

case. I hope that this decision will alert all Americans to the dangerous judicial activism that plagues the Ninth Circuit. Furthermore, I hope that this case is reversed on appeal, so that many more generations of school-children will proudly learn the Pledge of Allegiance.

#### HIGH FRUCTOSE CORN SYRUP ANTITRUST DECISION

Mr. LEVIN. Mr. President, I wish to bring to the Senate's attention a recent decision of the U.S. Court of Appeals for the Seventh Circuit, written by Judge Richard Posner, in the case of *In Re High Fructose Corn Syrup Antitrust Litigation*, found at 2002 U.S. App. LEXIS 11940. Judge Posner's unanimous opinion, joined by Circuit Judges William Bauer and Michael Kanne, articulates in clear, cogent, and unequivocal language the standard for the Federal courts in the Seventh Circuit to follow in deciding whether circumstantial evidence of price-fixing or tacit collusion should be presented to a jury in antitrust cases. This is a much needed improvement in the state of the law, and I hope that it will soon be followed in other circuits as well.

Last month, the Permanent Subcommittee on Investigations, which I chair, completed a 10-month investigation into the reasons why gasoline prices fluctuate so dramatically and why retail gasoline prices seem to go up and down together at so many gas stations. The majority staff issued a comprehensive 400-page report explaining our findings, and we then held 2 days of hearings on the report.

I will not summarize the entire report here, but I would urge anyone interested in how gasoline prices are set to visit the subcommittee's Web site, where the report can be downloaded.

I would like to highlight, however, several of the issues the subcommittee examined that are directly relevant to the Seventh Circuit's decision. First, the subcommittee found that in several of our domestic gasoline markets where there is little competition a few oil companies have sufficient market power to raise the price of gasoline through their decisions on how much gasoline to produce.

The subcommittee examined retail prices in several geographic markets. The subcommittee found at various times in these markets the prices of the major brands of gasoline followed a "ribbon-like" pattern. The prices of these brands moved up and down together, usually by about the same amount each day, and they maintained a constant difference in price with respect to each other.

The documents reviewed by the subcommittee indicate that the marketing practices of the various gasoline wholesalers and retailers in the market contribute to this pricing pattern. First, the major brands usually seek to maintain a constant price difference with respect to one or more other brands

that are considered the major competition or the price leader in that market. Second, the market strategy of the major brands generally is to maintain market share, and avoid costly price wars which do not result in greater market shares, but often lead to lower margins for all of the firms competing in the market. Thus, most of the major brands establish their retail price simply by following the price movements of one or more other brands. They do not attempt to undercut their rivals; rather they seek to maintain their relative competitive position with respect to their rivals.

Another strategy supporting the ribbon-like retail price pattern is the influence the refiners maintain over the retail price. Major brand refiners usually set the wholesale price paid by their dealers on the basis of surveys of the retail prices of competitors; the refiner then subtracts an amount considered to be an adequate margin for the retailer, and charges the retailer for the remainder. In this manner, the dealers receive a fixed margin for their gasoline, and the benefits and costs of retail price changes accrue to the refiner rather than the dealer. In reality, therefore, a few refiners rather than many individual dealers set the retail price of gasoline for the major brands.

The resulting retail pricing pattern—the ribbon-like pattern—is exactly the same pattern one would expect to see in a market where there is some type of collusion between the firms in the market. In a collusive marketplace, each firm has an agreed-upon market share, and the relative prices of the different brands are fixed.

By itself, parallel pricing does not indicate collusion. Parallel pricing can develop in a competitive market, as each firm strives independently to obtain some advantage from a movement in price, only to be matched by its competitors who seek to deny that firm any such advantage.

Hence, to establish that firms in a market are colluding with one another, it is necessary to demonstrate more than just the existence of parallel or interdependent pricing. A plaintiff, or the government, as the case may be, must establish either an explicit agreement on pricing, or present sufficient circumstantial evidence indicating a tacit agreement on pricing.

It is rare to find in the modern age, with many corporations well-schooled in the antitrust laws, and legions of lawyers eager to educate those who are not, to find an express agreement to fix prices or restrict supply. Moreover, in markets most susceptible to price-fixing those with few firms, a high degree of concentration, homogeneous products, and high barriers to entry, such as the gasoline market—express collusion is totally unnecessary to carry out the purposes of any such conspiracy. In highly concentrated markets, the few firms can observe each other's behavior, determine how they react to various strategies, and react accordingly.

