Report of the President's Commission on Antitrust

Joe Sims

ANTITRUST has had bipartisan support since the Sherman Act became law in 1890. Both political parties have preached devotion to its principles, and most political candidates have promised vigorous action against the most notorious monopoly of their times. It used to be the oil trust, or the steel trust or the railroad barons, but today, it is the oil industry that is blamed for everything from high prices to shortages. Though both political parties claim the more active record of enforcement and though my own impression is that the Republicans should win that argument—if only because they have spent more time enforcing the antitrust laws and proportionately less time trying to rewrite them—I recognize that this is a barroom question which even statistical analysis will not resolve.

The issue is tremendously complicated by a lack of consensus, a schizophrenia, on what antitrust enforcement really is or should be. The near unanimity of opinion at the time the Sherman Act was passed did not last. Almost immediately, enforcement became a matter of great controversy, in part because the early targets of the act were labor unions and a number of labor leaders went to jail convicted of a criminal restraint of trade for their success in union organizing. In any case, within a mere quarter of a century (in 1914), Congress passed two additional comprehensive antitrust laws—the Clayton Act (which, among other things, exempted labor union activities from the antitrust law) and the Federal Trade Commission Act. The latter created an independent enforcement agency, the Federal Trade Commission, and expanded the notion of antitrust to include "unfair trade practices," thus giving legislative recognition to the idea that antitrust involved something more than economics.

As time passed, new concepts of mass merchandising took hold, putting increased competitive pressures on the traditional small retailer and eventually producing the Robinson-Patman Act amendments to the Clayton Act (1936). That Robinson-Patman is seriously described by some as an antitrust law shows how diverse are the troops that gather from time to time under the antitrust banner.

There were more additions to the stable of "antitrust" laws over the years. In 1950 came the Celler-Kefauver amendments to the anti-merger statute (Section 7 of the Clayton Act). These amendments made Section 7 into an effective tool for blocking anticompetitive mergers, one that has been aggressively used for this and other purposes by both public prosecutors and private plaintiffs. The decade of the 1970s has seen a tremendous amount of antitrust legislative activity: the repeal of the fair trade amendments to the Sherman Act (which had permitted states to allow manufacturers to control the retail prices at which their products were sold), the Antitrust Procedures and Penalties Act (which set up a regulatory system for antitrust consent decrees and changed Sherman Act criminal violations from misdemeanors to felonies), and finally, the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

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Hart-Scott-Rodino was very controversial, so much so that an effort to kill it by filibuster was only narrowly defeated. Nevertheless, it was, by and large, sensible legislation. Certainly, the part of the act that increased the investigatory powers of the Justice Department's Antitrust Division was long overdue, and the notion underlying the second part, advance notification of significant mergers, is not radical in concept. The third part of the act, which allows state attorneys general to bring treble damage suits on behalf of injured consumers, is less clearly desirable, but even there, the strongest objections are practical ones. The notion that consumers should be reimbursed for damages actually caused by illegal conduct certainly is not in itself shocking.

However, Hart-Scott-Rodino is less important for its substantive content than for what it may portend for the near future. Along with other recent antitrust legislation, it may well signify a resurgence of antitrust fervor, still fed as in the past by populist fears of bigness and industrial concentration, but now also greatly assisted by the ravages of inflation. Antitrust is a perfect *political* answer to inflationary fears. There certainly can be no doubt that price-fixing contributes to inflation, and it is only a small step from there to the more general notions that the big corporations are the inflation villains and that the world would be better off with this political, social, and economic power broken into smaller units. While the equation is slightly different, much of the analysis is of the same approximate quality as that which justified the economic legislation of our last major crisis in economic confidence—the Great Depression—and there is obviously a risk that our legislative response to this crisis will be equally misguided.

Thus, there have been proposals like the late Senator Philip Hart's industrial reorganization bill, designed to facilitate the wholesale restructuring of specific "concentrated" industries. "No-fault" monopoly, as we will see, is being advanced as yet another way to get at the "problem," whatever the problem may be. Conglomerate merger legislative proposals of various kinds are surfacing, and much rhetoric is devoted to notions of "shared monopoly," undoubtedly on the premise that a more pejorative label will make it possible to challenge some industrial structures that are not otherwise reachable under the Sherman Act.

