UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

In the Matter of	)	
	)	Docket No. 9312
North Texas Specialty Physicians,	)	
a corporation.	)	
	)	

BRIEF *AMICUS CURIAE* OF THE VOLUNTARY TRADE COUNCIL IN SUPPORT OF NEITHER PARTY

[PUBLIC RECORD]

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The Voluntary Trade Council[1] is a nonprofit research and education organization that develops practical solutions to the problems caused by violent state intervention in free markets. The VTC focuses on the harm caused to individuals and businesses by the enforcement of antitrust and other "competition" laws. Through publications, filings with government agencies, and the Internet, the VTC applies the principles of free market economics and rational ethics to contemporary antitrust policies and cases.

The VTC has a longstanding interest in the Federal Trade Commission's formulation and enforcement of antitrust policy in the health care industry. The VTC and its officers have filed comments in nearly two dozen cases brought by the FTC against physician and hospital groups since 2001.

This brief presents objections to the constitutional legitimacy of the Commission and the economic principles of Complaint Counsel's case. VTC does not ask the Commission to affirm or reverse Judge Chappell's Initial Decision. Instead, this brief constitutes a statement of objections on behalf of United States citizens that refuse to acknowledge the Commission's authority to act in their name and that of the "public interest."[2]

[1] The Voluntary Trade Council is the trade name of Citizens for Voluntary Trade, a Virginia corporation.
[2] The VTC thanks Douglas Messenger and Amanda Howe for their assistance in preparing this brief.

Argument

1. Introduction

Judge D. Michael Chappell's Initial Decision employs every antitrust cliché in the book, finding NTSP guilty of, among other things, "restraint of trade", failure to demonstrate "a net procompetitive effect on competition", failure to offer a "plausible and valid efficiency justification", and "unfair methods of competition." None of this rhetoric, however, provides much useful information about the basic principles that drive the Commission's actions against NTSP.

Beginning in the late 1970s, and accelerating rapidly after 2000, the Commission has escalated its intervention in the health care market, prosecuting 21 organizations—comprising approximately 12,000 physicians—for alleged antitrust violations. Each case presented a similar fact pattern: A third-party health care payer, usually a managed care organization (MCO), would complain that a group of physicians had rejected a contract offer; the Commission then opened an investigation of the physicians for "price-fixing," because the MCO either was unable to negotiate a contract, or it had agreed to pay a price higher than initially offered. The Commission took the position in each case that the physicians were obligated to accept the payer's initial offer unless it could be shown that higher prices would result in greater efficiencies, as defined by the Commission.

Every group, except NTSP, declined to contest the charges and signed a consent order granting the Commission broad power over the physicians' future business practices. The order proposed in Judge Chappell's initial decision largely mirrors the

terms of those consent orders, although Complaint Counsel has cross-appealed those portions of the decision that diverge from the earlier settlements.

Complaint Counsel argues that NTSP must act in a "procompetitive" manner that excludes any joint "non-risk" contracting not expressly approved under Commission policy (or more accurately, the Commission staff's selective interpretation of that policy.) Complaint Counsel says this will increase competition, lower prices, and ultimately benefit consumers. But history has demonstrated that violent state intervention never benefits consumers, and it generally harms those producers that most efficiently meet consumer demand. Typically, the beneficiaries of violent intervention are those businesses that are unable to compete in a free market, and therefore divert their resources away satisfying customers through improved efficiency and towards currying favor with politicians and state regulators. Such behavior is truly "anticompetitive" in a free market, yet such actions are routinely condoned by government officials as being in the "public interest." There is, however, no *bona fide* public interest outside the protection of individual rights. As the Declaration of Independence eloquently proclaims, *all* men are created equal, and by virtue of their existence possesses *inalienable* rights to life, liberty, property, and the pursuit of happiness.

Mirroring the principles set forth in the Declaration, the free market is the history of *social competition*, which economist Ludwig von Mises defined as "the striving of

individuals to attain the most favorable position in the system of social cooperation."[3] Mises said that competition was not a "right" that could be guaranteed through government mandates. Market competition only takes place when there is peaceful interaction between buyers and sellers.

Complaint Counsel, in contrast, proposes that the state should forcibly prohibit certain economic transactions based on a predetermined view of how markets *should* behave. Complaint Counsel justifies this position in this case by arguing that NTSP engaged in violence by "coercing" MCOs into paying a price that was greater than what the MCOs had originally offered, and which exceeded what any individual physician could have obtained outside of coordinated action through NTSP. Complaint Counsel asks the Commission to reorganize the market to mitigate the damage caused by NTSP's "anticompetitive" conduct.