After a while, the firms in these markets can develop patterns of behavior that are as non competitive as if an actual agreement had been reached.

The problem, therefore, is how to determine whether certain market activity is the natural result of the structure of the market and purely independent decisionmaking, or is the result of some tacit agreement or understanding or agreed-upon practices that restrict competition.

Again, rarely will there be a "smoking gun" document pointing out the existence of tacit collusion. The best way—and in reality the only way to determine whether in fact such collusion exists is to look at all of the evidence regarding the marketplace and the behavior of the firms in the market. For example, are the companies acting independently? To what extent and how do they communicate with each other? To what extent do they have agreements between themselves on terms of sale, supply, storage, or transportation? To what extent do they share information? To what extent do they pursue innovation independently?

At the subcommittee's hearings we heard testimony from several attorneys general, knowledgeable in the antitrust laws, including Attorney General Jennifer Granholm from my home State of Michigan, that the standards used by the courts in recent years have become unduly stringent for plaintiffs seeking to present evidence of tacit collusion to a jury in an antitrust case. Many courts have been requiring plaintiffs in price-fixing cases to present evidence that it was more likely than not that the conduct complained of was the result of collusion before the evidence would be presented to the jury. In effect, this standard delegates to the judge on a motion for summary judgment the determination of the basic factual issues that are normally the province of a jury. Furthermore, it essentially requires the plaintiff to present evidence amounting to a "smoking gun" demonstrating collusion in order to survive a motion for summary judgment by the defendants. This standard thus prevents many cases that should be presented to a jury from ever getting to the jury.

Judge Posner's opinion in the High Fructose Corn Syrup case clarifies the law of the Seventh Circuit that economic evidence and other evidence indicating firms in a market have an agreement—either tacit or explicit—not to compete should be presented to a jury. The opinion clearly states that in a price-fixing case the question of "whether, when the evidence was considered as a whole, it was more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices" should be presented to a jury, and that the antitrust laws do not establish a higher threshold for surviving motions for summary judgment than other types of cases. The plaintiff need not present one single item that demonstrates an

agreement; rather the plaintiff need only demonstrate that the evidence as a whole more likely than not shows an agreement.

Several weeks ago, following the subcommittee's hearing, I wrote a letter to the Federal Trade Commission informing them of the subcommittee's findings, and urging the FTC to take a number of actions to improve the competitiveness of the gasoline refining and marketing industry.

One of the points I stressed to the FTC was that "In concentrated markets juries should be permitted to consider circumstantial evidence in determining whether or not the firms in the market are acting in collusion. In highly concentrated markets, outright conspiracies and collusion between the market participants are totally unnecessary to develop concerted action. When there are few firms in a market, these firms can easily track and follow each other's behavior. In reality, the only way to demonstrate collusion in a concentrated market is through circumstantial evidence."

The Seventh Circuit has now established this principle as law. I commend the Seventh Circuit for this clarification and hope that other circuits will follow.

I ask unanimous consent that my letter to the FTC be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

UNITED STATES SENATE,  
COMMITTEE ON GOVERNMENTAL AFFAIRS,  
*Washington, DC, June 6, 2002.*

Hon. TIMOTHY J. MURIS,  
*Chairman, Federal Trade Commission, Pennsylvania Avenue, Washington, DC.*

DEAR CHAIRMAN MURIS: I am writing to follow-up on several issues raised in the recent report of the Permanent Subcommittee on Investigations, "Gas Prices: How Are They Really Set?," and the Subcommittee's hearings on this subject.

One of our central findings is that the increasing concentration in the petroleum refining industry has exacerbated the factors that cause price spikes. This has led to sharp increases in prices and an unprecedented level of volatility in a number of gasoline markets in the past several years. Because of the importance of petroleum in America today, gasoline price spikes can significantly harm the national economy.

During our investigation and at the hearing we examined a variety of proposals for reducing this volatility. I am pleased that the Federal Trade Commission (FTC) has been proceeding with its own study of the reasons for the volatility in gasoline prices and, as you stated in your remarks at the second public conference on this subject, will closely study our report and hearing record during your review. I nonetheless would like to take this opportunity to highlight some of the areas we examined that I believe deserve serious attention during your overall review and as the FTC reviews proposed mergers in the oil industry.

