identified in the Complaint. There are, however, at least two curative practices that could solve this problem.

The first is that, in accordance with the DOJ's initial intent, misuse of the practice should simply be enjoined. As discussed above, using a technique common to federal law, such an injunction would prohibit the practices from being used to violate the Sherman Act.

Second, instead of following the presently contemplated schedule under which a Tunney Act hearing is planned for October 23, 1995, in accordance with a revised and expedited schedule discussed below, a postponement of the hearing should be sought until the Special Commission's final report and Dean Cass' lengthy separate statement have been published, the ABA has either made changes in the Report or announced that it will not do so, and the Government has determined whether to challenge any of the Special Commission's recommendations. This would enable first the DOJ and then the Court to know if what if any changes have been recommended and/or made with respect to anticompetitive practices charged in the Complaint, when assessing what action to take. Such knowledge would at minimum be desirable to the DOJ's assessment, and under the Tunney Act is essential to the Court's assessment, of whether the decree is within the reaches of the public interest. *Otherwise the Court will be passing on a decree without knowledge of what, if anything, will be banned in connection with anticompetitive practices identified in the Complaint.*

Furthermore, postponing the Tunney Act hearing until such knowledge is available should be combined with a revised schedule in order to spur quicker action that would avoid the undue passage of time invited by the current provisions of the decree. Instead of the Special Commission not having to submit the Report until February 29, 1996, the Board of Governors then having unlimited time to review the recommendations, and the DOJ then having 90 days to decide on challenges, a firm date such as December 31, 1995, should be set as the time by which the Commission's report must be finished, any changes to it need to have been made by the ABA, and the DOJ need have notified the Court whether it accepts the Report or intends to challenge any of its provisions. The date of December 31, 1995 is, after all, more than six months after the Consent Decree was filed.

5. The ''Novel'' Relief Involving Review by the Special Commission Raises Additional Problems (i) Because it May Bind the Court, Regardless of Relevant Circumstances, to Use a Full Blown Rule of Reason Analysis Rather ''Quick-Look'' Rule of Reason Analysis When Considering a Government Challenge to Recommendations of the Special Commission, and (ii) Because it Circumvents the Tunney Act Rights of Third Parties

In addition to compliance weaknesses stemming from the composition and views of the Special Commission, there also are other reasons why use of this admittedly novel compliance mechanism may cause failure to rectify the anticompetitive practices identified in the Complaint.

A. First, the Government has agreed that, if it challenges any of the proposals in the Special Commission's Report, the challenge will be decided ''by this Court applying a Rule of Reason antitrust analysis.'' (Consent decree, p. 8.) This may be intended to bind the Court in advance to use a *full blown* Rule of Reason analysis. It would be inappropriate to confine the Court in advance to such a full blown Rule of Reason analysis, when it is surely possible and indeed probable that some of the anticompetitive practices on which the Commission is to make recommendations are susceptible to a ''quick-look'' Rule of Reason analysis in which the Court could quickly determine that there is a lack of redeeming procompetitive value.[22]

This is even more the case since, in accordance with its incredible standard practice of saying that there are no determinative documents to be made available to the Court and the public, the DOJ has not provided any information indicating why it believes that the matters which are to be the subject of recommendations by the Special Commission should necessarily be adjudicated under a full blown Rule of Reason analysis rather ''quick-look'' Rule of Reason analysis or other analysis.

The following examples demonstrate why this Court should not be bound in advance to a full blown Rule of Reason analysis:

A(i). The exclusion of adjuncts from the student/faculty ratio has been a method used to increase dramatically the demand for full time professors and, by doing so, to (a) simultaneously make necessary the payment of higher salaries to them while (b) lowering their individual output by spreading the same work among a larger body of full-timers. It has been, in short, a method of concertedly increasing the demand for and the price of full-time labor, whether this is efficient or not.[23] Such concerted action is normally a *per se* violation of the antitrust laws (except when taken by a certified labor union)—it normally is not even given the benefit of ''quick-look'' Rule of Reason treatment. However, the recommendations of the Special Commission may result in little or no change in the rule excluding adjuncts from computations of the student/faculty ratio. If that is the result, it would seem proper to apply, at most, a ''quick-look'' rule of reason analysis.

A(ii). The exclusion of clinicians who are not on tenure track or its equivalent, when computing a school's student/faculty ratio, has been a method of concertedly insuring higher salaries for non-clinical, or ''academic,'' faculty. There is, indeed, evidence showing that opposition to including such clinicians in the ratio arose because they generally were paid less than ''academic'' faculty and thus would bring down the average and median salary levels that all schools were required to meet for academic faculty. (Exhibit 14.) There is not as yet any recommendation from the Special Commission reversing the exclusion of such clinicians, nor has the Government provided any evidence as to why such exclusion has any procompetitive benefits, let alone significant ones. In the circumstances, ''quick-look'' Rule of Reason treatment is the most that is warranted.

A(iii). As appears to be implied by the statement in the CIS that over one-third of all ABA-approved schools are on report for inadequate facilities even though nearly all schools occupy new or substantially renovated facilities (CIS, p. 8), the problem existing with regard to physical facilities has been, in the bluntest terms, that the accreditors have required schools to build the law school equivalent of the Taj Mahal. The accreditors seem never to be satisfied unless a school's facilities are such that they cost from $20 to $60 million. The accreditors operate at such a

[22] It is even possible that in certain instances *per se* analysis should apply. In the *Ivy League Overlap* case, *United States* v. *Brown University, et al.*, 5 F. 3d 658 (3d Cir. 1993), the Third Circuit repeatedly and extensively pointed out that quick-look Rule of Reason treatment, or even *per se* treatment, could be appropriate in an antitrust case involving education if restraints were motivated by self-interested economic factors, involved price-fixing, or lowered output. Such factors are often present here, as discussed below.

[23] Simultaneously, at least at schools with limited resources that cannot afford to adequately pay both a large number of full-timers and a large number of adjuncts, and probably at other schools as well, it reduced the demand for adjuncts, and thereby caused reduction in the compensation paid to them.