Complaint Counsel's arguments are problematic on a number of fronts. First, any attempt to prohibit private "restraints of trade"—more accurately known as the "freedom of contract"—falls well outside the enumerated power to regulate interstate commerce claimed by the Commission under the federal Constitution. Secondly, even if Congress has the power to prohibit private restraints of trade, the Commission has no constitutional authority to exercise the judicial power of the United States in adjudicating any complaint against NTSP. Finally, both Complaint Counsel and NTSP rely on incorrect economic premises with respect to how free market prices are actually determined.

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[3] Ludwig von Mises, *Human Action* 273 (4th revised ed. 1996).

2. <u>The Commission lacks authority under the Constitution to hear any complaint brought against NTSP</u>.

NTSP has objected to Complaint Counsel's case on jurisdictional grounds, maintaining that as a memberless nonprofit corporation operating wholly within Texas, NTSP's actions do not constitute "commerce" within the statutory reach of Section 5 of the FTCA.[4] NTSP has further suggested that elements of its challenged conduct—including comments made to physicians regarding particular contract offers—are protected acts of "commercial free speech" under the First Amendment.[5] Complaint Counsel and Judge Chappell disagreed with both of these arguments and found there was no jurisdictional or constitutional barrier to finding NTSP in violation of Section 5.

Within the confines of existing case law, there may be plausible grounds for rejecting NTSP's jurisdictional and constitutional claims. NTSP's error, however, was in not looking beyond those confines to the text of the Constitution itself. The constitutional problems with Complaint Counsel's case extend so far as to negate the prosecution itself, for the Commission cannot adjudicate this case, nor for that matter can Section 5 of the FTCA or the preceding Sherman Act be enforced consistent with the Constitution's delegation of legislative power. Accordingly, the question of whether the Commission should affirm or reverse the Initial Decision based on NTSP's narrower claims is moot.

[4] Respondent's Appeal Brief 58-59.
[5] Respondent's Appeal Brief 25, 53-54.

a. A general prohibition of private restraints of trade, such as physician joint contracting, does not constitute a "regulation" under the Commerce Clause.

The Initial Decision relied on Sherman Act case law in finding NTSP guilty of a Section 5 violation.[6] Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States."[7] The courts and the Commission, however, only consider "unreasonable" restraints of trade a Section 1 violation, although there is no fixed *ex ante* definition of every act that is considered "unreasonable." Judge Chappell found that NTSP's actions fixed prices in "non-risk contracts" with payers, and that was "unreasonable" under the prevailing interpretation of Section 1. Judge Chappell held that NTSP failed to prove that its challenged conduct "had a net procompetitive effect on competition" and that there was not a "plausible and valid efficiency justification" for its actions.[8]

The proposed order contained in the Initial Decision imposes substantial conditions on NTSP's future conduct. Section II of the Order compels NTSP to "cease and desist" from taking any action that the Commission considers joint "non-risk" contracting with payers. The Order further prohibits NTSP from "[e]xchanging or facilitating in any manner the exchange of information among physicians concerning the terms or

[6] Initial Decision 64.
[7] 15 U.S.C. § 1
[8] Initial Decision 91.

conditions, including price terms, on which any physician is willing to deal with a payor."[9]

NTSP has adequately addressed the issue of whether its alleged restraints of trade were "unreasonable" under the prevailing Sherman Act case law. The larger question, however, is whether *private* restraints of trade are subject to blanket prohibition by the federal government consistent with the Constitution. This requires an analysis of the scope of federal power to govern commerce.

The United States receives its authority to regulate trade exclusively from the Constitution, which grants Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[10] NTSP has argued that its challenged activities do not constitute "commerce," and that even if it was, it was not "among the several States." Judge Chappell rejected those claims, but assuming *arguendo* that NTSP's conduct does constitute interstate commerce, do the antitrust laws then constitute a valid "regulation" of that commerce?

The Commerce Clause was adopted to give Congress the ability "to ensure a national market and a regime of free trade among the states."[11] The Constitution's framers understood the term *regulate* to mean "make regular," or subject to a particular rule or method. The Commerce Clause allows Congress to decide *how* acts of interstate commerce should be performed. It does not, however, give the federal government

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[9] Initial Decision 94.
[10] U.S. Const. art. I, § 8, cl. 3.
[11] Roger Pilon, *Cato's Letter #13: The Purpose and Limits of Government* (1999), *available at* <www.cato.org/pubs/catosletters/cl-13.pdf>.

blanket power to *prohibit* acts of commerce that Congress (or the President or the judiciary) considers merely imprudent or undesirable.

