorably than students from ABA-approved law schools who are perceived as having achieved greater academic achievement.

James B. Healy submitted to the Government a background brief by himself and three other students detailing the closure of the unaccredited Commonwealth School of Law. The closure prevented them from graduating (Exhibit 32). The four unsuccessfully sought to transfer to 15 law schools with credit for their courses at Commonwealth. Mr. Healy inquires whether the students have any recourse. Finally, Mr. Mirabile believes ABA-approved schools should give complete credit for all work at unapproved law schools.

Under the consent decree, the ABA may not prevent ABA-approved schools from offering transfer credit for work successfully completed at a state-accredited law school. The decree allows the ABA to require that two-thirds of the credits required for graduation be successfully completed at an ABA-approved law school. As with the LL.M. programs, the decree leaves the choice of whether to offer transfer credits to the individual school. Some schools may choose to do so; others may not.

Mr. DeGiacomo proposes eliminating the requirement that two-thirds of the credits be completed at an ABA-approved law school and Mr. Mirabile proposes granting credit for all work at unapproved law schools. For reasons of educational policy, an accrediting agency may require that the bulk of an education be completed at the degree-granting institution. The two-thirds requirement allows the ABA to ensure quality control - the legitimate purpose of accreditation. The decree provision rests on the ABA's existing parallel rule for credit for courses completed at foreign law schools, a rule that did not so directly implicate the guild interests that distorted the rule for transfers from domestic schools.

In addition to comments about bar admission and LL.M. requirements, Mr. Stern pointed out that the ABA's student-faculty ratio rules had no rational application to educational quality because they excluded part-time faculty from the ratio. Evidence that anticompetitive purposes had distorted the

formulation of the present student-faculty ratio rule was the basis of the Department's allegation in the Complaint. But low student-faculty ratios may ensure smaller classes and more student-faculty contact, desirable educational outcomes. Because of this, the Special Commission will have the first opportunity to address this educational policy issue.

F. Other Practicing Attorneys

The Justice Department received comments from five other practicing attorneys.

1. William A. Stanmeyer (Exhibit 33)

William A. Stanmeyer is a practicing attorney and former law professor. He commends the Justice Department for bringing this action. He believes that many of the ABA's Standards are irrelevant to quality legal education, sometimes vague, and often applied arbitrarily. Mr. Stanmeyer is troubled by outgoing ABA President George Bushnell's denial of any wrongdoing and fears that the ABA will resist real change.

The Justice Department agrees that some of the ABA's accreditation practices had little to do with quality. The decree is designed to remedy these problems. In terms of Mr. Bushnell's comment, a defendant is not required to admit to the charges in the Complaint as part of a settlement. This is one of the incentives to enter a decree instead of proceeding to trial. Finally, the Department expects that the contempt

sanction will be sufficient to ensure that the ABA will abide by the decree.

2. Four Concerned Lawyers (Exhibit 34)

The Justice Department received an anonymous comment from "4 Concerned Lawyers." They congratulate the Department on the consent decree. They are concerned about having the ABA's Consultant on Legal Education, Jim White, reporting to the ABA's Executive Director, Bob Stein. They fear that friendship between White and Stein will prevent the latter from effectively supervising the former. Second, the four wish that the Justice Department would investigate the relationship between Consultant White and Indiana University, where he teaches, and examine the payment arrangements between them.

In response, we note, preliminarily, that the decree does not require the Consultant to report to the Executive Director. Moreover, there are strong incentives to ensure that the terms of the decree are carried out. Violations of the consent decree are punishable by contempt sanctions. In fact, the Consultant and Executive Director must sign annual certifications acknowledging this. In addition, the decree opens up the ABA's accreditation operations to more scrutiny. The Accreditation Committee, Council, and Standards Review Committee will have many members who are not affiliated with law schools. The payment arrangements between White and Indiana University do not raise an

antitrust concern or relate to the antitrust violations alleged in the Complaint.

