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SYMPOSIUM: THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES

A CRITICAL PROFILE OF THE NATIONAL ANTITRUST COMMISSION

JOE SIMS*

Historical Background

Popular preoccupation with national economic issues frequently leads to vigorous debate in political and academic circles concerning the effectiveness of the antitrust laws. There are those who believe we need more strenuous and innovative antitrust enforcement, and there are those who think we already have too much, most of which is undirected.

These views are difficult to reconcile. To the first group, the antitrust statutes are too weak and too timidly enforced. Large corporate enterprises have acquired a dangerous degree of market power and a concomitant measure of political power. To restore the discipline of the market, this group would argue that we need stronger and more pervasive antitrust regulation of the economy.

The second group contends that current antitrust enforcement more often prevents, rather than furthers, the efficient functioning of our market economy and, as a result, imposes very substantial (though unrecognized) costs on society. Antitrust laws, this group believes, are too inflexible and do not take account of the realities of economic structure and performance in what has become a world marketplace. According to the second perspective, what we need is more centralized direction and control of antitrust enforcement, and legislative correction of the overly-rigid language and harsh judicial interpretations of existing antitrust laws.

One would expect that both groups would agree on the desirability of

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Portions of this article contain material from two prior articles on the National Commission for the Review of Antitrust Laws and Procedures. Sims, *Report of the President's Commission on Antitrust*, REGULATION (March/April, 1979), at 25; Sims, *National Review Commission Complete: Final Report Issues*, 2 ABA ANTITRUST SECTION 1 (1979).

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a full reexamination of antitrust laws and enforcement patterns by a national study group. But in fact, only those who sought to limit antitrust enforcement have called for study commissions and reviews; the antitrust expansionists generally have opposed such notions. These attitudes generally reflected the political perceptions of both groups. The expansionists have not been confident of their ability to control such a commission and, at least as importantly, they have had unique political leverage through the Senate Judiciary Committee's Antitrust Subcommittee.

Until 1976, the Antitrust Subcommittee was headed by Senator Philip Hart (D. Mich.), a longtime antitrust activist and champion of expansionist antitrust reform. Senator Hart was always receptive to new ideas and, as a result, antitrust expansionists flocked to his subcommittee. He held innumerable hearings on such dramatic and innovative concepts as his massive Industrial Concentration Act and no-fault monopoly. These hearings attracted much interest in the antitrust legal and economic community, some interest in the Washington media, and little interest elsewhere.

In the meantime, those who sought to limit antitrust enforcement efforts saw more hope through a broad approach, and continued to push for a thorough review of antitrust laws and enforcement. A variety of politicians and business groups, as well as those parts of the government most responsive to business interests kept up a regular drumbeat of criticism and suggestions for review. Especially during the early part of the 1970's, this effort continually seemed on the brink of success.

The Antitrust Division of the Department of Justice found itself caught in the middle with conflicting instincts on the general subject of antitrust reform. Like all bureaucracies, the Antitrust Division had some who would have been pleased with an expansion of their authority, regardless of the merits of that change. But unlike most other bureaucracies, this view was definitely a minority one. The majority of those in policy positions in the Division over the past two decades have been professional antitrust lawyers, from whose perspective the extremes of either position always had seemed unattractive.

Those calling for more expansive antitrust enforcement were frequently, in the eyes of Antitrust Division professionals, either misinformed or attempting to misuse antitrust enforcement to reach other political goals. On the other hand, those who sought to limit traditional enforcement were seen as protecting narrow business interests. Neither group was happy with the Antitrust Division, and the Division was anxious to maintain its independence from both. Thus, the Division consistently opposed calls for antitrust study commissions, and, at the same time, was extremely selective in its support of the various legislative proposals set forth by the Hart Subcommittee.

In early 1977, with the coming to power of the Carter Administration and the retirement (and subsequent death) of Senator Hart, the stage was set for a shift in momentum in favor of an antitrust study commission. For reasons not altogether clear, Attorney General Bell very quickly became

an advocate of an antitrust study commission. There is no indication that he was adopting the rationale of other study commission supporters; indeed, the existing evidence of his motivation indicates the contrary. As judged by his public statements, Bell came into office with serious concerns about three antitrust issues: "big case" problems, shared monopolies, and agricultural cooperatives.¹

Bell spoke repeatedly about "big case" problems: how they were too long, too complicated for court proceedings, how there was too much work on both sides not directed toward a speedy resolution.² Bell's worst fears were certainly confirmed at the Justice Department by the *IBM*³ and *AT&T*⁴ cases, two goliaths that, at the time, showed no signs of moving ahead at flank speed. His exposure to these monster cases produced his controversial suggestion that big antitrust cases should be tried before Congress instead of a court — a suggestion Bell has since described as merely an effort to get attention focused on the problem.⁵

Shared monopoly was also a constant topic of concern, although even Bell had trouble defining the term. Like pornography, however, he was sure the Antitrust Division could tell it when it saw it, if only the Division would look for it. Bell was going to make sure the Antitrust Division *did* look for it, by instigating and prosecuting shared monopoly cases instead of spending all its time on small merger or price fixing cases. His third major concern — the anticompetitive impact of regulation — was fully consistent with Antitrust Division efforts over the previous decade, and his support merely insured the continuation of those efforts. Bell apparently felt that at least some of these concerns could be usefully addressed by a study commission.

At this same time, Senator Edward Kennedy (D. Mass.) had just gained the Antitrust Subcommittee chair, and set out to put his considerable energy and charisma to work in advancing the expansionist antitrust viewpoint. Certainly, Kennedy intended to make the Antitrust Subcommittee a center of political and intellectual activity. Continued inflation and energy problems appeared to have spawned nationally an extraordinary mixture of anti-big business and anti-big government passion — which gave the Subcommittee unprecedented political visibility. Thus, it is not surprising that Kennedy reacted negatively to the idea of an antitrust study commission. He already had the equivalent of such a commis-

¹ See, e.g., Address by Attorney General Bell before the Harvard Law Review (March 19, 1977), 806 ANTITRUST & TRADE REG. REP. (BNA) F-1 (March 22, 1977).

² See, e.g., 839 ANTITRUST & TRADE REG. REP. (BNA) A-10 (Nov. 17, 1977) (reporting Bell's address to the Litigation Section of the American Bar Association on discovery reform and class action problems).

³ *United States v. International Bus. Mach. Corp.*, 69 Civ. 200 (S.D.N.Y., filed Jan. 17, 1969).

⁴ *United States v. American Tel. & Tel.*, Civ. No. 74-1698 (D.D.C. filed Nov. 20, 1974).