It is in the context of both the history of antitrust and the current intellectual activity that the recommendations of the National Commission to Review Antitrust Laws and Procedures (NCRALP) should be examined. NCRALP really dealt with three areas—regulatory reform, "big-case" antitrust litigation rules, and substantive proposals to change the antitrust laws. The last two of these are examined here. (For a discussion of the commission's regulatory reform recommendations, see "No Confidence in Old Trusts," pages 12–13, this issue.)

Background

The commission was proposed by Attorney General Griffin Bell, who hoped to find a way to deal with the obvious problem of big-case antitrust litigation. Bell inherited two giant cases —*United States* v. *IBM* and *United States* v. *AT&T*—and, from the beginning of his tenure, was interested in doing more than his predecessors to move both of them along. Early on, he suggested that perhaps big cases should be litigated not before a district judge but instead before Congress, and he still has not completely recovered from that idea. Yet, while his initial remedy may have been ill-conceived, he had a clear notion of the problem and NCRALP owes its existence to Bell's concern over *IBM* and *AT&T*.

The Antitrust Division did not greet Bell's proposal with wild enthusiasm. The division has continually opposed suggestions for an antitrust review commission, in part for bureaucratic reasons, but in larger part for fear that if the subject were ever opened for debate, more bad than good would result. (This concern is analogous to the fear of a constitutional convention, not for what it would be created to do, but for the unknown result it might produce.) After all, the Antitrust Division has never been a powerful agency. It has occasionally made a difference, but more often than not, when in conflict with another part of the executive branch, it has been the loser. In recent years, its record is much better, but this is largely post-Watergate, and is to some extent a direct reflection of the antagonism to presidential control that has characterized our national politics over the last five years. The much more usual outcome of a conflict between the divi-

sion and another agency is that noted by Dean Acheson in his description of the oil cartel investigation in the early 1950s. After failing to get the Justice Department to stop what he viewed as activity inconsistent with U.S. foreign policy interests, Acheson appealed to what he called "our common superior." The investigation was stopped.

Certainly the division was not at all enthusiastic about tinkering with the Sherman Act, which is, after all, the "Magna Carta of free enterprise" and is generally perceived within the agency as a very successful tool for judicially adjusting the rules of the economic game to changing circumstances. Nor was there any desire to become embroiled in the continuing debate over monopoly, oligopoly, concentration, and efficiency, not to mention the "bigness is bad" arguments of antitrust populists.

Nonetheless, Judge Bell is a determined man, and it was soon clear that there would be an antitrust commission focusing on regulatory reform and "big case" litigation. The Antitrust Division was allowed to protect its flank by limiting the commission's mandate to working "within the framework of existing antitrust laws." As we shall see, this protection proved a trifle illusory.

"Big Case" Litigation Procedures

It is perhaps not surprising that a commission composed largely of people recommended by Judge Bell quickly agreed with him that there was, indeed, a big-case problem. What *is* slightly surprising is that, despite all the possible convenient villains—the complicated nature of the questions in litigation, the breadth of the substantive rules, the scope of the discovery process in modern litigation, the financial incentives for delay—the commission put the primary blame where it belongs, on weak judicial management. Throughout this portion of its report, the commission returns again and again to the notion that strong, effective, and continuing judicial control is *the* answer to protracted litigation.

The commission's litigation recommendations divide into two parts, those dealing with pretrial procedures and the trial itself and those dealing with the relief obtained after the litigation. Both are of substantial importance to antitrust lawyers but perhaps of less general interest to readers of this magazine. There are, however, several procedural suggestions that have substantive overtones or are likely to have major impact.

The commission directs attention to dilatory behavior by lawyers, leaving little doubt that in its view most of the blame falls on the defense bar. Although it recommends a number of neutral changes, it comes down hard on defense lawyers and their clients, recommending that defendants—when they lose—be required to pay interest on any damages awarded from the date the complaint was served rather than the date of judgment, thus adding a significant additional risk to litigation. This issue was the most divisive in the entire commission report: nine of the commission's twenty-two members dissented, including all but one of the practicing lawyers. In fact, except for Craig Spangenberg and Lawrence Sullivan, the only members voting in favor of prejudgment interest were government officials.

This change—if implemented—would obviously favor plaintiffs and increase pressures on defendants to settle rather than litigate. In effect, it would create a separate penalty for litigating if one lost, thus making a nuisance value settlement more attractive. No doubt it would discourage delay, but it would also encourage litigation blackmail.