Law professor Randy Barnett discussed the constitutional distinction between "regulate" and "prohibit" in his book *Restoring the Lost Constitution*:

> Apart from the Commerce Clause, the terms "regulate" or "regulation" appear seven times in the body of the Constitution and three times in the amendments proposed by Congress to the states, though only once in the Bill of Rights as ratified. The term "prohibit" is used once in the body of the Constitution and twice in the Bill of Rights. Article I, Section 4 gives Congress the power to "alter such Regulations" on the time, place, and manner of elections prescribed by the state legislatures. Clearly, the power to regulate or facilitate elections is not the power to prohibit them. Article I, Section 8 gives Congress the power "[t]o regulate the Value" of money, not to prohibit the use of money or to "regulate" its value to zero.
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> In two places the Constitution makes an explicit distinction between prohibition and regulation. Article III, Section 2 gives the Supreme Court appellate jurisdiction, as to both law and fact, "with such Exceptions, and under such Regulations as the Congress shall make." . . . If the power to make regulations included the power to prohibit that which is regulated, there would have been no need to give explicit power to Congress to make "exceptions" to appellate jurisdiction.[12]

Barnett said the power to regulate commerce does include the power to prohibit "wrongful acts with respect to commerce between state and state." Barnett adds, however, that "commerce itself can rarely violate the rights of another," and therefore is not a "wrongful act" subject to outright prohibition.[13]

In order to accept the Sherman Act's ban on private restraints of trade as a legitimate application of the Commerce Clause, two standards must be satisfied: Does the ban "make regular" commerce among the states, and does it facilitate "a national

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[12] Randy E. Barnett, *Restoring the Lost Constitution* 303-304 (2004).
[13] *Id*. at 306.

market and a regime of free trade"? Barnett's analysis suggests that a *per se* prohibition on private restraints, "unreasonable" or otherwise, contradicts the plain meaning of "regulate" in use throughout the Constitution. Further examination of the Initial Decision only weakens the case for concluding otherwise.

The phrase "make regular" signifies a process whereby a *uniform* method is prescribed to perform a particular act. A government act is not a valid regulation merely because it tells private parties what to do; the act must set forth an objective standard that is equally applicable to all similarly-situated parties. Additionally, to abide by the Constitution's ban on *ex post facto* laws[14], a valid regulation must allow a rational person to understand *ex ante* what conduct is necessary for compliance.

Neither the Sherman Act nor the FTCA prohibits the particular acts challenged by Complaint Counsel—NTSP's "non-risk" joint contracting with third-party payers. Instead, Complaint Counsel relies on judicial and Commission policies that purport to interpret the two antitrust statutes. Complaint Counsel relies principally on the 1994 *Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care* (1994 Statements). These statements represent the executive branch's view of what actions health care providers can take without risking antitrust prosecution. They describe "safety zones" where certain types of conduct will not be challenged. Such safety zones, however, can be altered or abolished at the whim of the Commission or the Justice Department, because the 1994 Statements remain, at all times, a series of *opinions* rather than legislative acts.

[14] U.S. Const. art. I, § 9, cl. 3.

The 1994 Statements state that to fall within the antitrust safety zone:

> [T]he participants in a physician network joint venture must share substantial financial risk in providing all the services that are jointly priced through the network. *The safety zones are limited to networks involving substantial financial risk sharing* not because such risk sharing is a desired end in itself, but because it normally is a clear and reliable indicator that a physician network involves sufficient integration by its physician participants to achieve significant efficiencies. Risk sharing provides incentives for the physicians to cooperate in controlling costs and improving quality by managing the provision of services by network physicians.[15] (Italics added for emphasis and citations omitted.)

The Initial Decision found NTSP's conduct fell outside the safety zones, because it operated joint ventures *without* sharing financial risk. Although Complaint Counsel did not prove collusion had occurred, "NTSP had rejected initial payor offers based on poll results showing that most of the [NTSP member] physicians would not be interested in the offers."[16] NTSP's rejections did not, according to Judge Chappell and Complaint Counsel, generate "a net procompetitive effect on competition," and therefore they were prohibited restraints of trade.

On first reading, the Commission's distinction between risk and non-risk contracting seems to offer a plausible basis for regulation. The 1994 Statements, it could be argued, "make regular" physician joint ventures by prescribing a particular method, risk contracting. In endorsing one method, non-conforming methods must be prohibited.

The 1994 Statements, however, do not simply prescribe a *method* of conducting inherently rightful commercial acts: they dictate the *content* of private economic transactions in pursuit of a particular set of *outcomes*. The 1994 Statements seeks to

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[15] U.S. Department of Justice and Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care* § 8(a)(4) (Revised Aug. 1996).

[16] Respondent's Appeal Brief 3.

"achieve significant efficiencies" in trade between health care providers and third-party payers by "controlling costs and improving quality." To those ends, non-risk contracting is restricted and often prohibited because, in the executive branch's opinion, risk contracting is a better indicator that the desired efficiencies are being achieved.