⁵ See 811 ANTITRUST & TRADE REG. REP. (BNA) A-8 (April 28, 1977) (report of Bell's initial proposal); 830 ANTITRUST & TRADE REG. REP. (BNA) A-21-22 (Sept. 19, 1977) (reporting Bell's subsequent characterization of his proposal).

sion — the Antitrust Subcommittee — and his commission could hold hearings, subpoena witnesses and, most importantly, pass laws. All a study commission could do was study and recommend, said Kennedy, and its recommendations would likely end up with those of most other such groups — on a shelf gathering dust.

Despite the reluctance of both the Antitrust Division and Kennedy, Bell grew even fonder of the notion of a study commission, and at his direction the Division began to draw up plans. It is no secret that some in the Division saw this effort as a damage-limiting exercise. There continued to be a substantial body of opinion within the Division that no change in the antitrust laws was required and a continued fear that the results of such a commission would more likely be harmful than helpful. Thus, in planning what became the National Commission for the Review of Antitrust Laws and Procedures (NCRALP, Commission or National Commission) the Division sought to insure against adverse consequences by influencing both the membership and the agenda of the Commission. The Division recommended people it thought qualified and sympathetic, some of whom were selected. All in all, the non-political members were a professional, highly qualified group, but clearly tilted toward plaintiff and prosecutorial perspectives.

The Division also, by and large, sought to limit the agenda to purely procedural matters and regulatory reform issues, and to avoid inquiry into substantive rules of antitrust law. When it finally became clear that there was going to be a study commission despite his views on the matter, however, Senator Kennedy and the FTC began pushing for a broader agenda, including exploration of substantive issues, such as shared monopoly, no-fault monopoly and attempts to monopolize. Moreover, Attorney General Bell had his own notions of substantive matters worthy of attention.

The result, in the Executive Order creating the Commission and defining its mission, was a mandate to consider, generally “substantive rules of law needed to expedite the resolution of complex antitrust issues” and, specifically, the legal standard in government attempt to monopolize cases and “non-judicial alternatives for resolution of complex antitrust cases.”⁶ But all substantive inquiry was subject to the general caveat that the Commission study was confined to “the framework of existing antitrust laws (as that term is defined in 15 U.S.C. § 12 (1976)).”⁷ Not accidentally, the definition does not include the FTC Act.

The other substantive area suggested for study was regulatory reform. In contrast to the antitrust laws themselves, the Antitrust Division viewed regulatory reform as an area where the political winds were favorable, and the downside risks small. Of course, this was an antitrust commission, not a regulatory reform commission, and an antitrust handle was needed. Antitrust exemptions were the obvious answer. Since most regulated industries

⁶ Exec. Order No. 12,022, 3 C.F.R. 155 (1977).

⁷ *Id.* at 156.

also enjoyed antitrust exemptions, economic regulation and antitrust exemption were nearly synonymous. A study of antitrust exemptions was favored by all involved, and was easily included.

There was only one more hurdle to overcome. The original Executive Order provided for three members from both the Senate and the House. The House was no problem, but a glitch quickly appeared in the Senate. Kennedy was obviously going to be one of the three, and another Democrat would be named, but the Republican proved more difficult. Strom Thurmond of South Carolina was the ranking Republican on both the full Judiciary Committee and the Antitrust Subcommittee, but Jacob Javits of New York had been pushing for an antitrust study commission for years. After fruitless negotiations, inquiries were made, the problem explained and on April 7, 1978, more than four months after the initial Executive Order was signed, a new order was issued expanding the size of the commission from 15 to 22 members.⁸ Both the Senate and the House were given two more slots, a state Attorney General slot was added to recognize the relatively new interest at that level of government, and the private sector slots were increased from five to seven to insure that the additional congressional appointments did not unduly tip the balance of membership. Senator Thurmond and Senator Javits both were appointed to the panel (although shortly thereafter, Thurmond resigned and was replaced by Orrin Hatch of Utah). The Commission's members were named by President Carter on June 21, 1978,⁹ and ordered to report back to him in seven months.

The Results

On January 22, 1979, NCRALP produced its report to the President — on time.¹⁰ For this accomplishment alone (which may be unparalleled), the

⁸ Exec. Order No. 12,052, 3 C.F.R. 173 (1978).

⁹ John H. Shenefield, Assistant Attorney General in charge of the Antitrust Division, was appointed Chairman of the Commission. The Commission included ten member of Congress: Senator Edward M. Kennedy, then Chairman of the Senate Subcommittee on Antitrust and Monopoly and now Chairman of the Senate Judiciary Committee; Senator Jacob J. Javits; Senator Howard M. Metzenbaum (now Chairman of the Senate Subcommittee on Antitrust and Monopoly); Senator Robert Morgan; Senator Orrin G. Hatch; Congressman Peter W. Rodino, Chairman of the House Committee on the Judiciary and its Monopolies and Commercial Law Subcommittee; Congresswoman Barbara C. Jordan; Congressman Robert McClory; Congressman John F. Seiberling; and Congressman Charles E. Wiggins. Two representatives of regulatory agencies, Michael A. Pertschuk, Chairman of the Federal Trade Commission, and Alfred E. Kahn, then Chairman of the Civil Aeronautics Board and now Chairman of the Council on Wage-Price Stability, were named. The Commission also included C. Clyde Atkins, Chief Judge of the United States District Court for the Southern District of Florida and Chauncey H. Browning, Jr., Attorney General of West Virginia. The private sector members were practicing attorneys Maxwell M. Blecher, John Izard, James M. Nicholson, Craig Spangenberg, and Gordon B. Spivak, and professors of law Eleanor M. Fox and Lawrence A. Sullivan. *See id.*

¹⁰ NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL (Jan. 22, 1979) [hereinafter cited as COMMISSION

members and staff deserve much credit. That the report is readable and generally useful is a welcome bonus. For those who approached it as a damage-limiting exercise, the effort was largely successful. Those who hoped for support for antitrust expansionism got a few kind words, and can justifiably claim credit for some progress. Only those who would prefer limitations on current antitrust policies were shut out, and that result was fairly predictable in view of the composition of the Commission.

The Commission's work was divided into three main areas. First, the Commission studied procedure, and made a variety of recommendations designed to eliminate or lessen the incidence of protraction in antitrust litigation. Second, the Commission dealt with several questions of substantive law and remedies. In this area, the Commission's recommendations were considerably more controversial, and included endorsement of a more expansive standard for preliminary injunctions, a recommendation that the Sherman Act be amended to expand the scope of the attempt to monopolize language in section 2, and a recommendation that Congress study "no-fault" monopolization legislation. Finally, the Commission added its voice to the current chorus of attacks on antitrust exemptions and, more generally, economic regulation, broadly endorsing a review of all significant exemption areas and repeal or substantial cut-backs of exemptions in surface transportation, insurance, agriculture, ocean shipping and export trade. In addition, the Commission endorsed legislation to require increased consideration of competitive issues in regulatory decision-making, along the lines of the Competition Improvements Act¹¹ introduced by Senator Kennedy.