The commission recommends another procedural change that would favor plaintiffs. The threat of private damage actions—in which antitrust plaintiffs can recover three times their actual damages—is considered by many to be more of a deterrent to collusive conduct than possible criminal penalties. In order to encourage private damage actions, the antitrust laws currently allow a *final* decision in a government action to be used as evidence of a violation in a subsequent private action. The prior government decision only establishes a rebuttable presumption of liability, however, and therefore is not considered very helpful by many plaintiffs' antitrust lawyers. The commission would assist private plaintiffs even more by amending the Clayton Act to ensure that ordinary collateral estoppel rules could be used in private antitrust damage actions. This would mean that, once the government proved a violation of the antitrust laws in court, the violation could not be rebutted in a subsequent private suit for treble damages. The commission recog-

nizes that the "use of collateral estoppel may somewhat increase pressure on antitrust defendants to settle rather than litigate." In its view, the dangers of this effect were outweighed by the potential advantages in expediting litigation.

The chapter dealing with the relief that courts may award is an intellectual complaint about the real world. The commission complains—quite accurately—that relief has frequently been ineffective in antitrust cases, especially in cases dealing with industry structure, and assigns the blame to the courts' failure to fashion relief in a way that would most promote competition. The courts have, according to the commission, paid entirely too much attention to "private" interests—those of the defendant and its employees, customers, and suppliers—and too little attention to the "public" interest in competition. In addition, they have, inappropriately in the commission's view, too often attempted to balance these "private" and "public" interests in attempting to come up with a balanced relief proposal.

The commission sees two ways to solve the problem—preventing the consummation of more transactions pending the outcome of litigation (thus rendering relief unnecessary in more cases) and convincing judges to be more aggressive on relief issues, especially in monopolization cases. Thus the report endorses a much liberalized standard for the granting of preliminary injunctions in merger cases. It would grant a preliminary injunction where the plaintiff shows that he is likely to win; and even where that showing cannot be made, it would still grant the injunction where "significant, substantial and difficult issues of law" are raised and the "balance of hardship" falls on the plaintiff.

As Commissioner Gordon Spivack (former director of operations for the Antitrust Division) points out in his dissent, the anti-merger statute is forward-looking, requiring only a showing that the transaction "may" lessen competition. The "probability of success on the merits" standard thus requires, according to Spivack, only that the plaintiff demonstrate by "reliable probative evidence a reasonable probability of a reasonable probability of a substantial lessening of competition in a specific market." Where this meager showing cannot be made, Spivack argues that any restraint imposed on the transaction is just as unjustified as any other form of government substitution of bureaucratic judgment for the operation of free markets.

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Spivack has put his finger on an anomaly that can be explained only by the commission's prosecutorial bias. A comparison of NCRALP's work on regulatory reform with its work on antitrust enforcement reveals a clear dichotomy. In the regulated industry areas, the commission rails against unjustified government intervention and would require a showing of absolute necessity before any form of economic regulation is approved. But when it examines antitrust enforcement, it seems to forget that this, too, is a form of government intervention —and the very wise test of regulatory necessity disappears.

For example, the commission's preliminary injunction standard would be met in every anti-merger case brought by the government, unless one indulges the unreasonable assumption that the government would challenge a merger that was neither clearly bad nor even presented at least "significant, substantial and difficult issues of law." It is troubling to see that not only is there no careful weighing of the necessity for such a standard, but there is an outright rejection of the need for any such showing: "Private interests, *no matter how substantial*, are of reduced importance where there is a strong public need for preliminary relief that will preserve competition . . ." (emphasis added).

Although the report outlines the difficult mechanical problems that a small number of cases have presented, it makes no attempt to compare the costs of those cases with the costs of discouraging or preventing many mergers that show no sign of injuring competition. It is not a big step from an automatic injunction to a requirement for affirmative approval for mergers, as the various conglomerate merger proposals now being floated confirm. I am

not sure where the balance lies, but the issue is surely important enough that it should at least have been discussed.

The report argues strongly that structural relief—that is, judicial restructuring of the offending industry—should be the preferred remedy for violations of Section 2 of the Sherman Act or Section 7 of the Clayton Act. In fact, the courts are sharply criticized for attempting merely to restore the status quo ante and for accepting partial divestitures, and it is concluded that courts should fashion whatever remedy is desirable to obtain "workable competition," including (where necessary) divestiture of more than the "offending" assets.