In predetermining economic outcomes—or at least attempting to—the Commission does not "make regular" interstate commerce, but in fact does the opposite. Restrictions on non-risk contracting create an *irregular* market where physicians are at a disadvantage in negotiating with payers. After all, insurers may collectively represent thousands (even millions) of individual consumers. If the payer seeks a contract shifting the bulk of financial risk to the physician, the 1994 Statements considers that the normal operation of a competitive market. But when even a handful of physicians join together and seek to shift financial risk to the insurers (or their customers), that is condemned by the Commission as illegal and "anticompetitive."

Regulation under the Commerce Clause must serve as a neutral arbiter of individual rights, not a mechanism for promoting the "special interests" of one economic group over another. Unlike regulations that direct the activities of the armed forces or the Post Office—entities that are creations of the federal government—commerce comprises the activities of private citizens that take place outside the "public" sphere. Accordingly, any state regulation of commerce must yield to the inherent rights of private property owners.

The Initial Decision relies on a classic antitrust argument: the rights of payers were violated by NTSP's collective action because it raised prices. This is an attempt to

condemn NTSP's actions as "coercion,"[17] creating a pretext for abridging NTSP's rights in order to protect the "rights" of NTSP's customers. Economist Dominick T. Armentano has explained the flaws with this line of reasoning:

> Some critics would argue that business people and corporations forgo their right to full liberty when they collude and restrict production, since such behavior violates the right of potential buyers. But this understanding of rights is misguided. Producers own their property, or are the trustees of property for owners, and possess *all* the rights to it, including the absolute right *not* to use it at all. Similarly, consumers have full rights to their own property, including the absolute right to spend or not spend their own money. The individual rights (property rights) of neither party can be violated by a refusal to deal or by a partial refusal to deal through, say, some voluntary restraint of trade.[18]

Armentano's observations are particularly important in this case, as there is no evidence of collusion by NTSP, and the Initial Decision inferred illegal behavior from a pattern of similar behavior by independent physicians. The thrust of this argument is that the government will cease to protect the individual's property rights when the owner chooses to act in concert with other property owners. There is no economic difference between NTSP's physicians acting independently or acting together, but Commission policy labors to manufacture a distinction based on the anticipated outcome of such actions. This is precisely the type of behavior that is outside the reach of the federal commerce power.

The Commission's discrimination against physicians in their dealings with payers flies in the face of the Commerce Clause's mandate to foster a "national market and a regime of free trade." Throughout the Constitution, explains economist and historian

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[17] *See* Initial Decision 88.

[18] Dominick T. Armentano, *Antitrust: The Case for Repeal* 100 (Revised 2nd ed. 1999).

Thomas DiLorenzo, the framers strived to protect individual economic liberties against the encroachment of special interests:

> [T]he Commerce Clause outlawed protectionist tariffs in interstate commerce, thereby making the country a free-trade zone, and the Constitution also prohibited export taxes to encourage international commerce. The Fifth Amendment's Due Process Clause ("No person . . . shall be deprive of life, liberty or property without due process of law") provided a degree of protection for property rights, as well, as it defended private property against arbitrary governmental usurpations.
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> According to the Constitution, taxes are supposed to be uniform ("all Duties, Imposts and Excuses shall be uniform throughout the United States") and devoted only to things that promote "the general welfare" — not the welfare of special-interest groups, as is the case today. Discriminatory taxation was outlawed because, as James Madison wrote in his famous *Federalist #10* essay, the main purpose of the Constitution was to limit "the violence of faction," by which he meant special-interest groups.[19]

The Initial Decision's proposed Order creates what amounts to a discriminatory tariff against NTSP, reducing the value of previously signed contracts by force in order to subsidize the operations of MCOs and other payers. (And this is on top of the numerous subsidies and legal privileges MCOs and payers already enjoy under government policy.) It is a clear example of the "violence of faction" that Madison spoke of.

Furthermore, because the Initial Decision imposes substantive restrictions on NTSP's ability to facilitate the exchange of information among its physician members regarding prices, the proposed Order violates the First Amendment. NTSP offers a limited argument on this point, stating that its "commercial free speech is protectible –

[19] Thomas J. DiLorenzo, *How Capitalism Saved America* 70-71 (2004).

especially in light of the undisputed lack of collusion among physicians." These conditionals are unnecessary, however. The First Amendment enjoins *all* infringements of private speech by the federal government. There are no exceptions for "commercial free speech" or speech that incites behavior the executive branch arbitrarily labels economic "collusion."

While NTSP's arguments are consistent with prevailing Supreme Court precedent, the case law contradicts the Constitution's unambiguous text. As Justice Thomas has correctly observed, "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than noncommercial speech."[20]

First Amendment problems aside, however, there can be no doubt that the Constitution does not permit Congress—and by extension the Commission—to prohibit private restraints of trade, which includes non-risk contracting by NTSP.

b. The Federal Trade Commission may not exercise the judicial power of the United States.