#### VERTICALLY INTEGRATED MARKETS

The Majority Staff report and testimony at the Subcommittee's hearings addressed a number of problems that arise when there is a high degree of vertical integration in highly concentrated markets. In such markets,

refiners have little incentive to lower wholesale prices, and retailers have limited ability to shop around for lower wholesale prices. The current situation on the West Coast also demonstrates that a high degree of vertical integration in a highly concentrated market poses substantial barriers to entry for other firms seeking to enter either the wholesale or retail market, including very high barriers to imports.

Professors Preston McAfee and Justine Hastings, both of whom testified at our hearings, have extensively studied the effects of vertical integration in concentrated markets. Their work indicates that mergers between two vertically integrated firms in highly concentrated wholesale and retail markets may be more detrimental to competition, through interdependent interactions between the integrated markets, than a straightforward analysis of the increase in concentration in each of those separate markets might indicate. For example, in looking at the California market, Professors Hastings and Richard Gilbert found "evidence in a broad panel that vertical integration matters for upstream retail prices and that wholesale prices tend to be higher in markets with large vertically integrated firms." I urge you to seriously examine and consider these findings and the work of Professor McAfee in this same area.

#### INVENTORIES

The increasingly tight balance between supply and demand in gasoline markets—including the reduced levels of crude oil and gasoline in inventories—is one of the prime factors underlying the recent volatility. In a tightly balanced market, even the slightest disruption in supply, such as a pipeline break or an unplanned refinery outage, will lead to a sharp increase in price due to the inelasticity in the demand for gasoline.

Most oil companies today have adopted just-in-time inventory practices. Although from each company's perspective these practices may minimize day-to-day operational costs, in the aggregate this has eliminated the refining industry's cushion or "insurance" against price spikes resulting from minor disruptions in the refining, distribution, and marketing system. It also has created a perverse incentive for refiners. The Subcommittee found documents indicating that a number of refiners prefer a market that is vulnerable to disruptions so they could take advantage of the higher prices that follow any disruption.

In reviewing proposed mergers, the FTC should carefully examine the potential effects upon the aggregate inventories that would be created as a result of the merger. The FTC should consider requiring companies seeking to merge to ensure that the aggregate inventories that would be maintained after the merger would not be less than, and perhaps even greater than, the aggregate inventories prior to the merger. This would ensure that increasing concentration would not further exacerbate one of the factors leading to price spikes.

#### PIPELINE AND TERMINAL CAPACITY

The history of the Wolverine Pipeline in Michigan, as recounted in the Subcommittee's report, demonstrates how control of critical transportation and storage facilities are a less visible but very effective way to influence cost, supplies, and market prices. The Wolverine case demonstrated that parties who control the transportation and storage facilities can take advantage of the complexity of the laws and regulations to circumvent the requirements of the law and limit competition in the market.

According to the Federal Energy Regulatory Commission (FERC), the Wolverine Pipeline violated the Interstate Commerce

Act for approximately twenty years in the manner in which it allowed access and established tariffs for shipments over the pipeline. With the intervention of the Michigan Attorney General, one small, independent company, Quality Oil, successfully challenged Wolverine's practices and obtained its rightful access to the pipeline. Quality Oil's access to the Wolverine Pipeline at non-discriminatory tariffs will benefit consumers in Michigan by increasing the supply of gasoline to independent dealers at competitive prices.

The Quality Oil/Wolverine Pipeline case demonstrates the importance of the mission of agencies such as the FERC and the FTC in ensuring there is fair competition in the marketplace. In markets in which a dominant player controls the transportation and storage of a product such as gasoline, I urge the FTC to use its available authorities to ensure that this market power is not abused. Similarly, in reviewing proposed mergers, the FTC should ensure that the proposed merger does not create any new barriers to entry into a market through a lack of access to pipelines and terminals.

#### REFINING CAPACITY

As you are aware, approximately half of the refineries in the United States have closed over the past twenty years. This has resulted in a decline in the aggregate amount of refining capacity, as well as increasing concentration in the refining industry. There are a variety of reasons for this increase in concentration, including the phase-out of federal subsidies that benefitted smaller refiners, increasing capital costs for refinery operation due to more stringent environmental regulations, economies of scale, and mergers within the oil industry. One of the Subcommittee's central findings is that in a number of markets this increase in concentration has exacerbated the factors that lead to price spikes.