The commission asserts, with some justification, that it is often impossible to put things back the way they were before an unlawful acquisition (Section 7) or before the unlawful amassing of monopoly power (Section 2). It concludes that, given these difficulties, the public interest would be better served by an effort to affirmatively restructure the marketplace to maximize opportunities for competition. But here again, the commission's intellectual argument runs into the reality that courts will always be reluctant to impose their judgment of a proper market structure. Even where it is subsequently concluded that a particular acquisition violates Section 7, and especially where it is concluded that a market structure developed over many years violates Section 2, courts will be reluctant to intervene in the activist way urged by the commission. Shareholders, employees, and customers may well be only "private" interests—but the protection of "private" interests is the distinctive function of the judiciary, and it is unrealistic (and perhaps wrong) to expect a district court judge to suppress such concerns. The initiation of a Section 2 or Section 7 lawsuit does not transform a federal district court into the Federal Trade Commission or an industrial reorganization court; it is still a court of law, and its role is to adjudicate a particular issue between particular parties. While the case for wide-ranging structural relief has intellectual appeal, at least from a regulatory or law-enforcement perspective, it is not likely to influence the actions of many judges.

Perhaps in recognition of the great difficulties in this area, the commission urges the creation of a task force, composed of representatives of the Antitrust Division, the Federal Trade Commission, the Securities and Exchange Commission, the Internal Revenue Service, and the Federal Judicial Center, to develop a manual for divestiture. The manual would include information about various divestiture methods, examples of cases, various tools for measuring impact, analysis of the use of masters and other technical experts, various tax provisions, and other guidelines and suggestions for increasing the effectiveness of relief once a violation has been found.

Substantive Standards

The most controversial, and in many ways potentially most important, recommendations of the commission involve substantive changes in the antitrust laws. The report suggests amending Section 2 of the Sherman Act to broaden dramatically the "attempt to monopolize" offense, and it recommends congressional consideration of a "no-fault monopoly" statute aimed at "strengthening the ability of the Sherman Act to deal with persistent monopoly power." Enacting these recommendations (especially the latter) would greatly accelerate the transformation of antitrust enforcers from referees to regulators.

Attempt to Monopolize. The "attempt to monopolize" provision of the Sherman Act has traditionally been one of the least satisfactory from a prosecutor's perspective. At common law, a criminal attempt to commit a particular offense required sufficient actions to create a "dangerous probability" that the offense would be committed. Justice Holmes established the notion that this "dangerous probability" concept was included within the "attempt" provision of the Sherman Act, and over the years the courts have elevated that notion to a position of primacy among the relevant criteria.

No better example of the importance of the "dangerous probability" concept exists than the recent *Empire Gas* case, where the court of appeals found that the defendant had engaged in clearly anticompetitive activities (including threats, predatory price cuts, and misrepresentations) to prevent smaller competitors from competing, but found no violation because it did not believe that the defendant was close to achieving an actual monopoly. The Supreme

Court refused to review the case, despite a strong plea by the Department of Justice that Supreme Court guidance in this area was essential. Certainly, therefore, this seemed a logical issue to put on the menu for a new antitrust commission.

The key problem here is really one of comparing costs and benefits. Although the notion of "dangerous probability" was abandoned long ago in the law of criminal attempts, it lives on in antitrust jurisprudence because of the fear that a more flexible standard would open the door to litigation designed to blunt or deter aggressive competitive behavior. One company's sale price may, to its competitor, be a predatory price cut, and an effort to expand market share is just as easily characterized as an attempt to exclude competition. Thus, the benefits of opening up the statutory standard for attempts must be balanced against the possible costs, and many knowledgeable observers —including the Antitrust Section of the American Bar Association and, historically, the Antitrust Division—have seen that balancing process as counseling against new legislation.

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Happily, there is a possible middle ground but, unhappily, the commission's report dismisses it in a one sentence footnote. The statutory standard could be loosened in government enforcement actions, but not in private litigation. Such a distinction would not be unique in the antitrust world, and indeed the "no-fault" monopoly notion pursued by the commission would, in all the forms presented, have been limited to government cases. This would give the government the necessary flexibility to deal with unilateral anticompetitive conduct, but would minimize the risk of chilling desirable aggressive competition. After all, the government can only initiate a small number of actions, and it would presumably give serious thought to the question of public injury before bringing any case. In any event, such a dangerous tool would not be available indiscriminately to any disgruntled competitor.