Even if *Congress* has the authority to ban private restraints of trade under the Commerce Clause, it is still doubtful that the Federal Trade Commission can undertake any enforcement action. NTSP has challenged the Commission's jurisdiction under the facts offered in Complaint Counsel's case. The Commission's very existence, however, must be confronted under a proper examination of the Constitution's framework of government and due process requirements.

[20] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring).

The Commission is classified as an independent agency of the executive branch. Section 5 of the FTCA directs the Commission to punish "unfair methods of competition . . . and unfair or deceptive acts or practices in and affecting commerce."[21] The Commission is empowered to define which specific acts are prohibited by Section 5; to appoint staff to investigate potential violations; to decide whether to prosecute a particular person or company; to decide questions of fact and law before a Commission-appointed administrative law judge; to issue a final order that is presumed correct on appeal; and to monitor compliance with final orders.

This combining of executive, legislative, and judicial powers within the Commission sharply contrasts with James Madison's warning in *Federalist No. 47*:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.[22]

The Constitution vests "the judicial Power of the United States" in the Supreme Court and any "inferior courts" established at the discretion of Congress. Article III, Section 1, requires all judges hold their office "during good Behaviour," subject only to impeachment and removal by Congress. As the Supreme Court has explained, "The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government."[23]

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[21] 15 U.S.C. § 45(a)(1).
[22] *The Federalist* 336 (Benjamin F. Wright, ed., 1961).
[23] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955).

Section 1 of the FTCA, in contrast, vests the Commission's adjudicatory powers with five commissioners appointed for seven-year terms, subject to removal by the President for "inefficiency, neglect of duty, or malfeasance in office."[24] The Commission's chairman serves in that post solely at the President's pleasure.

The Commission's exercise of judicial power in the present case is indisputable. The commissioners issued the complaint against NTSP in their name, authorized subpoenas to various parties in connection with the initial investigation and complaint, supervised Judge Chappell's trial of the facts and law, and now sits as a quasi-appellate body reviewing the Initial Decision *de novo*. All of these actions must be performed by a court established under Article III, not an "independent agency" of the executive branch nominally acting under Article II.

The Commission has no authority to try any complaint against NTSP, or any other person or corporation. Only Article III judges can exercise the judicial power, and such judges must have *life tenure*, not a fixed term subject to executive control. Appellate lawyer Howard Bashman discussed the Supreme Court's own case law on this point in a column questioning the constitutionality of recess appointments of Article III judges:

> In *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), six Justices concluded that judges who lacked the tenure and compensation protections provided in Article III of the U.S. Constitution could not preside over Article III cases. *See also Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962) (recognizing that only Article III judges can exercise the judicial power of the United States).
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> In *Evans* v. *Gore*, 253 U.S. 245, 252 (1920), the Supreme Court explained that the purpose of Article III's tenure and compensation protections "was

[24] 15 U.S.C. § 41.

> to invest the judges with an independence in keeping with the delicacy and importance of their task and with the imperative need for its impartial and fearless performance." And, in *United States* v. *Will*, 449 U.S. 200, 218 (1980), the Court explained that Article III's tenure and compensation clauses recognized that a "[j]udiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." The Court also observed that Article III was intended to prohibit the English monarchy's practice, in colonial times, of "mak[ing] Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." *Id.* at 219.[25]

The Commission's unconstitutional exercise of judicial power infringes upon numerous other constitutional rights guaranteed to NTSP: The right to a trial by jury under Article III and the Sixth and Seventh Amendments, the right to be secure against unreasonable searches under the Fourth Amendment, and the right not to be deprived of liberty or property without due process of law under the Fifth Amendment.

c. The Commission is not an impartial judge of fact because of the actions of former Chairman Muris.

NTSP's constitutional rights have also been violated by the bias of former Commission chairman Timothy J. Muris, who presided over the Commission when the complaint in this case was issued. Chairman Muris failed to publicly disclose a material conflict-of-interest: His paid consulting work for Aetna, one of NTSP's alleged victims, during a previous Department of Justice antitrust investigation where NTSP was an

[25] Howard J. Bashman, *Questioning the Constitutionality of Recess Appointments to the Federal Judiciary*, The Legal Intelligencer (March 12, 2001) <available online at http://hjbashman.blogspot.com/2001_03_01_hjbashman_archive.html#107564728859468484>.

adverse party. NTSP counsel, for unknown reasons, apparently chose not to mention Chairman Muris's conflict at trial or in its Appeal Brief.[26]

