Testimony of

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STATEMENT OF F. JAMES SENSENBRENNER, JR.
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Before the United States Senate Committee on the Judiciary

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Mr. Chairman, Ranking Member Leahy, and Committee Members. I am pleased to testify before today's Committee hearing on: "Reconsidering Our Communications Laws: Ensuring Competition and Innovation."

Before I begin, I would like to make an important point about the antitrust laws. Some antitrust critics contend that fidelity to the free market is somehow inconsistent with a commitment to antitrust. However, as a strong conservative who adheres to the primacy of free markets, I believe that the antitrust laws preserve the integrity of the free market upon which economic vitality depends. The communications industry is no exception to this rule. The principled application of the antitrust laws in the communications market has facilitated competition, reduced prices, encouraged the deployment of new technologies, and enhanced consumer choice for millions of Americans. The House Judiciary Committee conducted its first hearing on communications and antitrust policy in 1957, when it examined a DOJ/AT&T consent agreement addressing anticompetitive conduct in this industry.

In ensuing decades, both the House and Senate Judiciary Committees conducted several additional hearings on communications competition and antitrust enforcement and oversaw the implementation of the historic 1982 Modification of Final Judgement that made long distance calling an affordable reality to millions of Americans. It is crucial to note that the Ma Bell monopoly operated in a highly intensive regulatory regimes for decades, but the antitrust laws provided the pro-competitive remedy that regulation could not, did not, and cannnot provide alone. However, following the consent decree, local service was still the exclusive province of Bell companies that inherited virtual monopoly control of the local exchange.

Throughout the 1980s, the Committee on the Judiciary conducted extensive hearings concerning the implementation of the 1982 decree and anticompetitive aspects associated with continuing monopoly control of local service. In the early 1990s, the Committee conducted several hearings on this issue, and in 1995, the Committee examined the Justice Department's responsibility to aggressively monitor competition in the telecom field.

The congressional record that gave rise to the 1996 Telecommunication Act was shaped by four decades of Judiciary Committee involvement in monitoring the application of the antitrust laws in the communications field.

In order to reaffirm the centrality of the antitrust laws in the liberalized regulatory regime established by the 1996 Act, Congress preserved an explicit antitrust savings clause in the legislation.

Section 601(c)(1) of the 1996 Act provided that:
" . . . Nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."

Despite the inclusion of this antitrust savings clause, a record of considerable judicial confusion has developed in our

Nation's courts. In 2000, the Seventh Circuit issued the Goldwasser decision, ignoring the plain language of the antitrust savings clause and holding that the Telecom Act "must take precedence over the general antitrust laws." In 2004, the Supreme Court embraced the reasoning of the Goldwasser court in Verizon v. Trinko. The decision stated: "One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists . . . it will be less plausible that the antitrust laws contemplate such additional scrutiny. . . ." The Court concluded: "against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs."

This is precisely the judicial analysis that Congress precluded in the 1996 Act, and this holding has done violence to remedial antitrust enforcement and competitive gains in the telecommunications marketplace. This assault on the antitrust laws should be of concern to Members of both bodies of Congress, but particularly to those who serve on the Committees charged with overseeing their implementation.

In recent years, the Internet has become a vital communication, information, and commercial medium. The Federal Trade Commission has until recently been precluded from enforcing the Federal Trade Commission Act's competition-enhancing protections in the facilities-based broadband Internet marketplace. In its Brand X decision last year, the Supreme Court upheld upheld an FCC determination that these services were outside of its regulatory ambit, thus permitting a more assertive role by the FTC in promoting competition in this marketplace.
According to FCC data released in April, 98.2 percent of Americans access high speed broadband lines by cable modem or DSL connections. This lack of competition presents a clear risk that broadband providers will leverage dominant market power to discriminate against competitors, and pre-select, favor, or prioritize Internet content over their networks.

Regrettably, legislation recently passed by the House invites the risk of competitive abuse by depriving those injured by this misconduct from an effective antitrust remedy. Specifically, H.R. 5252 provides the FCC with "exclusive" authority to define and adjudicate discriminatory broadband practices. This authority displaces the antitrust laws and the vital pro-competitive and pro-consumer purposes they advance.

It came as little consolation that when considering H.R. 5252, the House accepted a Floor amendment containing a nearly-verbatim recitation of the antitrust savings clause contained in the 1996 Act effectively circumvented by the Trinko court. In fact, the amendment passed by the House is weaker than the savings provision contained in the 1996 Act for two important reasons. First, it is a "rule of construction" by its own terms, while the savings provision in the 1996 Act contained no such limitation. Second, the amendment is narrower because it applies only to one section of H.R. 5252, while the savings provision in the 1996 Act applied to the entire 1996 Act and subsequent amendments to it. I voted against this amendment because I concluded that it provides a proven roadmap for judicial circumvention of a substantive antitrust remedy for competitive misconduct in this field. In addition, to preserve an explicit antitrust remedy for broadband discrimination, I authored and my Committee passed H.R. 5417, the "Internet Freedom and Nondiscrimination Act of 2006," by a bipartisan vote of 20-13.

Mr. Chairman, I commend you for scheduling today's hearing and thank you for the invitation to testify. As the Senate Judiciary Committee asserts its role in this body's consideration of communication legislation, I urge its Members to ensure that the antitrust laws and the agencies that enforce them are provided a clear, continuing, and unambiguous role in promoting and defending the pro-competitive goals for which they were established.