3. Frederick L. Judd (Exhibit 35)

Frederick L. Judd is an attorney, certified public accountant, and a graduate of Brigham Young University ("BYU") law school. He fears that the ABA's requiring law schools to set schedules that limit the amount of time students can work excludes students who need to work to pay for law school. Mr. Judd wished to work as a C.P.A. while a full-time BYU student, but was prevented from setting up a class schedule that would enable him to work during the day.

The ABA's Standard limiting full-time students to 20 hours of work per week does not raise antitrust concerns or relate to the violations alleged in the Complaint. There may be strong educational policy reasons to limit students' work so they may devote more time to their studies.

4. Michael L. Coyne (Exhibit 36)

Michael L. Coyne is an attorney in private practice in North Andover, Massachusetts, and is also associate dean of MSL. In his comment, Dean Coyne complains about deposition testimony of former Accreditation Committee Vice Chairman Claude Sowle and ABA Consultant on Legal Education James White, taken by MSL in its private action against the ABA. Dean Coyne believes that their testimony about salaries is at odds with Paragraphs 15 and 16 of

the United States' Complaint, in which we allege that the ABA collected salary data for peer schools and found that schools which paid salaries below the median were non-compliant. Dean Coyne says that Mr. Sowle testified in the private action that the ABA has not paid attention to geographic or competitive salary information for some time. He asks the Department to clarify whether this testimony contradicts documentary evidence held by the Justice Department.

Dean Coyne also seeks disclosure of materials that were obtained under the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314. The Act imposes strict disclosure limits on the Government (15 U.S.C. § 1313(c) and (d)), and the Government must comply with them.

The "Government's Opposition To MSL's Motion For Intervenor Status and For Determinative Documents And Materials," filed on October 10, 1995, addresses MSL's request for documents in more detail. Were the Court to order production of the documents, there would be a substantial chilling effect on the Department's work. Defendants would be less willing to enter consent decrees because they would fear it would lead to the production of their documents. MSL has a private action against the ABA and has sought discovery in that action. That is the proper forum for MSL's discovery requests.

Dean Coyne also attached pages 207-08 of Mr. Sowle's testimony to his comment. On those pages, Mr. Sowle admitted that the Accreditation Committee considered how salaries paid by

a school compared to those paid by its peers. Dean Coyne's concern as to the substance of the deposition testimony regarding the use of salary information does not seem directly relevant to the issue in this APPA proceeding. That issue is whether entry of the proposed consent decree is in the public interest. Regardless of the testimony, the relief proposed adequately deters the defendant from using the accreditation process to fix salaries.

5. Jackson Leeds (Exhibit 37)

Mr. Leeds believes that the consent decree will allow state courts to violate antitrust laws in regulating admissions to the bar.[20] Mr. Leeds believes that the New York Court of Appeals wrongly requires law schools to be approved by the ABA, American Association of Law Schools, or the New York State Department of Education. Moreover, Mr. Leeds apparently requested from the City University of New York Law School at Queens College ("CUNY") a copy of the ABA's site inspection report for CUNY. CUNY apparently refused because distribution of the report is limited to those authorized to receive it by the ABA's Council of the Section of Legal Education. Mr. Leeds also is upset that CUNY admits students with low traditional indicators (test scores and GPAs), and claims that CUNY does not enforce class attendance policies.

[20] It is not entirely clear that Mr. Leeds is a practicing attorney. His letter indicates legal training and, hence, we have classified him here as such.

In response, the Justice Department notes that, under Parker v. Brown, supra, and its progeny, the actions of the state courts in determining bar admissions or in approving law schools are immune from antitrust prosecution. CUNY's apparent refusal to give Mr. Leeds the inspection report, CUNY's admissions standards, and its class attendance policies do not raise antitrust issues and are not related to the subject matter of the Justice Department's Complaint in this action.

G. Members Of The General Public

The Justice Department received comments from three individuals whom we cannot identify as being in any of the preceding categories.

1. Robert Reilly (Exhibit 38)

Robert Reilly is concerned about practicing lawyers who are graduates of unapproved law schools but who are unable to practice in many States because those States require graduation from ABA-accredited law schools. Mr. Reilly believes that the States impose this requirement to limit competition and to deny graduates of unapproved law schools the ability to practice law in the place they wish to live.