The Initial Decision actually describes the DOJ investigation of Aetna in some detail. In June 1999, the Antitrust Division sued Aetna to block its acquisition of Prudential Insurance Company of America. According to Judge Chappell, "NTSP assisted the Department of Justice in that investigation." NTSP subsequently assisted additional investigations of Aetna by the DOJ, the Texas attorney general, and the Texas Department of Insurance.[27]

Chairman Muris, then (as now) a law professor at George Mason University, "publicly criticized both the American Medical Association for its opposition" to the Aetna-Prudential merger, and put himself at the forefront of the public debate in his capacity as an Aetna consultant:

> Muris wrote a widely-circulated Commentary entitled "Bigger Can be Better," in which he maintained that the Aetna acquisition of Prudential Healthcare was "simply not a problem under the antitrust laws because neither Aetna nor other large national carriers can control prices or limit competition to hurt consumers." Muris also argued that "the health insurance market is extremely fluid," that "consumers move from HMO coverage to preferred provider plans and back again," and that "because of this intensely competitive environment, doctors (in Texas) receive only 15 percent of their payments in those states from Prudential and Aetna combined." For these reasons, among others, Muris asserted that "health care industry mergers generally benefit consumers by increasing quality and lowering costs," and that the investigation by the Antitrust Division of the Aetna acquisition was misguided and should be closed.[28]

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[26] NTSP is aware of the conflict, however, as it was a representative of NTSP (not counsel) that first brought the matter to The Voluntary Trade Council's attention.
[27] Initial Decision 50-51.
[28] Vorys, Slater, Seymour and Pease LLP. *Bush Nominee to Federal Trade Commission Expected to Support Insurance Industry Consolidations*, Insurance Industry Antitrust Newsletter (April 2001) <available at http://www.vssp.com/FSL5CS/antitrust%20newsletter/antitrust%20newsletter663.asp>.

During Chairman Muris's tenure, nearly two dozen physician groups were prosecuted by the Commission for antitrust violations, cases that presented a similar factual and legal pattern to the NTSP matter. This was a substantial increase in physician prosecutions from the term of the previous Commission chairman.

It would not be unreasonable to suspect Chairman Muris of seeking retribution against NTSP on behalf of Aetna, his former client. At best, Chairman Muris committed a substantial lapse in professional ethics. His failure to even disclose his relationship with Aetna—to say nothing of his failure to *recuse* himself from key votes on the NTSP investigation—should cast a pall over this entire proceeding.

The larger problem, however, is not that one member of the Commission had a conflict-of-interest, but rather that the extra-constitutional nature of the Commission itself easily gives rise to such problems. The Commission often speaks of its cases as matters of "public interest," but the truth is that the commissioners and their prosecutorial staff often allow their own careers to slant their judgment in bringing and deciding cases:

> [C]onsider the incentives of those who are in charge of enforcing the antitrust statutes. At the Antitrust Division, there are 331 attorneys and 50 economists, while the FTC maintains a comparable 435 attorneys and 63 economists. These agencies are hierarchical and experience much of the red tape that any government bureau does. But at some point, every decision is made by an individual, who has his own career agenda and objectives.
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> One study of the Antitrust Division found that the strengthening of the anti-merger laws (the 1950 Cellar-Kefauver amendment), and especially the early cases brought to court, made antitrust expertise more valuable in the private marketplace. There was a clear increase in the demand for

> these skills so that a young lawyer had a great deal to gain by working in the Antitrust Division. What's more, he or she had even more to gain from the specific experience of arguing cases at trial in the federal courts. Lawyers at the Antitrust Division have every incentive to choose cases that will go to trial, and go to trial quickly, regardless of the efficacy of the action in combating monopoly, or its effect on consumer welfare.
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> A similar study focuses on the FTC. The study found that the ultimate career objective of most FTC lawyers was a job at a prestigious private law firm. Robert Katzmann writes that some cases threaten the morale of the staff because they often involve years of tedious investigation before they reach the trial stage. Therefore, the FTC opens a number of easily prosecuted matters, which may have little value to the consumer . . . in an effort to satisfy the staff's perceived needs. One FTC attorney is quoted in the study as saying, for me, each complaint is an opportunity, a vehicle which someday could take me into the courtroom. I want to go to trial so badly that there are times when I overstate the possibilities which the particular matter might offer.
>
> It's clear from studies like these that the antitrust bureaucracy doesn't select cases to prosecute on the basis of their potential net benefit to society. Instead, the staff at FTC and the Antitrust Division use the discretion that they do have to further their own private interests and careers rather than those of the public at large. The antitrust bureaucracy cannot be counted on to uphold the public interest in enforcing antitrust laws. (Citations omitted.) [29]

An agency that combines executive, legislative, and judicial powers, staffed with lawyers whose careers depend on expanding the reach of antitrust to the heavens and beyond, is a recipe for the very tyranny Madison cautioned against in *Federalist No. 47*. NTSP is simply the latest target of opportunity for a group of staff lawyers (and former commissioners) looking to generate future business in the private sector. The Constitution was supposed to prevent such extra-judicial muggings from taking place.