In several recent mergers the FTC has required the divestiture of refining assets to preserve competition in the wholesale market. The Subcommittee received testimony that the divestiture of refining assets to firms that were much less capitalized than the divesting firm has contributed to the decline in inventories, as these less capitalized firms are less able to carry inventories. I urge you to review whether the divestitures the FTC has required have had the intended effect of preserving competition, or whether, in view of experience to date, additional conditions upon mergers or divestitures of assets are necessary to fully preserve competition in the refining industry.

#### MORATORIUM ON MERGERS

At the Subcommittee's hearing, the Attorneys General from the States of Connecticut and Michigan recommended that a one-year moratorium be placed on all major mergers within highly concentrated markets in the oil industry. The purpose of the moratorium would be to enable the Congress to consider more effective remedies to the problems arising from increasing concentration and allow the FTC to consider this problem as well. I am enclosing for your consideration a copy of the statement of Attorney General Blumenthal in support of this moratorium.

#### PARALLEL PRICING

The Subcommittee also received testimony on what the appropriate burden of proof should be in order to establish illegal collusion under the antitrust laws. The Attorneys General testified that the standard currently used by many courts presents too high a hurdle for plaintiffs in antitrust cases to present their evidence to a jury.

In concentrated markets juries should be permitted to consider circumstantial evidence in determining whether or not the

firms in the market are acting in collusion. In highly concentrated markets, outright conspiracies and collusion between the market participants are totally unnecessary to develop concerted action. When there are few firms in a market, these firms can easily track and follow each other's behavior. In reality, the only way to demonstrate collusion in a concentrated market is through circumstantial evidence.

We found numerous instances of parallel pricing within the gasoline industry. At certain times in certain markets, all of the major brands went up and down together, and stayed at a constant differential with respect to each other. Although parallel pricing in and of itself does not necessarily indicate collusion, I believe that additional circumstantial evidence should be considered by a jury in determining whether in fact such collusion exists in concentrated markets.

I therefore support the standard set forth in *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990), cert denied, 500 U.S. 959 (1991), in determining whether the plaintiff's circumstantial evidence of collusion can be presented to the jury.

#### IMPORTANCE OF INDEPENDENTS IN GASOLINE MARKETS

Numerous studies have demonstrated the importance of independent gasoline refiners and dealers in preserving competition in the gasoline wholesale and retail markets. For example, in one of the most rigorous studies to date, which is cited in the Subcommittee's report, Professor Hastings documented how the loss of one independent retail chain in Southern California led to across-the-board price increases at the pump in the areas previously served by the chain. In addition, the Subcommittee's investigation found a number of industry analyses indicating that the greater the presence of non-majors in a specific market, the lower the retail price.

The continuing decline of independents nationwide and in a number of markets presents a significant concern that prices in the affected markets will rise above purely competitive levels. In your reviews of proposed mergers I urge you to carefully examine the effect of the proposed merger upon the presence of independents in the market. Not only are large retail chains necessary to present effective competition for other large retail chains, but a healthy independent sector is necessary to maintain true price competition.

In this context, I urge you or the FTC staff to meet with the Association of Merger Dealers and seriously consider their proposal for the purchase of up to 17 Mobil-branded retail sites currently owned by Phillips/Tosco, which were acquired by Tosco under the consent decree in the Exxon-Mobil merger. In my opinion, it would be worthwhile for the FTC to consider this proposal as a test case to see whether the divestiture of gasoline stations owned by major brands to the dealers rather than to other major brands can be an effective way to inject competition into markets where a proposed merger would be detrimental to competition.

In closing, I would like to thank you and the FTC staff for the support provided to the Subcommittee during this investigation. Our extensive requests for documents were responded to in a timely manner, and the FTC personnel were readily available to answer the Subcommittee's questions. I look forward to continuing our productive working relationship in this and other issues.

Should you have comments regarding this letter, please feel free to contact me or have your staff contact Dan Berkovitz or Laura

Stuber, Counsels to the Subcommittee, at 224-9505. Again, thank you for your time and consideration.

Sincerely,

CARL LEVIN,  
Chairman, Permanent  
Subcommittee on Investigations.

#### ADDITIONAL STATEMENTS

##### HONORING MELISSA BYERS OF LEAWOOD, KS

• Mr. ROBERTS. Mr. President, today I am pleased to honor Melissa Byers of Leawood, KS, for her impressive essay, "Determining the Role of Peacekeeping in a Global Age." This essay won first place in a State-level competition in the 15th Annual National Peace Essay Contest sponsored by the United States Institute of Peace. She received a \$1,000 college scholarship, and is competing for national awards of up to \$10,000. Melissa is a high school student at Blue Valley North High School in Overland Park, KS.