State bar admission requirements restricting bar membership to graduates of ABA-approved schools may limit competition, but they cannot be challenged under the antitrust laws because of the "state action" immunity doctrine announced by the Supreme Court

in Parker v. Brown, supra. Consequently, such requirements are beyond our enforcement jurisdiction.

2. Robert W. Hall (Exhibit 39)

Robert Hall, President and Director, Hawaii Institute for Biosocial Research, expressed dissatisfaction with the proposed Final Judgment, primarily because he believes that it does not remedy the ABA's role in "anticompetitive admissions processes required by the ABA in the accreditation process." In particular, he criticized the control of the Law School Admissions Council ("LSAC") by ABA-approved law schools. He does not believe that law schools should use the LSAC's aptitude test (the "LSAT") in the admissions process.

While the ABA's Accreditation Standards require that law schools use the LSAT, or a comparable aptitude test, we do not know that the ABA requires law schools to maintain median LSAT scores. The ABA's requirement appears consistent with Department of Education regulations mandating that accrediting agencies require that accredited schools employ a suitable aptitude test to screen applicants. Whether the LSAT, or any other test, is a reliable indication of an aptitude for a field of study seems to involve educational, not antitrust, policy questions. This issue is also not raised in the Complaint.

Mr. Hall also criticized the domination of the law school accreditation process by insiders and the lack of public involvement in the accreditation process. We recognize this

problem and the consent decree remedies it by introducing more people outside of legal education into the accreditation process and by setting term limits for members of the committees that oversee law school accreditation. Mr. Hall further believes that the insider status of some members of the Special Commission may have the effect of putting the fox in charge of the chicken house. The proposed consent decree answers this, too, by requiring that the ABA's Board of Governors review the Special Commission's findings. Additionally, the Justice Department may challenge the Special Commission's recommendations in this case.

Mr. Hall further believes that the ABA has boycotted any law school that does not have small classes for at least some part of its total instructional program. He believes it will be costly for a proprietary school to offer small classes. In response, we note that the size of classes usually raises issues of educational policy. An accrediting agency may require some small classes so students benefit from greater teacher contact.

Finally, Mr. Hall criticizes the ABA Interpretation requiring law schools to have facilities that are owned rather than leased. He points out that this may be a problem in areas where land and buildings are extremely expensive. In response, the Justice Department notes that the decree is tailored to the antitrust violations alleged in the Complaint. The ABA is not charged with violating the antitrust laws by virtue of all of its facilities standards, including its rules regarding leased facilities or their implementation.

3. Amrit Lal (Exhibit 40)

Amrit Lal wrote to congratulate the Justice Department on the consent decree. Dr. Lal believes that state bar examiners allegedly manipulate bar exam results to limit bar admissions. The Supreme Court, in Hoover v. Ronwin, 466 U.S. 558 (1984), held that the state action immunity doctrine protected one state supreme court's bar admissions restrictions from an antitrust claim that made similar allegations. Dr. Lal also alleges that the Pennsylvania Board of Law Examiners discriminate on the basis of age, ethnic identity, and national origin. These concerns do not relate to the matters alleged in the Complaint.

H. Massachusetts School of Law (Exhibit 41)

MSL has filed a massive 83-page comment with an Appendix and about 400 pages of Exhibits. MSL previously filed an Intervention Motion that both parties oppose. MSL was denied accreditation by the ABA in 1994 and has filed an antitrust case against the ABA in the Eastern District of Pennsylvania. Last month, MSL filed a second action against the ABA in a Massachusetts state court, alleging unfair competition, fraud, and other matters. MSL's comment recommends numerous changes in the proposed Final Judgment, the delay of its entry, and the vast production of documents and materials from the Justice Department's investigatory files. The Government opposes the requested modifications and recommends no delay in the entry of the Final Judgment. We also oppose MSL's "discovery" request,

believing that it is particularly inappropriate to grant discovery collaterally in an APPA proceeding to a party whose discovery requests have been denied in its own litigation.