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[29] Edward J. Lopez, *Breaking Up Antitrust*, The Freeman: Ideas on Liberty (Jan. 1997) <available at http://209.217.49.168/vnews.php?nid=208>.

3. <u>Complaint Counsel relies on false economic premises in attempting to discern an "objective" price for physician services</u>.

Although the Commission has no authority to prosecute or try NTSP, a brief analysis of the Initial Decision's economic reasoning is useful to furthering the public's understanding of this case. All parties to this matter—including Judge Chappell and NTSP—are operating under false assumptions about how a "free market" for health care should operate. These errors in economic reasoning only compound the numerous constitutional defects in the antitrust laws and the Commission's enforcement of them.

Throughout Complaint Counsel's case and the Initial Decision, there is heavy emphasis on the role of the *federal government* in determining prices for physician services. That role centers around the reimbursement schedules used to determine physician compensation under Medicare:

> The Medicare RBRVS fee schedule is Medicare's Resource Based Relative Value System ("RBRVS"), a system developed by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for each service rendered to Medicare patients. Health plans that contract with physicians on a fee-for-service basis often do so based on a stated percentage of the Medicare RBRVS fee schedule, which provides reimbursement rates for a large number of specific procedures. The Medicare RBRVS establishes weighted values for each medical procedure, such that the application of a percentage multiplier enables one to determine the fees for thousands of different services simultaneously.
>
> NTSP' s polling form, which asks each physician to disclose the minimum price that he or she would accept for the provision of medical services pursuant to a fee-for-service HMO or PPO agreement, asks member physicians to indicate their price selection by placing a check mark next to one of several pre-printed Medicare RBRVS ranges. On October 15, 2001 , the NTSP Board received annual poll results. Based on the poll results, NTSP established minimum prices of 125% of2001 Medicare RBRVS for HMO products and 140% of2001 Medicare RBRVS for PPO products as

> minimally acceptable fee schedules. On November 11 2002, NTSP conducted another annual poll to determine minimum reimbursement rates for use in negotiation of HMO and PPO products and anesthesia contracts with health plans. On its 2002 polling form sent to physicians, NTSP included the 2001 poll results, reported by mean, median, and mode. The results of the 2002 annual poll by mean, median, and mode, for HMO were 131 %, 135%, and 135%; for PPO, 146%, 145%, and 145%. As summarized below, these minimum rates were used by NTSP in its negotiation of economic terms of non-risk contracts on behalf of its member physicians.[30]

RBRVS is based on a premise familiar to Marxists: objective theory of value. This theory—also known as labor theory of value—holds that all goods and services exchange at the value of the labor required to produce them. Labor earns a subsistence wage for producing goods, and the purchaser of labor (the capitalist) makes his profit by adding the labor to raw materials.

RBRVS attempts to put labor theory of value into practice by driving prices down to the point where physicians can only earn a "subsistence wage." The government refers to this as "cost containment," but in fact cost has nothing to do with it. RBRVS sets a uniform reimbursement level for a particular service irrespective of the actual cost or quality. These are price controls designed to reduce government expenditures on Medicare, not a method of delivering physician services with a greater degree of economic efficiency.

MCOs express their contract offers in terms of RBRVS for the same reason the government does: to reduce expenditures on physician services. Third party payers generate profits by maximizing their collection of premiums from individual customers

[30] Initial Decision 74-75.

while minimizing the amount of health care actually provided. The system is designed to collectivize patient care by making it impossible to determine market prices; RBRVS prices are based on the arbitrary, often random, drawing of relationships between various medical services. It is akin to determining the prices of food by relating the price of bananas to the price of peanut butter and then to the price of tomato soup.

The paradox, of course, is that it is government intervention through Medicare and Medicaid—and the subsequent creation of MCOs through subsidies—that has driven up health care expenditures in the first place. With the government subsidizing some health care customers and MCOs replacing direct market interaction for others, health care demand has consistently risen since the 1960s. Simultaneously, the government restricts the supply of health care services through mandatory licensing of providers and the regulation of insurance (dictating what services must be covered, prohibiting discrimination by insurers, etc.) These interventions have combined to wreck the free market price system, which depends on minimum intervention and a *subjective*, rather than objective, theory of value.