1. Procedural Issues

In the procedural area, the Commission's specific recommendations fall into four areas: time limits, discovery reforms, sanctions against delaying litigants, and various expedited adjudication devices. In all these areas, the Commission emphasized close judicial control as the truly effective solution to the particular problem.¹² Most of the Commission's specific recommendations are designed to place the court in a position of greater active control over the litigation, particularly in the pretrial period, and circumscribe the means by which counsel can effectively dictate the pace of the proceeding.

For example, the Commission strongly endorsed time limits, starting from the premise that "much of what lawyers do during litigation could just as well be left undone."¹³ From there, the Commission proceeds to the

REPORT], reprinted in 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) (Jan. 18, 1979).

¹¹ S. 2625, 95th Cong., 2d Sess. (1978).

¹² See COMMISSION REPORT, *supra* note 10, at 18-26, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 5-8; see also Kingdon, *The "Big Antitrust Case": Thoughts on Procedural Reform*, 37 WASH. & LEE L. REV. 25 (1980).

¹³ COMMISSION REPORT, *supra* note 10, at 27, 897 ANTITRUST & TRADE REG. REP. (BNA)

notion that setting relatively tight time limits will encourage lawyers to sort out those items actually necessary to the litigation from the universe of possible issues.¹⁴ In order to maximize the impact of this recommendation, the Commission drafted and recommended the adoption of a Uniform Local Rule of Court which would require an early pretrial order establishing a firm discovery schedule and a trial date within a reasonable period (no later than two years after the date of the complaint "save where manifest injustice would result").¹⁵

The Commission also strongly urged discovery reform, citing with approval the efforts by the Judicial Conference, the ABA's Litigation Section, and the Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation to limit the scope of discovery.¹⁶ Here too, the Commission urged strong court involvement in the creation of discovery plans: "Although the court should . . . avoid the imposition of a discovery plan by fiat, uncooperative attitudes or unproductive proposals by the litigants should not be accepted by the court."¹⁷ As a specific example, the Commission recommends amendment of Rule 16 of the Federal Rules of Civil Procedure to "clarify judicial authority to define issues unilaterally, where litigants have failed to use reasonable efforts to agree."¹⁸

With respect to the scope of discovery, the Commission would amend Rule 26(b) to limit the scope of discovery to either the "issues raised" (the standard proposed by the ABA) or "claims or defenses" (as suggested by the Judicial Conference), rather than the "subject matter" of the action as currently provided by the Rule.¹⁹ The Commission urged greater use of Rule 26(c), which authorizes courts to protect litigants from "annoyance, embarrassment or undue burden or expense," and would amend the rule to allow courts to deal with abuses on their own motion.²⁰ On mechanics, the Commission agreed with the Judicial Conference Committee, the ABA Litigation Section, and the Second Circuit Commission that Rule 33 (governing written interrogatories to parties) and Rule 34 (governing the production of documents and things) should be revised to prevent the production of masses of unorganized and undesignated documents. The Commission strongly supported amendment of Rule 33(c), to require responding parties to specify documents responsive to each interrogatory, and Rule 34,

(Special Supp.) at 8.

¹⁴ *Id.* at 27-30, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 8-9.

¹⁵ *Id.* at 32-35, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 11.

¹⁶ See A.B.A. LITIGATION SECTION, REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE (Oct. 1977); JUDICIAL CONFERENCE OF THE UNITED STATES COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 6-7 (March 1978); SECOND CIRCUIT COMMISSION ON THE REDUCTION OF BURDENS AND COSTS IN CIVIL LITIGATION, DRAFT REPORT (Sept. 18, 1978).

¹⁷ COMMISSION REPORT, *supra* note 10, at 44, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 13.

¹⁸ *Id.* at 63, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 19.

¹⁹ *Id.* at 46, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 14.

²⁰ *Id.* at 46-49, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 14-15.

to require responsive documents to either be labeled corresponding to the document request or produced as maintained in the ordinary course of business.²¹

In its most focused discovery recommendation, the Commission followed the lead of Commissioner Fox in proposing a highly structured exchange of market-definition information.²² In cases where market definition is an issue, the Commission would require, within 20 days of the first pretrial conference, that the plaintiff serve on the defendant its preliminary market definition contentions, and the defendant respond with its contentions 30 days thereafter. After 30 more days, both would exchange various market data, including the number and identity of competitors, the particular products involved, and market shares. All principal documents utilized would have to be exchanged, and all persons relied upon identified. According to the Commission, such an exchange would be "likely to obviate much of the need for such discovery" on market issues,²³ although the Commission would not preclude the parties from engaging in further discovery on market definition or changing their initial market definition contentions if the need arose. The judge, in the Commission's plan, would retain the power to limit the markets considered to the number "reasonably necessary" in the context of the particular litigation.

The Commission found that delay in complex litigation is often attributable simply to unreasonable and intentionally dilatory behavior by lawyers: "Lawyers, particularly in 'high-stakes' antitrust litigation, too often file meritless defenses, or counterclaims, make excessive or abusive demands, unreasonably resist legitimate discovery requests, provide unresponsive 'stonewalling' answers and unreasonably produce masses of insignificant, nonresponsive information."²⁴ The Commission recommended amendments to Rule 7(b)(2) of the Federal Rules of Civil Procedure, to make it clear that sanctions are authorized whenever a motion is submitted "primarily" for delay (as currently construed, only motions submitted *solely* for delay are sanctioned).²⁵ Similar changes were recommended to 28 U.S.C. § 1927 (1976) to lower the level of wrongful intent required and also to allow not only costs against attorneys who engaged in dilatory behavior, but all expenses and attorneys' fees.²⁶ The Commission additionally advocated amendment of Rule 37, to authorize sanctions for delays caused by excessive or abusive discovery requests and give the court authority to impose sanctions *sua sponte*.²⁷ The Commission also stressed the

²¹ *Id.* at 49, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 15.

²² *Id.* at 65-66, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 20.

²³ *Id.* at 66, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 20.

²⁴ *Id.* at 82, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 24.

²⁵ *Id.* at 86, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 25.

²⁶ *Id.* at 86-88, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 25-26. 28 U.S.C. § 1927 (1976) now provides for the imposition of costs against an attorney who "so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously."
Id.