1. Capture

MSL does not believe that the proposed consent decree adequately remedies the "capture" of the ABA accreditation process by the group that benefitted from it. MSL suggests, as more effective remedies, requiring the ABA to choose "procompetitive" nominees for the Council and Committee (MSL provides the names of 21 possible nominees),and banning any members of the "insider" group (MSL lists about 47 "insiders" and about 32 of their "helpers") from further participation in accreditation. It urges that the decree should ban "the ABA from violating the Sherman Act through use of its other accreditation criteria to achieve anticompetitive purposes." Comment, p. 11. The Government believes that it is inappropriate for it or the Court to micromanage the defendant's accreditation activities to require that certain people be designated to participate in accreditation and others prohibited. Such relief would be extraordinary and unique among consent decrees. Enjoining the ABA from violating the Sherman Act in its application of its remaining accreditation criteria is at the other extreme--so vague as to add little effective relief. This is because such a provision requires a Rule of Reason trial just to enforce a contempt action. The consent decree's limits on law school

faculty participation on governing committees, the required involvement of "outsiders" on site inspections, and the close involvement of the ABA's Board, itself undoubtedly independent from accreditation "insider" control, are reasonable measures to eliminate the capture of the accreditation process.[21]

MSL claims that the ABA has violated the consent decree by adding an extra academic to the Section of Legal Education's Nominating Committee and that the new data questionnaire circulated by the ABA to law schools requests data from which average and, possibly, individual salaries can be calculated is in violation of the decree. Our information, however, is that no additional academics have been added to the Nominating Committee since the decree was filed, and that the event that MSL describes took place last year. The 1995-96 Nominating Committee has one legal educator.[22] As to the data questionnaire, our understanding is that average salaries cannot be calculated, except in the most gross fashion, and that individual salaries cannot be calculated in any fashion from the data being collected. Moreover, the aggregated salary expense data the ABA collects is not given to the Accreditation Committee, the Council or members of site teams, and is not used in connection with law

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[21] The ABA's Board, independent of consent decree requirements, has also required the Consultant of the Section of Legal Education to report to the ABA's Executive Director.

[22] The Nominating Committee members are a California practitioner, a law school librarian, a university president (who is a former law school dean), a Nebraska practitioner, and a non-lawyer public member. The term of the individual mentioned by MSL expired last summer.

school accreditation. The Justice Department does not object to the collection of this data as long as it cannot be disaggregated.

2. Secrecy

MSL points out that the ABA's accreditation Standards and Interpretations are often quite general. Their content has been supplied by the enforcement process and by the policies followed by enforcement officials. MSL believes that a simple cure for monitoring the ABA's actual accreditation practices would be to require that all documents created during the accreditation process be made public.

The proposed Final Judgment does require the defendant to publish annually the names of those who participate in domestic and foreign site inspections and the schools inspected. Additionally, the Council must report to the Board all schools under accreditation review and the reason the law schools are still under review. The Council must also approve and the Board review all annual and site inspection data questionnaires sent to law schools. Our interviews indicated that some individuals thought that schools and site inspectors might be inhibited in some respects if their free exchange of views during the accreditation process were made public. Since this appears to be a matter implicating legitimate accreditation process concerns, the Government was reluctant to include total disclosure as required antitrust relief.

3. The Special Commission

MSL attacks the composition of the Special Commission, claiming that they were appointed by the two immediate past Chairmen of the Council and that at least 8 of the 15 commissioners "are part of the heart and soul . . . or are closely tied to the capturing inside groups."[23] Comment, p. 20. While many of the members of the Special Commission have had close ties to the ABA and its accreditation activities, its membership is six legal academics (including one well-known critic of ABA accreditation), two judges, one university president (a past ABA president and Council Chair), five practitioners (including one critic of ABA accreditation), and one public member (the president of the League of Women Voters). The Special Commission had been established by the ABA, prior to settlement negotiations with the Government, to make a comprehensive review of the ABA's accreditation of law schools. The Government will closely examine its report. The proposed decree leaves matters that have legal educational policy implications to the Special Commission The ABA had initiated the Special Commission in response to criticisms prior to the filing of the Department's case and it is reasonable to give the first opportunity to address these policy interests to the Commission. The Special Commission's recommendations are subject to the approval of the ABA's Board. The Government may challenge any

[23] Only two of the Commissioners are listed in MSL's enumeration of the 79 "insiders" and "helpers" group. Comment, p. 6 n.4.

proposal with respect to the six subjects enumerated in the proposed consent decree.[24] The Government expects that it and the defendant will resolve any differences that may develop so that court involvement in the process will be unnecessary.