As Dr. Jane Orient, executive director of the American Association of Physicians and Surgeons, explained in an article opposing the adoption of RBRVS, the subjective theory of value restores economic decision-making power to health care consumers:

> **The objective theory of value considers only the producer and completely neglects the consumer.** Nowhere does the calculation of ``relative value" consider the most important factor: the benefit to the person who purchases the goods or services.

In contrast, the **subjective theory of economic value** proposes that the value of an object is not inherent in the thing itself, but exists in the mind of the person who values it.

As Bettina Bien Graves pointed out, this theory ``represented a completely new, revolutionary approach to economics. For the first time, the individual actor himself became the unit with which economics was concerned. His actions, his responses . . ., were recognized as the key to explaining market phenomena".

The ranking of values varies with each individual, depending on personal circumstances and expectations. A person may be willing to make great sacrifices to obtain certain services, but will purchase others only if they are very cheap. For example, to one person cancer chemotherapy or surgery may seem a burden so great that the expectation of benefit may not be worth the price (either in money or suffering). To another, a small chance of cure may be worth any amount of pain and all of his worldly possessions. No third person can make a determination of the value of the service, even though its cost to the persons providing it may be exactly the same in the two instances.

According to the subjective theory of value, costs are basically **opportunity costs** incurred by a decision-maker, i.e. the value of the other goods or services he is willing to forego in order to obtain the goods or services under consideration. Such must be borne exclusively by the person making the decision; they cannot be shifted to others. Nor can they be measured by others, since subjective mental experience cannot be directly observed. (However, the subjective value is reflected in the price that an individual is willing to pay.) Further, costs are dated at the moment of final decision or choice. A recalibration of the relative value scale every five years is far too slow to account for changes in the personal circumstances of the actors in any economic transaction.

The objective theory of value must be assumed by those who believe in central planning by omniscient planners. The subjective theory of value is espoused by those who believe in economic freedom, in the rights of individuals to engage in voluntary transactions that they perceive to be of mutual benefit.[31] (Emphasis in original and citations omitted.)

[31] Jane M. Orient, M.D., *The Resource-Based Relative Value Scale: A Threat to Private Medicine* <available at http://aapsonline.org/brochures/rvs50.htm>.

RBRVS, Dr. Orient noted, abolished the right of individual patients to contract with physicians and replaced it with a form of central planning where "[t]he patients' values are completely excluded from the equations."[32]

Because the costs and benefits of trade are personal and subjective, there is no rational means of determining social efficiency in the manner Complaint Counsel and NTSP have attempted to do in this case. Consequently, there is no means of determining an objective—or "competitive"—price for physician services. There is no economic basis for Complaint Counsel to condemn the non-risk contract prices negotiated by NTSP as anticompetitive.

[32] *Id.*

Conclusion

If the Initial Decision were under review by an Article III court, the Voluntary Trade Council would urge reversal in the strongest possible terms. But because this case remains within the closed world of the Federal Trade Commission, we decline to lend the appearance of credibility to this proceeding by calling for a particular result. The Commission has no right to exist, much less to take action under the federal Constitution. A call for reversal implies this Commission has a theoretical right to affirm, and that is too great a concession. As stated above, the Voluntary Trade Council's mission is to present a statement of objectives so that the public record of this proceeding, hopefully, includes at least a token protest of what has taken place.

In any case, reversal of the Initial Decision will not provide justice to NTSP or the other two dozen physician groups prosecuted by the Commission in recent years. NTSP has already expended substantial resources in mounting its defense against the Commission's assaults, and no doubt it will continue to fight the Commission in the Article III courts should a final order be issued against its interests. And even if the Commission dismisses its complaint, NTSP and all physicians will remain under the continuing threat of future prosecution as new antitrust principles are inevitably "discovered" by Commission staff (and members of the coordinate antitrust bar) seeking to further their careers. Until the 1994 Statements, and the antitrust laws themselves, are repealed, there is little promise that justice will prevail.

In closing, we recall one of the grievances of America's first government in declaring its independence from the tyranny of Britain's king: "He has erected a multitude of

New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance." More than two centuries later, the Federal Trade Commission has sent its swarms of antitrust lawyers to harass the nation's physicians and price them out of the marketplace. Such tyranny should only be met with resistance. Physicians may not declare independence from the United States, but they must build upon NTSP's example and resist the Commission with every intellectual and legal tool at their disposal.

Appealing to the Supreme Judge of the world for the rectitude of our intentions,

/s/

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Dated: February 18, 2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 18, 2005, I caused true and correct copies of the foregoing Motion for Leave to File Amicus Curiae Brief and accompanying Brief Amicus Curiae of The Voluntary Trade Council to be served as described below.

Service by courier of paper copies, including an original, signed version, and 12 photocopies, and by electronic mail, was provided to:

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Service of one copy by was provided, by First Class mail, postage prepaid, to:

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