²⁷ COMMISSION REPORT, *supra* note 10, at 86-87, 897 ANTITRUST & TRADE REG. REP. (BNA)

need for revision of the ABA and state codes of professional responsibility to redefine and emphasize the duty to refrain from dilatory conduct. The Commission urged the bar associations to move beyond the existing "well-intentioned" but "uncomfortably general" ethical rules and define with specificity unethical delaying practices.²⁸

The Commission left little doubt that it believed the defense bar responsible for most of the professional malfeasance in antitrust litigation, noting that defendants "can garner considerable financial benefit by protracting litigation."²⁹ A sharply divided Commission came down hard on defense lawyers and their clients, recommending the award of prejudgment interest (interest from the date of service of the complaint rather than the date of judgment) at prevailing commercial rates as a necessary incentive to avoid delay.³⁰ This issue was the most divisive in the entire Commission Report. Nine members of the Commission dissented, including all but one of the practicing lawyers.³¹ In fact, with the exception of Commissioners Spangenberg and Sullivan, the only persons voting in favor of prejudgment interest were government officials. Recognizing that their recommendation on prejudgment interest would tend to strongly favor plaintiffs, the Commission sought to even the scales by urging that courts take the plaintiff's litigation conduct into account in calculating its attorneys' fee awards³² — but, obviously, many members of the Commission felt that the balance had not quite been struck.

Finally, the Commission encouraged expanded application of various procedural devices that can be used to avoid full trials altogether, such as summary judgment, interlocutory appeal, separate trials on separable issues (such as liability and damages) and collateral estoppel. The Commission suggested nothing novel in its discussions of summary judgment, interlocutory appeal, or trial of separable issues, but emphasized that these procedural devices can often be used in protracted litigation to focus issues and facilitate settlement, even where they cannot be used to dispose of the case completely.³³ To encourage wider application of collateral estoppel in antitrust litigation, the Commission recommended revision of section 5(a) of the Clayton Act,³⁴ which provides that a final judgment entered against

(Special Supp.) at 26.

²⁸ *Id.* at 88, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 26-27.

²⁹ *Id.* at 90, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 27. See Fox, *Monopoly and Competition: Tilting the Law Towards a More Competitive Economy*, 37 WASH. & LEE L. REV. 49, 50 (1980) [hereinafter cited as Fox].

³⁰ COMMISSION REPORT, *supra* note 10, at 89-91, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 27-28.

³¹ *Id.* at 91, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 28. Commissioners Blecher, Fox, Izard, McClory, Nicholson, Spivack, Wiggins, Hatch, and Seiberling dissented from this recommendation. *Id.*

³² *Id.* at 90, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 27-28.

³³ *Id.* at 68-72, 105-06, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 21-23, 31-32.

³⁴ 15 U.S.C. § 16(a) (1976).

a defendant in a government case can be used as *prima facie* evidence against the defendant in a subsequent litigation. Noting that some courts have interpreted the statute to preclude a collateral estoppel (rather than merely *prima facie*) effect,³⁵ the Commission would amend the statute to assure that it imposes no limitation on the offensive use of collateral estoppel in appropriate circumstances.³⁶ The Commission recognized that this modification — like prejudgment interest — would increase pressure on defendants to settle government cases in order to avoid subsequent estoppel, but concluded that this effect did not outweigh the potential benefits of the rule.

Significantly, the Commission refrained from endorsing several innovative procedural proposals. Of the five specific procedural issues mentioned in the original Executive Order,³⁷ the Commission ultimately agreed with only two — revision of discovery practices and increased sanctions. The Commission rejected probably the most publicized proposal, a roster of district court judges,³⁸ decided against revision of pleading requirements, the case for which the Commission described as “very weak;”³⁹ and concluded that no amendment of evidentiary rules was necessary. In addition, the Commission made no recommendation on what has become a very controversial issue in major antitrust litigation, the continued use of juries. The Commission found the evidence about the effect of juries “inconclusive” and that, furthermore, the constitutional right to jury trial was beyond the Commission’s mandate.⁴¹ The Commission did suggest that where antitrust trials employ juries, courts make a greater effort to render the proceedings comprehensible by, for instance, instructing the jury periodically throughout the trial on the factual issues and relevant legal principles and allowing the jury to take notes.⁴²

2. Substantive Issues

The Commission devoted two chapters of its report to substantive issues: relief in section 7 (Clayton Act) and section 2 (Sherman Act) cases and new statutory standards for monopolization and attempt to monopolize cases. Both have strong procedural elements, and both were clearly intended to favor plaintiffs and prosecutors. Both also have an air of academic abstraction. In fact, the relief chapter is little more than an intellec-

³⁵ See, e.g., *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 690 (1961) (dictum); *Purex Corp. v. Procter & Gamble Co.*, 308 F. Supp. 584, 589-90 (C.D. Cal. 1970), *aff'd*, 453 F.2d 288 (9th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972).

³⁶ COMMISSION REPORT, *supra* note 10, at 101-05, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 29-31.

³⁷ Exec. Order No. 12,022, § 2(a)(1), 3 C.F.R. 155, 156 (1977).

³⁸ COMMISSION REPORT, *supra* note 10, at 20-22, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 7-8.

³⁹ *Id.* at 75-76 n.14, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 19 n.14.

⁴⁰ *Id.* at 99-101, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 28-29.

⁴¹ *Id.* at 106-07, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 32.

⁴² *Id.*

tual complaint about the real world. The Commission quite accurately complained that relief frequently has been ineffective in antitrust cases, especially in structural cases, and assigned the blame to the failure of the courts to utilize their power to fashion relief in a way that would most promote competition.⁴³ The courts, according to the Commission, have paid entirely too much attention to what the Commission described as "private" interests (those of the defendant and its employees, customers and suppliers) and too little attention to what the Commission called the "public" interest in competition.⁴⁴ In the National Commission's view, the courts inappropriately have attempted too often to balance these "private" and "public" interests in drafting a balanced relief proposal.⁴⁵

The Commission envisioned two ways to solve the problem of ineffective relief: prevent the consummation of additional transactions pending the outcome of litigation, thus rendering relief unnecessary in some cases; and convince judges to be more aggressive on relief issues, especially in section 2 cases. Thus, the Commission endorsed a greatly liberalized standard for the granting of preliminary injunctions. The National Commission favored granting a preliminary injunction where a probability of success on the merits is shown without any further investigation; even where that showing cannot be made, the Commission still would grant a preliminary injunction where "significant, substantial and difficult issues of law" are raised and where the "balance of hardship" falls on the plaintiffs.⁴⁶ But as Commissioner Spivak, a former Director of Operations for the Antitrust Division, pointed out, the current "probability of success on the merits" standard requires only a showing 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."⁴⁷ Where this relatively meager showing cannot be made, Spivak believes, a restraint on the consummation of the merger (whether a preliminary injunction or hold separate order) would be a wholly unjustified governmental substitution of bureaucratic judgment for the operation of free markets.⁴⁸

Spivak has put his finger on an anomaly explainable only by the prosecutorial bias of the Commission. Of course, the Commission's standard would include every government merger case, barring the possibility that the government would challenge a merger that did not involve "significant, substantial and different issues of law." Thus, the Commission's proposal would have the same practical effect as the automatic statutory stay un-

⁴³ *Id.* at 115-19, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 32-34.

⁴⁴ *Id.* at 121-25, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 35-36.