This middle ground has historically been favored by the Antitrust Division and was recommended to the commission both by the executive order establishing it and by Donald I. Baker, the former head of the Antitrust Division. Amazingly, it is not even analyzed in the commission's report. Instead, the report recommends changing Section 2 of the Sherman Act to require a finding of an attempt to monopolize when, after weighing the defendant's intent, its present or probable market power, and the anticompetitive potential of the conduct in question, a court determines that the conduct "significantly threatens competition" in a relevant market.

The commission also recommends a second addition to the Sherman Act to prevent the use of the Areeda-Turner test for predatory pricing. Professors Philip Areeda and Donald Turner have popularized the notion first advanced in their 1975 *Harvard Law Review* article that, as a matter of law, any price above marginal cost (or, as a more accessible proxy, average variable cost) should be presumptively legal, since marginal-cost pricing is economically efficient and thus desirable. The Areeda-Turner test has, in some courts, been slightly recast to read that any price at or above marginal cost by definition cannot be predatory. This revised test has gained wide acceptance in the courts, in large part because it is easily administrable. Not coincidentally, it provides, as does the "dangerous probability" standard, an easy means for summary disposition of litigation seen as mere competitive complaining.

Like the per se rule against price-fixing, this test may conceivably produce a wrong result from time to time, but one can be reasonably sure that the costs of searching out the rare exception far outweigh the benefits of finding it. In the vast majority of cases, marginal-cost pricing should be encouraged, not challenged. Unfortunately, the commission was apparently determined to take care of those rare circumstances when a "dominant" firm—a term never defined in the report—uses its superior efficiency "unfairly" to disadvantage some struggling new entrant.

Of course, one could agree (as Areeda and Turner would) with the abstract proposition that, in some circumstances, pricing above marginal cost could be predatory, and still

(Continues on page 31)

have serious qualms about changing the language of Section 2 of the Sherman Act. At the least, a recognition of the trade-offs involved in such a decision—and an analysis of them—is necessary. And certainly, the alternative of turning only the government loose, rather than allowing any disgruntled competitor to rush into court, deserved discussion in the commission's report. Instead, the report recommends what would be the first substantive change in the eighty-eight-year-old Sherman Act without any analysis of these crucial issues.

In so doing, I should note, the commission was actually moderating its original view. In December, it voted twelve to zero to recommend a "unilateral restraint of trade" statute. Led by Commissioner Maxwell Blecher, the commission was seeking a remedy for every wrong, or as Areeda and Turner put it, seeking "to use [the attempt clause] as a tool to control distasteful business behavior." The statute included in Blecher's separate views is an example of what was under consideration; it would prohibit *any* conduct engaged in "with the specific intent to restrain trade." In the vast majority of cases, where the conduct is ambiguous and there is no direct evidence of intent, this issue of liability would have to go to a jury.

Where Blecher and his supporters saw no great danger, I see the potential for disaster. Such a statute would be roughly equivalent to opening up the Federal Trade Commission Act (prohibiting "unfair methods of competition") to private enforcement. The probability that every unsuccessful competitor could demand a jury verdict on whether a price cut was undertaken with the "intent to restrain trade" or was merely hard competition would certainly discourage aggressive competitive behavior. Blecher accepted that possibility, but believed that it was more important that anyone injured be enabled to recover his damages.

Given this state of affairs, perhaps one should be happy the commission ended up where it did. It took hard work by its staff, Chairman John Shenefield (the current head of the Antitrust Division), and Senator Edward Kennedy to beat off the Blecher proposal, and it may well be that the final recommendation is the best that could have been achieved under the circumstances. Still, the report must stand on its own merits, intra-commission politics notwithstanding, and when evaluated on that basis, this careless approach is disappointing and ultimately unpersuasive.

No-Fault Monopoly. As noted earlier, the Antitrust Division had no desire to get involved in rewriting the antitrust laws, fearing unattractive and perhaps irrational results. But that fear was not shared by all the parties involved, particularly the FTC. The FTC decided to use the commission to make some progress on what it saw as important antitrust initiatives. Professor John Flynn of the University of Utah was recruited as a consultant and the "no-fault" monopoly effort was under way.