Melissa sets an incredible example for all students in our country. Melissa came into my office and I met with her to extend my congratulations on her accomplishments. I would like to submit her essay into the RECORD and recognize her fine work.

The United States Institute of Peace is an organization created and funded by Congress to promote research, education, and training on the resolution of international conflicts. This National Peace Essay Contest is one of the Institute's oldest activities to promote civic education on international peace for students across the United States. I would like to commend the Institute of Peace and Melissa Byers for their participation.

Mr. President, I ask that Melissa's essay be printed in the RECORD.

The essay follows:

##### DETERMINING THE ROLE OF PEACEKEEPING IN A GLOBAL AGE

(By Melissa Byers)

Throughout the history of the United States, we have adapted foreign policy to meet the unique challenges of the times. Past US foreign policies of imperialism, expansionism, and isolationism were adapted in ways representing a narrow national interest. But global conflicts such as those moderated by the current United Nations missions to the Central Africa Republic, Sierra Leone, and Kosovo, not withstanding the huge ramifications of September 11, require a new foreign policy perspective. The collapse of the Soviet Union effectively ended the Cold War, bringing with it the possibility and the necessity of recognizing that the old order is past and a new order is required. By examining the traditional roles of the military and exploring several case studies, the issues surrounding national policy come more clearly into focus, and we can better begin to formulate and redefine a new way of thinking about the peacekeeping role of the United States military and our national interest.

Much has been written about the traditional role of the military, and protecting the homeland is a foundational context in defining the role of the military. Erwin A.

Schmidl, a historian for the Austrian Ministry of Defense defines five types of peacetime military operations (1) frontier operations, (2) colonial interventions and counterinsurgency, (3) occupational duties, (4) peacekeeping military operations, and (5) multinational operations (Sismanidis 1). This theory can certainly be applied to U.S. history. In frontier operations, the presence of US military was a stabilizing influence in fulfillment of Manifest Destiny. The US military in putting down the Filipino insurrection of 1901 was an example of colonial interventions and counterinsurgency operations, and the US post-WW II occupation of Germany and Japan in deterring the rise of militant forces was an example of occupational duties. The presence of forces in Haiti in trying to maintain political and economic stability is an example of peacekeeping military operations, and the recent NATO interventions in the old Yugoslavia in preventing ethnic cleansing and genocide is an example of multinational operations. The common thread of national protectionism underpins all five roles, formulating the traditional groundwork for the post-WW II definition of peacekeeping.

The timeliness of this essay is evident in the ashes and aftermath of September 11. With the physical destruction of the two World Trade Towers also came down the ideological pillars of an inviolable and invincible United States. Traditionally, wars have been fought between known enemies and specific military targets. The profile of the enemy was defined. But with the fall of the United Soviet Socialist Republic came a new set of variables that changed foreign policy. The profile of the "enemy" is not obscured. In many modern conflicts, violence often occurs between subtle ideological or ethnic enemies. The role of modern peacekeepers is evolving around these global human and economic conflicts. On the evening of September 11th, President George W. Bush's address to the nation articulated a shift in peacekeeping policy as it relates to national security and foreign relations, "America and our friends and allies join with all those who want peace and security in the world and we stand together to win the war against terrorism" (Bush Sept 11). In the evolving new foreign policy, definitions are broadened, national security is equated with international security, and American interests are linked with global interests.

The current evolution of the U.S. military's peacekeeping role stems from United Nations mandates that peacekeepers should maintain international peace and security. As published on the United Nations Website, the role of the peacekeeper is divided into three categories. (1) Cease-fire peacekeeping, in which conflicting countries can pull back, creating a more conducive environment for negotiations. (2) Multi-dimensional peacekeeping, in which experts inspire major political, social and economic change, strengthening national institutions. (3) Humanitarian peacekeeping, in which massive human suffering is relieved, delivering needed support and supplies (What is Peacekeeping?).

In the last six months, the role of U.S. peacekeepers has been drastically redefined to include these roles. In response to the threat of global terrorism, the U.S. has broadened homeland defense to include global interests. In a speech, marking the 100-day anniversary of September 11, Bush declared, "American power will be used against all terrorists of global reach" (Bush Dec. 20). The U.S. has now begun to build coalitions, attack terrorist networks, employ economic sanctions against those supporting and harboring terrorism, and condemn terrorist attacks wherever they occur. More funds have