⁴⁵ *Id.*

⁴⁶ *Id.* at 127, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 37.

⁴⁷ *Id.*, at 138 n.43, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 37 n.43.

⁴⁸ *Id.* Senator Javits expressed similar views on this issue. See *Separate Views of Commissioner Javits*, *id.* at 388-91, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 110-11.

successfully sought in the original pre-merger provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976,⁴⁹ and later dropped from that legislation before its passage. The proposal is also very similar to the standard propounded by the Antitrust Division in its recent unsuccessful attempt to enjoin the acquisition of Carrier Corporation by United Technologies.⁵⁰ This proposal would give the enforcement agencies a virtual veto power over mergers, since the issuance of a preliminary injunction would effectively preclude the subsequent consummation of most mergers. Thus, the practical effect of the Commission's proposal is to allow the regulatory agencies broad authority over merger activity, which, absent an "abuse of discretion," would be essentially free from judicial review. Unfortunately, NCRALP did not even consider those issues and, as a result, its recommendation lacks credibility.

The National Commission also argued strongly that structural relief should be the preferred remedy for violations of section 2 of the Sherman Act or section 7 of the Clayton Act.⁵¹ In fact, the Commission sharply criticizes courts for attempting to restore the *status quo ante* and for acceptance of partial divestiture as an adequate remedy.⁵² The National Commission believes that courts should fashion whatever remedy is desirable to obtain "workable competition", including (where necessary) divestiture of more than the "offending assets."⁵³ The Commission's approach would place the court in an actively "regulatory" position in constructing equitable relief — contrary to the traditional judicial inclination to respond only to the particular adjudicated wrong and simply put things back where they were before the violation.

The Commission argued, with some justification, that attempts to restore competition by less radical means, such as injunctions aimed at particular practices or divestiture only of the offending assets, often flounder. Given these difficulties, NCRALP concluded that the public interest would be better served by an effort to restructure the marketplace.⁵⁴ Here again, the Commission's intellectual argument runs into the practical, real-world fact that courts are always going to be reluctant to impose their judgment of a proper market structure.⁵⁵ Even where a court subsequently concludes that a particular acquisition violates section 7, and especially where it concludes that a market structure developed over many years violates section 2, courts will be reluctant to intervene in the activist manner urged by NCRALP. The effects on shareholders, employees, and cus-

⁴⁹ See H.R. 8532, 13489, 14580; S. 1284, 94th Cong., 2d Sess. (1976).

⁵⁰ See *United States v. United Tech.*, [1979-2] TRADE CAS. (CCH) § 62,393 (N.D.N.Y. 1978), *aff'd* [1979-2] TRADE CAS. (CCH) § 62,405 (2d Cir. 1978).

⁵¹ COMMISSION REPORT, *supra* note 10, at 114-21, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 33-34.

⁵² *Id.* at 119-23, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 34-35.

⁵³ *Id.*

⁵⁴ *Id.* at 114-20, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 33-34.

⁵⁵ See, e.g. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 347-48 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

tomers, "private" interests though they may be, will always concern a district court judge, and properly so. Moreover, 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 remains 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 perspective, the proposal is not likely to influence the actions of very many district judges.

Perhaps in recognition of the great difficulties in this area, the Commission urged the creation of a task force, including 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.

Only two substantive liability standards received any real attention by the Commission. The first issue, the attempt to monopolize standards, was mandated by the Executive Order itself,⁵⁷ and to absolutely no one's surprise, the Commission found the state of the law in the attempt area to be confusing and inconsistent.⁵⁸ While it would be hard to find anyone who would disagree with that conclusion, resolution of the problem is a subject on which reasonable men could differ forever. Despite this lack of consensus and strong opposition by the ABA Antitrust Section and others, the Commission nevertheless decided to recommend an amendment to section 2 of the Sherman Act.

The Commission found too restrictive the prevailing view that a section 2 attempt case requires a showing of a dangerous probability of success in achieving monopoly, under which near-monopoly market share is often a prerequisite.⁵⁹ The Commission's amendment to section 2 of the Sherman Act would provide that conduct which "significantly threatens competition in any relevant market" constitutes a "dangerous risk of monopoly." The threat to competition would be evaluated under the amendment by weighing the defendant's intent, its present or probable market power, and the anticompetitive potential of the conduct at issue.⁶⁰ In addition, the

⁵⁶ Commission Report, *supra* note 10, at 132-34, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 39-40.

⁵⁷ See Exec. Order No. 12,022, 3 C.F.R. 155 (1977).

⁵⁸ COMMISSION REPORT, *supra* note 10, at 143-45, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 41.

⁵⁹ *Id.* at 145-46, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 42.

⁶⁰ *Id.* at 141-51, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 42-44. The Commission's proviso would state that:

[I]n determining whether a person has attempted to monopolize a part of trade or commerce, (1) a dangerous risk of monopoly shall be held to exist upon a showing that the conduct alleged to constitute the attempt significantly threatens competi-

Commission's proviso would prevent the Areeda-Turner predatory pricing test (defining as predatory only prices that were below average variable or marginal cost) from being used as a definitive or controlling consideration in an attempt to monopolize case.⁶¹

The Commission was obviously concerned that the combination of a strict reading of the dangerous probability requirement and the simplicity and logic of the Areeda-Turner formulation was preventing full utilization of the attempt to monopolize provision. In fact, some members of NCRALP and the Commission staff favored a separate statutory prohibition of unilateral anticompetitive conduct, although there was no agreement on either language or standards.⁶² The final recommendation was designed simply to make the attempt proviso more useable.

Although the Commission described the continued viability of the dangerous probability standard as "more a matter of precedent than well-reasoned antitrust analysis,"⁶³ there is no doubt that both this analysis and the Areeda-Turner formulation's popularity with the courts are due in significant part to the fear that a relaxation of these standards would result in a significant increase in litigation attacking aggressive competition and that the summary procedures now available to discourage such attacks would no longer be effective.⁶⁴ The Commission, however, did not recognize or discuss this problem, nor did it discuss the solution suggested by the Executive Order itself, i.e., changing the standard for government cases only. Such a change seems the logical answer to these competing concerns, and it is strange that the Commission chose to ignore it. Allowing the government greater latitude in dealing with unilateral anticompetitive conduct would go a long way toward invigorating the attempt provision without raising any realistic fears about chilling legitimate commercial behavior. The Commission's failure to even discuss this option is a disap-

tion in any relevant market, as determined after an evaluation of the defendant's intent, the defendant's present or probable market power, and the anticompetitive potential of the conduct undertaken; and (2) the fact that a defendant's prices were not below either average variable cost or marginal cost shall not be controlling, but may properly be considered, in assessing the defendant's intent and the conduct at issue.

Id. at 165-66, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 50.

⁶¹ *Id.* at 149-51, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 44.