Flynn's original testimony was very hardline. Despite the language of the executive order restricting the commission's work to the "framework of existing antitrust laws," he argued, "no-fault monopoly" was clearly within the mandate because it was part of the solution to the "big-case" problem. It would shorten the trial itself, and that is the most direct way to deal with protracted cases. Although this rationale was shown to be probably erroneous and was later abandoned, Flynn, in his testimony, placed most of the blame for protraction—and for what he viewed as inadequate remedies in monopolization cases—on the need to prove "bad" conduct. In Flynn's view, the key issue in a monopolization case should be monopoly power, since that was the evil, no matter how the power was created or maintained. In other words, even monopoly power that results from superior efficiency must be destroyed. Thus, his "no-fault" monopoly proposal: once the government proved the existence of monopoly power, the defendant's liability would be established and the case would immediately move to the remedy stage. The remedy would be dissolution, unless the defendant could establish that dissolution would result in the loss of substantial economies of scale (not including managerial or financial efficiencies).

The commission immediately perceived that it was up to its ears in the "Great Concentration Debate." If there were any doubts left, they were destroyed by the testimony of Areeda, whose *Antitrust Law* (written with Turner) was cited as the intellectual base for Flynn's proposal and by the subsequent debate between former Solicitor General Robert Bork, now at the Yale Law School, and Michigan State University economist Walter Adams.

Areeda defended the intellectual concept, but carefully withheld any definitive opinion on the practical workability of legislation based on it or even the possibility of drafting such legislation. He cautiously agreed that the commission should consider the concept while clearly separating himself from Flynn's testimony, especially on the relevance of managerial and other non-scale efficiencies. In addition, he recognized the potential costs of this form of government intervention, and thus he argued that the persistence of monopoly power over a substantial period of time (at least five and perhaps ten years) was a critical prerequisite to any enforcement action. All in all, Areeda could be viewed as only a lukewarm supporter of a legislative proposal.

Bork and Adams turned out to provide the best entertainment of the commission hearings. Bork blasted the basic "no-fault" concept, arguing convincingly that eliminating the "bad conduct" element of a Section 2 trial would be a flawless prescription for purchasing shortness of trials at the price of rational outcomes. To Bork, persistent monopoly power (if it ever really existed, which he doubted) was much more likely the result of efficiency and better performance than predatory conduct. Thus, simply to assume the existence of predatory conduct would be wrong and, therefore, to dispense with the conduct requirement would reduce consumer welfare, since the most efficient competitor would be subject to attack and dismemberment because of its very efficiency.

Adams bemoaned the failure of government antitrust enforcement, which had resulted, in his view, in rampant monopoly throughout the economy. Although he thought the "no-fault" approach was inadequate, it was a step in the right direction—the ultimate goal being, his testimony would suggest, a rule forbidding any company from employing over ten people, thus making the economy very competitive indeed with everyone except the rest of the world.

After all this, the commission was sharply divided, with some of its members favoring endorsement of a "no-fault" proposal, some fiercely opposed, and some arguing that the present state of the law was fine so long as judges read it the way they did. The FTC submitted a modified recommendation limiting Flynn's proposal in various ways, but eventually the commission chose merely to recommend congressional study. Clearly Chairman Shenefield and the commission's staff were quite skeptical about the "no-fault" concept, and their skepticism was a major factor in the FTC's failure to carry the day completely.

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Still, one has to concede that the FTC won a victory. It certainly raised the visibility of the "no-fault'" notion, which was originally introduced by Senator Philip Hart in 1976 but quickly faded into obscurity. And it got some generally favorable quotable language from a presidential commission. The commission chose its words carefully, of course, but details and caveats tend to be washed away by the tides of time. Thus, in this respect, the report is yet another step in the transition of antitrust from negative second-guessing and post facto punishment—the law as referee—to affirmative regulatory intervention.

Conclusion

Obviously, Senator Kennedy's ascension to the chairmanship of the Senate Judiciary Committee has enormous potential significance for the future of antitrust legislation. It becomes even more significant when combined with the fact that both the Antitrust Division and the FTC are headed by very aggressive people—albeit with some significant differences in philosophy and approach—and with the presence in the White House of a President who has positioned himself as an independent populist. When we add to that the fact that a presidential election is less than two years away and that inflation will probably persist until then, we have all the ingredients for a new surge of antitrust activism. The NCRALP report is, in this context, a reformer's document, and the true test of its impact will be its capacity to generate new legislation in the coming two years. ■