MSL claims that this process involves lengthy delays, possibly 15-18 months, and requests that either the Court delay entry of the decree until the Special Commission's report is adopted and approved by the Board and Justice Department, or that the Court should allow third parties the opportunity to comment.

While we do not expect anything so lengthy as a 15-18-month delay, entry of the decree should occur now.[25] The decree has established a reasonable, defensible remedy to treating the allegations in the Complaint. Specific practices that clearly violate the antitrust laws and cannot be justified on educational policy grounds have been immediately enjoined. The process that produced these and other accreditation rules is in the process of reformation, with the initial work being done by the ongoing Special Commission, subject to later approval by the ABA Board and Justice Department.

The public has had the opportunity to comment on the subject areas referred to the Special Commission and some, including MSL, have. Certainly, if third parties have comments or complaints

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[24] The six subjects are a small part of the Special Commission's entire report.

[25] The decree can be entered once the comments and the Response have been published in the Federal Register and the Government has certified to the Court compliance with the APPA.

about the Special Commission's report, which will be made public, the Justice Department welcomes and will consider those comments.[26] We have often initiated judgment enforcement proceedings based on information from third parties. Public comments will be valuable in forming our response and in our discussions with the defendant after the Special Commission's report.

MSL claims that use of the Special Commission circumvents the Tunney Act. The consent decree establishes a process rectifying the conduct alleged in the Complaint. The public has had the opportunity to comment on the process as well. The Department will welcome comments when the Special Commission's report is public. In the unlikely event the two parties cannot reconcile differences on the Special Commission's report, the proposed consent decree provides that the Court will resolve the Government's challenge, applying a Rule of Reason analysis.

MSL believes that such a challenge should be decided under a "quick look" analysis. In a recently decided case, however, the Third Circuit remanded for a Rule of Reason analysis a district court decision that had applied a "quick look" analysis where elite Northeastern universities fixed the price charged to commonly-admitted students who also received financial aid. United States v. Brown University, et al., 5 F.3d 658 (3rd Cir.

[26] Only a few of the 41 comments discuss the Special Commission.

1993). The subjects referred to the Special Commission do not directly restrain price and do not seem as appropriate for a "quick look" analysis.

MSL also comments on some of the topics on which the Special Commission will report. It notes that the student-faculty ratio standard has been applied by the ABA against law schools to require the employment of the capturing group - full-time legal theorists - and discourages the use of judges and practitioners.

The proposed consent decree left the initial recommendation regarding the correct use of student-faculty ratios to the Special Commission for several reasons. Student-faculty ratios are generally regarded as a useful legitimate accreditation tool, as is the requirement of a core full-time faculty. The Government expects that the Special Commission and the ABA Board will suitably assess the continuing utility of student-faculty ratios in a manner that does not skew the outcome to promote guild interests.

MSL also criticizes the ABA's use of the vague facilities accreditation standards to micromanage law schools and to require the construction of what it terms "Taj Mahal" law school facilities. The use of this standard to enhance unnecessarily full-time faculty working conditions is an appropriate concern. Since adequate facilities can be clearly related to educational quality, but the construction of unnecessary facilities imposes costs on universities and state governments, the Special

Commission should have the opportunity to recommend a standard and practice that will consist wholly of legitimate educational concerns.