⁶² See *Separate Views of Commissioner Blecher*, COMMISSION REPORT, *supra* note 10, at 333-39, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 95-96; *Separate Views of Commissioner Sullivan*, *id.* at 413-14, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 117.

⁶³ COMMISSION REPORT, *supra* note 10, at 145-47, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 42.

⁶⁴ See *Separate Views of Commissioner Hatch*, COMMISSION REPORT, *supra* note 10, at 353-53, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 101; *Partial Concurrence of Senator Edward M. Kennedy and Senator Robert Morgan*, COMMISSION REPORT, *supra* note 10, at 355-56; 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 101-02; *Separate Views of Commissioner Javits*, COMMISSION REPORT, *supra* note 10, at 391-92, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 111-12.

pointing exception to the general quality of the analysis in its report.

Possibly the single most controversial subject the Commission dealt with was the so-called "no-fault" monopolization proposal set forth by the Federal Trade Commission and others.^{64,1} The proposals varied, but generally would have permitted government suits for structural relief where monopoly power had persisted over some undefined number of years. The proposals would eliminate any requirement that "bad" conduct be shown to have assisted in the creation or maintenance of this monopoly power, and mandate divestiture for a violation in the absence of a showing that divestiture would eliminate scale or other efficiencies.

The Commission staff originally tried to discourage a detailed inquiry into "no-fault" proposals, on the ground that the Executive Order did not contemplate substantive changes in the antitrust laws. The proponents of "no-fault" responded that their proposals were indeed relevant to the Commission's inquiry because they would expedite complex antitrust litigation. By eliminating the conduct requirement from antitrust litigation, trials would be shorter and quicker. This position ultimately was abandoned by "no-fault" proponents after it became clear that conduct evidence of various kinds would almost surely be relevant and admissible in either the liability or the relief stage of a "no-fault" proceeding, and thus it is doubtful that time would be saved.

Indeed, there were strong arguments that the proposed new statute would require longer and more complicated proceedings, since all proposals mandated at least some inquiry into the existence of scale efficiencies, an inquiry not necessarily relevant under today's law.⁶⁵ The scale efficiencies of an organization and the losses that would result from divestiture cannot thoroughly be assessed without an investigation which would include but not be limited to, past conduct. Unable to demonstrate persuasively the litigation economies in "no-fault" monopoly, its proponents and the Commission ultimately rested their jurisdictional case on the likelihood of improving relief by enabling the government to concentrate and focus on the "real problem" of market structure and encouraging judges, once a violation was found, to enforce structural relief wherever possible.

As the Commission Report outlines, NCRALP eventually divided into three camps of relatively equal size: (1) one group favored the "no-fault" legislation; (2) another group favored exhortations to the courts to presume that persistent monopoly power is caused by culpable conduct, and thus shift the burden of proof to the contrary toward the defendant; (3) a third group would not revise the traditional proof requirements, arguing that current substantive standards are not the cause of significant protraction

^{64,1} See Dougherty, Kirkwood & Hurwitz, *Elimination of the Conduct Requirement in Government Monopolization Cases*, 37 WASH. & LEE REV. 83 (1980); Fox, *supra* note 29, at 53-62.

⁶⁵ See *Separate Views of Commissioner Hatch*, COMMISSION REPORT, *supra* note 10, 357-64, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 102-03; McKinney, *The Case Against No-Conduct Monopolization*, 37 WASH. & LEE L. REV. 73 (1980).

and that a change would be positively harmful.⁶⁶

The Commission thus could not reach a consensus position, even though the Commission Report describes the option of new legislation as "the logical solution to the several problems that today afflict monopolization litigation."⁶⁷ The Commission, in the end, recommended congressional study of the issues and the various proposed solutions, with particular emphasis on the kinds of efficiency defenses that should be permitted, the proper role of market definition in such cases, and the likely number of industries which would be affected by various alternative proposals.⁶⁸

The proponents of "no-fault" accomplished all they could reasonably hope for in getting a Presidential Commission to support, however tentatively, their efforts for legislation. Details and caveats tend to be washed away by the tides of time, and in the long run the Commission's support may well be seen as the first step toward legislation.

3. Exemptions and Immunities

On the immunities front, NCRALP joined the long and growing line of official and semiofficial organizations that have criticized both specific statutory exemptions and the implied immunities that frequently result from economic regulation. It should shock no one that the Commission concluded that competition is good and antitrust immunities are generally bad. Nor is it surprising the Commission concluded that, even when immunities are absolutely necessary, they should be limited to those necessary to accomplish the statutory purpose. Of the particular immunities studied, NCRALP quite predictably concluded they should all either be repealed or substantially cut back.⁶⁹

Economic deregulation is one matter on which both the antitrust "liberals" (favoring expanded enforcement) and the antitrust "conservatives" (interested in relaxing antitrust enforcement) can agree. The liberal camp rightly views the antitrust immunities as means of protecting unjustified corporate profits from the rigors of the market. The conservative group bases its opposition to certain antitrust rules as well as antitrust immunities on the common ground that a market economy should be left free from regulatory restraints. Accordingly, the Commission was nearly unanimous in its conclusions in this area.

Of course, the Commission, with its limited resources and time, could not study in detail all antitrust exemptions. Instead, it focused on those immunities and exemptions where data were most easily available and where the Commission saw some hope of change. In so doing, the Commission followed very closely in the footsteps of the Task Group on Antitrust

⁶⁶ COMMISSION REPORT, *supra* note 10, at 155-62, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 47-49.

⁶⁷ *Id.* at 155-58, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 47.

⁶⁸ *Id.* at 160-63, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 49.

⁶⁹ *See id.* at 177-95, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 50-56.

Immunities created by President Ford, which produced a comprehensive set of reports in January of 1977 generally reviewing antitrust immunities. In fact, the Antitrust Commission concentrated on many of the same major exemptions as the Task Group — surface transportation, insurance, agriculture, ocean shipping, and export associations (the Webb-Pomerene exemption). Of course, the Commission staff, composed largely of Antitrust Division personnel, obviously had some influence on the choice of areas to focus on, but the more powerful influence was the recognition by Commission members that the Commission, if it was to be effective and influential, needed to concentrate on those areas where data were readily available.

The portion of the Commission's Report dealing with immunities and exemptions is about half of its total report, and includes historical background and analysis of each of the exemption areas studied. Given space considerations, I can only summarize the Commission's conclusions in each of the areas studied.

The Commission spent more time on the surface transportation exemptions than any other issue and focused almost all its attention on trucking. This was a logical development, for several reasons. First, this area was an area of hot activity at the time the Commission was created: Senator Kennedy was holding hearings; the ICC was changing some important regulatory principles; and the Carter Administration, basking in the thrill of victory with airline deregulation legislation, was looking at trucks as a second course. Second, the empirical and analytical work in this area dwarfs that in most of the other exemption areas. Finally, the Commission felt that, for both of these reasons, the chances of significant reform in this area were the greatest.

