officers of the ABA, that the politically powerful Section continues to violently oppose the Consent Decree, and that, while it is claimed that the leadership has now undergone a metamorphosis regarding its antitrust responsibilities, the leadership, as said, cared nothing about antitrust for a long period of time.

Thus there is ample historical and current reason to fear that the DOJ's reliance on the ABA leadership, rather than on an injunction, as the vehicle for obtaining compliance with the antitrust laws will prove inadequate and may result in a failure to rectify the violations charged in the Complaint. There are two simple steps that can be taken to cure this problem, however. First, anticompetitive practices found to exist by the Government should be enjoined, as discussed above. Second, to test whether the leadership will in fact act in accordance with a new found commitment to antitrust, the Tunney Act hearing should be postponed until December 31, 1995 (as discussed above) to see whether the leadership forwards recommendations adequate to cure the violations and whether it has taken other steps that are required by the Decree or are desirable to cure violations. Such other steps would include, for example, appointing numerous persons known to have procompetitive views to the various committees, and excluding from further Section work the capturing insiders and their supporters, who are responsible for the problems.

*8. The Effectiveness of the Decree is Potentially Diminished by Lack of Knowledge Regarding the Identity of an Antitrust Compliance Officer, by a Serious and Inexplicable Limitation on the Compliance Officer's Duties, and by Reliance on Staff of the Department of Education Who Have Been Ineffective in Regard to the ABA*

The Consent Decree provides that the ABA shall appoint an Antitrust Compliance Officer who shall supervise a compliance program by, among other things, supervising accreditation activities to insure they are not inconsistent with certain provisions of the Decree. (Consent Decree, pp. 8–10.) The Antitrust Compliance Officer is to be appointed within 30 days of entry of the Decree. The Decree also provides that the ABA shall, by October 31, 1995, hire an independent, non-legal-educator, outside consultant to assist in validating all Standards and Interpretations as required by the Department of Education (''DOE'') and to develop a plan for such validation by December 31, 1995. (Consent Decree, p. 7.)

A. The existence of an Antitrust Compliance Officer could be a matter of the first importance. However, the identity of the Officer is crucial. Antitrust is a field in which there is a wide gulf between the opinions of two vigorously differing sides of the bar. There is the plaintiff's side of the bar, composed of Government enforcers and plaintiffs' treble damages lawyers, who believe in and seek relatively widespread and vigorous application of antitrust. On the other side, there is the defense side of the bar, whose members, by belief and affiliation, generally minimize the circumstances in which antitrust violations should be found to exist. There are relatively few lawyers who straddle the two camps intellectually and by professional affiliations.

If the person appointed to be the Compliance Officer is highly defense oriented by belief and previous professional commitments and work, then the result is likely to be approval of activities which would be found anticompetitive and which would not be approved even by persons who straddle the two camps. What is anticompetitive, and what cannot be justified by claims of being necessary for quality, are, after all, matters which are subject to differences of opinion. Thus, the identity, professional background, and views of the Compliance Officer will almost surely be vital in determining whether the person will be an adequate proponent for the strictures of the Decree. His or her identity will be vital to assessing whether the public interest will be served or thwarted by the provision for a Compliance Officer.

Yet, as said, under the Decree the Compliance Officer will not be selected until *after* the Decree is entered—and thus will not be known to the Court when assessing whether the public interest will be served. The Court will thus be unable to make a fully knowledgeable assessment.

The problem, however, is readily curable. The Decree need only provide that the Compliance Officer must be named a reasonable time *before* the Tunney Act hearing, so that knowledgeable assessments can be made by the DOJ, commentators and the Court as to the likelihood that the named individual will be a vigorous proponent of antitrust. Naming a Compliance Officer before the Tunney Act hearing should not pose any more problem than naming a DOE consultant by October 31, 1995, which the Decree specifically provides shall be done. (Consent Decree, p. 7.)

Additionally, the Decree presently contains a paramount hole in the duties of the Compliance Officer. The Officer is to review ABA actions to be sure they do not violate Sections IV and VI (Consent Decree, pp. 8–9.), which respectively (a) list the activities banned outright by the Decree—including price fixing, denial of entry into graduate programs, denial of transfer credit, and preclusion of profit making status—and (b) supervise various procedural matters such as those involving membership on committees. *But the Compliance Officer has no supervisory responsibilities relating to Section VII of the Decree, and therefore does not supervise the ABA's accreditation activities in the areas where recommendations are to be received from the Special Commission (after review by the ABA leadership), recommendations which are to govern if not challenged by the Government or which are to govern as possibly amended after a DOJ challenge. This is an incomprehensible lacuna in the duties of the Compliance Officer.* The accreditation rules governing the matters to be treated by the Special Commission—e.g., student/faculty ratios, hours of work by professors, physical facilities, and so forth—have encompassed several of the most crucially important, most anticompetitive, actions of the accreditors. Yet, as said, such matters are not to come within the purview of the Antitrust Compliance Officer. How can this possibly be justified? How can it be within the reaches of the public interest? There is, of course, a simple corrective step, which is to change the Decree so that the Compliance Officer also has the duty of reviewing and supervising accreditation activities involving student/faculty ratios, hours of work and other matters that are to be addressed in the first instance by the Special Commission and reviewed by the ABA.

B(i). The reason why the DOJ has required the ABA to ''validate'' the accreditation criteria as required by the DOE is not entirely clear. It *would* be clear if, in accordance with the DOE's abstract written criteria of ''validity,'' DOE approval ensured that ABA accreditation criteria assure educational quality. Unfortunately, however, DOE review of the ABA has been wholly ineffective to date in assuring quality.

(ii). DOE assessment of accrediting agencies such as the ABA is carried out by a small office which has relatively few staff members. For convenience we shall refer to it simply as the Accreditation and State Liaison Division (''ASLD''). The ASLD receives reports from accreditation agencies such as the ABA; ASLD has charge of scores of such agencies who report to it. After