4. "Procedural" Matters

MSL believes that the proposed relief is inadequate to eliminate the capture problem. MSL anticipates that the ABA will claim that it was not "feasible" to include practitioners to staff 6-7-person inspection teams and staff them with insiders.[27] The proposed consent decree does require that the composition of site teams be made public. This will make it easier for the public, and the Government, to see if the defendant is living up to its obligations under the decree. MSL raises the specter of other possible abuses by a Legal Consultant intent on evading, at a minimum, the spirit of the consent decree. The decree cannot address all possible outcomes but a systematic evasion of its mandate is cause for a contempt hearing. On balance, the decree makes a reasonable effort to eliminate capture of the accreditation process while preserving the ABA's ability to perform legitimate and important accreditation work. This case has also captured the attention of the ABA's leadership, which has personal and economic incentives to avoid a repetition of the conduct that caused the United States to bring this suit.

[27] There is no requirement that the size of inspection teams be that great. ABA inspection teams have doubled in size over the past 20 years.

5. Reliance on ABA Leadership

MSL doubts that the ABA's leadership can be trusted to effect changes in the accreditation process, relying, in particular, on the ABA's outgoing president's statement denying antitrust liability. A value of the consent decree process is that it permits the Government to obtain effective and immediate relief that the defendant may accept in part because it does not require an admission that can be used collaterally. Whether the defendant believes it has violated the antitrust laws is not as important as whether it intends to comply with the decree. Further, unlike defendants in most antitrust cases, the ABA's leadership did not economically benefit from the conduct alleged in the Complaint, nor, perhaps, did the ABA itself. Benefit accrued to legal academics in the Section of Legal Education, not ABA leaders who have an economic incentive to avoid conduct that may be costly to their organization. The leadership adopted changes and entered this decree over the apparent opposition of the leadership of the Section of Legal Education.[28] MSL's recitation of ABA antitrust "insensitivity," involving far different subjects several decades ago, is of little relevance.

[28] Within a month of the filing of the consent decree, the chairpersons of the Council and Accreditation Committee had resigned, sharply criticizing the settlement.

6. ABA Antitrust Compliance Officer

MSL also objects to the provision of Section VIII of the proposed Final Judgment that requires an antitrust compliance program, including the appointment of an antitrust compliance officer. Compliance programs have been a fairly standard provision in civil antitrust cases brought by the Government and settled by consent decrees since the Folding Carton case in the late 1970s.[29] The compliance program is, if anything, somewhat more rigorous than in other consent decrees.

We expect that the ABA's General Counsel will be named as the compliance officer. This, too, typically occurs in Government antitrust consent decree proceedings. We know of no case in which the "identity, professional background and views of the Compliance Officer" was an issue in an APPA proceeding. Clearly, since the compliance officer may be required to provide advice to the defendant's officials, one cannot expect the compliance officer to be one chosen by MSL.

MSL claims that it is "an incomprehensible lacuna" for the proposed consent decree not to give the antitrust compliance officer "supervisory responsibilities" with respect to the Special Commission. But, we see no there, there. The Special Commission's charge is to reconcile the educational policy

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[29] U.S. v. Alton Box Board Co., 1979-2 Trade Cas. (CCH) ¶ 62,992 (N.D. Ill. 1979). The then-Assistant Attorney General of the Antitrust Division described the antitrust compliance program as "innovative provisions that add a new dimension to . . . [a] recent emphasis on preventive antitrust." P. 1, Legal Times of Washington, July 9, 1979.

questions in the six subjects it is to report on. While it may be seeking antitrust advice, there is no reason why its work, which also includes a comprehensive review of law school accreditation, must be supervised by the antitrust compliance officer or why that should be required by the Court.

MSL also claims that the Department of Education's review of ABA accreditation "has been wholly ineffective to date in assessing quality." It believes that Section VI(L) of the proposed consent decree may be related to that claimed failure by the Department of Education.[30] MSL concludes that "it is perplexing that the Antitrust Division would now rely on the DOE as a vehicle for assuring quality or for precluding self-interested conduct." Comment, p. 58. The Justice Department disagrees with MSL's statement about the Department of Education and has no doubt that the Department of Education has carried out its mandate under the Higher Education Act. MSL's claim does not relate to whether entry of the proposed Final Judgment is within the reaches of the public interest, the issue now before the Court.