Its conclusions, after all this effort, were simple and stark: economic regulation of the trucking industry should be ended, and the Reed-Bulwinkle antitrust immunity for joint rate-setting should be repealed.⁷⁰ The Commission waffled slightly on railroad deregulation, but clearly had the same general feelings about the railroad industry.⁷¹ Interestingly, it made no distinction between railroads and trucks with respect to repeal of the Reed-Bulwinkle Act.

The insurance industry caused NCRALP as much trouble as any. A number of Commissioners had considerable prior background in the area, and there was no common starting point. In addition, the inquiry into insurance regulation seemed to be inextricably tied to non-economic issues, such as discrimination and availability. Thus, the Commission struggled mightily with insurance, but in the end, it bit the bullet. The Commission concluded that there was simply no justification for the continued complete antitrust exemption of the insurance industry, and recommended repeal of the McCarran-Ferguson antitrust exemption.⁷²

To replace McCarran-Ferguson, the Commission made two recommen-

⁷⁰ *Id.* at 177-80, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 56.

⁷¹ *Id.* at 211-16, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 63-64.

⁷² *Id.* at 214-16, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 64.

dations. First, it suggested the adoption of a statute affirming "the lawfulness of a limited number of essential collective activities."⁷³ According to the Commission, these activities might include pooling and joint calculation of past loss data and perhaps trending of that data, but probably would not include the preparation of the administrative expense component of insurance rates and certainly would not include the joint setting of any rates.⁷⁴ Secondly, the Commission recommended more study on the regulatory problems of insurance, and "the appropriate mix, if any, of state and federal regulation."⁷⁵ The Commission urged that its first recommendation, repeal of McCarran-Ferguson and its replacement with a much more limited statute, should not await the completion of the more complicated and comprehensive study recommended in its second recommendation.⁷⁶

There was remarkably little controversy within NCRALP on the agriculture exemption. It was generally accepted quite early that a comprehensive exemption for agriculture cooperatives was not desirable, and the Commission spent the remainder of its time on trying to arrive at a formulation for change. The final conclusion, with only one dissent,⁷⁷ was that only the formation of agriculture cooperatives should be completely exempted from antitrust scrutiny. Actions following the formation, including mergers and marketing agreements, should be tested under the antitrust laws.

The Commission obviously was faced with a study in analytical inconsistency: cooperatives are formed to do things that are ordinarily illegal under the antitrust laws. Once we allow their formation, how can we logically prevent them from doing what they were formed to do? After much debate, the Commission settled on what it viewed as a middle ground: action of a cooperative after its formation would be tested by Clayton Act merger standards, and not the arguably harder Sherman Act criteria ordinarily applicable to agreements among competitors.⁷⁸ Thus, price fixing arrangements, marketing agencies in common, "super coop" arrangements, or other cooperative activities would not be *per se* illegal but instead would be prohibited only when their effect may be substantially to lessen competition. This "incipency" test would presumably permit more conduct of this type by small cooperatives, and less by those with dominant market shares. The recommendation obviously looks better as a policy judgment than a litigation standard.

Though these standards would govern mergers of cooperatives, NCRALP believed that the acquisition of market power through internal

⁷³ *Id.* at 226-28, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 65.

⁷⁴ *Id.* at 216, 234-43, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 72.

⁷⁵ *Id.* at 242-43, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 72.

⁷⁶ *Id.* at 242-45, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 72-73.

⁷⁷ *See id.* at 270 n.30, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 76 n.29a (noting Commissioner Izard's opposition to amendment or repeal of the Capper-Volstead Act).

⁷⁸ *Id.* at 259-63, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 76-77.

growth should still be controlled by administrative regulation. The Commission recommended that Congress amend the current section 2 of the Capper-Volstead Act,⁷⁹ which allows the Secretary of Agriculture to control cooperative conduct leading to "undue enhancement" of prices, to clarify its meaning.⁸⁰ The National Commission also recommended that Congress separate enforcement responsibility for the provision from responsibility for promotion of agricultural cooperatives, possibly by removing enforcement from the Department of Agriculture.⁸¹ Finally, the Commission suggested that the Secretary of Agriculture take competitive factors into account in making decisions under the agricultural marketing order program.⁸²

Considering the ocean shipping exemption, the Commission could reach no consensus and recommended additional study.⁸³ This recommendation was heavily influenced by the Carter Administration's creation of an interagency study of ocean shipping regulatory policy. In part, however, there was a feeling on the part of many Commissioners that they simply did not have enough information to reach a final decision. Nevertheless, NCRALP did agree, with only one dissent,⁸⁴ that some features of the current regulatory system were unnecessarily anticompetitive and should be abolished. Specifically, the Commission recommended that no antitrust immunity be granted to shipping conferences that did not permit independent action by their members or engaged in dual rate contracts, rate agreements with independent lines, or pooling agreements among conferences.⁸⁵ The international comity and defense considerations that so concerned the Commission as a general matter in this industry were obviously not sufficient to convince the Commission that these particularly anticompetitive devices were necessary.

The Commission rejected the recommendation of its Business Advisory Panel and urged the Congress to consider whether the Webb-Pomerene exemption for export associations should continue.⁸⁶ In addition, the Commission recommended that, if the exemption was retained, it should be limited to those situations where a clear showing of need can be made. The Commission saw no reason to distinguish between services and the export of goods, and recommended that any continued exemption be applicable to either.⁸⁷

⁷⁹ 7 U.S.C. § 292 (1976).

⁸⁰ *Id.* at 261-63, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 77.

⁸¹ *Id.*

⁸² *Id.* at 261-66, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 77-79.

⁸³ *Id.* at 265-66, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 79.

⁸⁴ See *id.* at 293 n.53, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 85 n.52 (noting the dissent of Commissioner Spivak).

⁸⁵ *Id.* at 285-88, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 85.

⁸⁶ See McDermid, *The Antitrust Commission and the Webb-Pomerene Act: A Critical Assessment*, 37 WASH. & LEE L. REV. 105 (1980).

⁸⁷ COMMISSION REPORT, *supra* note 10, at 300-04, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 88-89.

The Business Advisory Panel, which grew out of an interagency export policy task force chaired by the Department of Commerce, had strongly supported the continued existence of the exemption and argued that in fact it was necessary to promote American exports.⁸⁸ The Commission was not convinced, but the panel's conclusion probably prevented a vote to repeal the exemption.