7. MSL Discovery Requests

MSL's comment restates the arguments made in its September 26 Intervention Motion for discovery of the Government's investigative files. As its first ground, MSL

[30] MSL's venturing into unrelated subjects and gratuitous attacks on a Cabinet agency is further reason why it should not have party or amicus curiae standing in this proceeding.

contends that it is entitled to discovery of a "wide spectrum of documents, evidence, memoranda and other evidence that can be determinative" under § 16(b) of the APPA. The APPA calls for the Government to file "materials and documents which the United States considered determinative in formulating [the proposed consent decree]" (emphasis added). Usually, there are no such documents and there were none in this proceeding.[31]

MSL again heavily relies on United States v. Central Contracting Co., 537 F. Supp. 571 (E.D. Va. 1982). Since Central Contracting was decided, however, two courts in this District have rejected requests for documents not identified by the United States as "determinative." United States v. LTV Corp., 1984-2 Trade Cas. (CCH) ¶ 66,133 at 66,335 n.3, appeal dismissed, 746 F.2d 51, 52 (D.C. Cir. 1984); United States v. Airline Tariff Pub. Co., 1993-1 Trade Cas. (CCH) ¶ 70,191 at 69,894. MSL attacks at great length the Government's certification in most APPA proceedings that there were no § 16(b) "determinative" documents. All of the APPA proceedings were court-supervised and the courts entered the consent decrees. The Government previously briefed this issue and incorporates that brief by reference.[32]

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[31] The Government attached three documents as exhibits to its Memorandum Opposing Intervention that, while not "determinative," were relevant to the proposed consent decree since they showed the ABA was reforming its accreditation of law schools before settling this case.

[32] At pages 11-20 of our October 10 Memorandum opposing intervention, we briefed the Court on the § 16(b) determinative documents requirement.

As a second prong for discovering the Government's investigative files, MSL claims that § 16(e) of the APPA provides for such discovery in the public interest when there is ". . . a need to protect the interests of injured parties by making available to them documents and information gathered by the Government that will 'assist in the effective prosecution of their claim.'" Comment, p. 68. Of course, no court has ordered such discovery in the 20-year history of the Tunney Act and none of the other 40 comments in this proceeding requested such discovery. MSL's stated purpose for its request is improper--to intrude into the Government's deliberative process to second-guess its use of prosecutorial discretion. Nor should MSL be able to use the APPA proceeding here to obtain discovery it was denied in its pending case against the ABA in the Eastern District of Pennsylvania. The discovery sought by MSL goes far beyond the limited purpose of an APPA proceeding, which is the review of the decree itself, not a review of the actions or behavior of the Justice Department.

MSL's attempt to obtain discovery under § 16(e) should be denied for a number of reasons. MSL should not use this proceeding to obtain discovery it was unable to gain in its two pending cases against the ABA. If anything, the APPA was designed to protect injured parties who are uninformed as to the source of their injury, not disappointed litigants. The purpose MSL states for its discovery request goes well beyond the limited purpose of an APPA proceeding and no court has required such

production under § 16(e). Additionally, requiring the production of investigative files will harm the public interest by discouraging other antitrust defendants from entering into consent decrees, and will make more difficult compliance with CIDs during Antitrust Division investigations.

8. Non-Decree Matters

In its comment, MSL requests the Government to give further consideration to three subjects outside the Complaint and proposed Final Judgment. The subjects are the accreditation requirements that substantially all law school first-year courses be taught by full-time faculty, the prohibition against full-time law students working more than 20 hours per week, and the library facilities and core collection requirement. MSL correctly recognizes that these matters are outside the scope of this APPA proceeding. Microsoft, 56 F.3d at 1459-60.

CONCLUSION

For these reasons, the Court should enter the consent decree upon the Government's certification to the Court of compliance with the APPA.

Dated: October 27, 1995 Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

On October 27, 1995, I caused a copy of "United States' Response To Public Comments" to be served by hand-delivery upon:

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