Finally, the Commission took up what seems to have become almost a perennial subject of debate in and around the Congress, the so-called Competition Improvements Act.⁸⁹ This Kennedy legislation is an attempt to short-circuit the lengthy individual regulatory reform process by requiring agencies making decisions which have competitive impacts to take those effects into consideration, evaluate their necessity, compare the competitive cost with the regulatory benefits, and where possible, limit the competitive costs. The Commission strongly endorsed legislation along these lines.⁹⁰ In fact, until the last-minute objections by congressional members who complained that endorsement of a specific bill would cause them embarrassment, NCRALP was prepared to endorse S. 2625 itself. In the end, the National Commission merely recommended the specific language of the bill, without citing the bill's title or number.

Legislative Results

Thus far, the practical impact of the Commission has been minimal. The Commission's Report was influential in producing parts of the omnibus antitrust procedural bill in the Senate — the "Antitrust Procedural Improvements Act of 1979"⁹¹ — and three counterpart bills in the House.⁹² These bills adopt the Commission's recommendations to amend the Clayton Act to allow government judgments to be given collateral estoppel rather than merely *prima facie* effect in subsequent private litigation,⁹³ and to authorize the award of prejudgment interest from the date of the complaint.⁹⁴ The bills also would amend 28 U.S.C. § 1927 (1976) to allow courts

⁸⁸ The Panel's conclusions are contained in Volume 2 of the Commission Report. COMMISSION REPORT, *supra* note 10, vol. 2 at 291.

⁸⁹ S. 2625, 95th Cong., 2d Sess. (1978). The Competition Improvements Act of 1978 is an amended version of the Competition Improvements Act of 1976, S. 2028, 94th Cong., 2d Sess. (1976). A recently introduced regulatory reform bill, S. 2147, 96th Cong., 1st Sess. (1979), contains a provision which is similar in intent, but more limited in its scope and impact than the previous Competition Improvement Act bills. Section 642 of S. 2147 requires a finding for certain agency actions affecting competition that "the policy or rule is the least anticompetitive alternative legally and practically available to the agency to achieve its statutory goals."

⁹⁰ COMMISSION REPORT, *supra* note 10, at 307-16, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 89-92.

⁹¹ Antitrust Procedural Improvements Act of 1979, S. 390, 96th Cong. 1st Sess. (1979). Passed by the Senate on July 20, 1979.

⁹² H.R. 4046, 4047, 4048, 96th Cong. 1st Sess. (1979).

⁹³ S. 390 96th Cong., 1st Sess. § 6 (1979); H.R. 4046, 96th Cong. 1st Sess. (1979). See text accompanying notes 33-36 *supra*.

⁹⁴ S. 390, 96th Cong. 1st Sess. § 5 (1979); H.R. 4048, 96th Cong. 1st Sess. (1979). See

to impose personal liability on the offending attorney for costs, expenses and attorneys' fees incurred because of attorney conduct engaged in "unreasonably and primarily for the purpose of delaying or increasing the cost of the litigation."⁹⁵

The substantive recommendations of greatest concern to the Commission — the no-fault monopoly concept and attempt to monopolize standards — have, however, generated absolutely no legislative interest. This is due only in part to their questionable merit; more importantly, the political climate has taken some unexpected turns.

The most surprising political turn has been the weakness of Senator Kennedy as Judiciary Committee chairman. Many observers thought Kennedy would be a powerful activist in this position. This concern increased the enthusiasm in some quarters for NCRALP, since it would tend to occupy the attention of the antitrust activists for a while and have the effect of diverting Kennedy's antitrust resources. Whether the Commission has been a major contributor or not is problematical, but Kennedy has certainly been slowed down.

Kennedy has introduced a number of antitrust proposals, but absolutely none have moved anywhere. His top priority, overturning the *Illinois Brick* decision, has barely kept its head above water, and it faces a most uncertain legislative future.⁹⁶ His conglomerate merger legislation⁹⁷ has died a quiet death, and he has been forced to fall back to a more limited proposal to limit acquisitions by major oil companies.⁹⁸ Even that is unlikely to pass, despite the political boost given by the Exxon-Reliance merger and the decision of the Carter Administration and the Antitrust Division to support Kennedy's efforts.⁹⁹ In short, Kennedy has so far been unable to deliver at anywhere near the rate that some hoped (and others feared) and is far from addressing the more complex problems of no-fault or attempted monopoly.

The Commission's recommendations with respect to antitrust immunities have likewise had little effect to date. In fact, the President, following the counsel of the recently concluded Interagency Task Force on Maritime Regulation, has announced his support for legislation that totally ignores the Commission's recommendations. The President recommended legislation to facilitate the grant of antitrust immunity to shipping conferences by the Federal Maritime Commission and authorize the FMC to extend

text accompanying notes 29-31 *supra*.

⁹⁵ S. 390, 96th Cong. 1st Sess. § 4 (1979); H.R. 4047, 96th Cong. 1st Sess. (1979). See text accompanying notes 26-28 *supra*.

⁹⁶ The Antitrust Enforcement Act of 1979, S. 300, 96th Cong., 1st Sess. (1979), popularly known as the *Illinois Brick* bill, has been approved by the Senate Judiciary Committee but has not been submitted for a vote of the Senate for fear of filibuster. See 926 ANTITRUST & TRADE REG. REP. (BNA) A-7 (Aug. 9, 1979).

⁹⁷ Small and Independent Business Protection Act of 1979, S. 600, 96th Cong. 1st Sess. (1979).

⁹⁸ Oil Windfall Acquisition Act of 1979, S. 1246, 96th Cong. 1st Sess. (1979).

⁹⁹ See 937 ANTITRUST & TRADE REG. REP. (BNA) A-27 (Nov. 1, 1979).

antitrust immunity to "shippers councils," which are organizations of users of ocean shipping.¹⁰⁰ The National Commission's work might deserve some minor credit for the trucking deregulation legislation introduced by Senator Kennedy¹⁰¹ soon after the Commission's Report. The argument against the antitrust immunities in the trucking area, however, was clear and convincing to all except those with financial or political interests in the present scheme of regulation long before the Commission's Report.

Thus, Senator Kennedy's original view now appears to have been quite prescient. So far, the Commission's Report has indeed not had significant political impact. Given continuing inflation, and the general support of both the Antitrust Division and the Federal Trade Commission for substantive legislation, one normally would expect the opposite. Whether this is due largely to better business lobbying, a growing understanding and acceptance of the essentially economic character of antitrust enforcement; or the general distrust of government is not clear. Whatever the reasons, this Congress is obviously not prepared to become an antitrust activist. Though some relatively technical legislation may pass, it seems unlikely that anything major will come out of the current session. And next year is a presidential election year, during which legislation generally plays second fiddle to presidential politics. Of course, as we saw in 1976 (with the Hart-Scott-Rodino Act), sometimes the two coincide. But moving complex pieces of legislation through both houses of Congress in a presidential election year is an extremely difficult task. The safest bet would probably be on no new antitrust laws until after the election.

That means that the NCRALP Report will likely be useful in the short run only to academics, for purposes such as this symposium. That is not necessarily bad — in fact, it might well be good. The National Commission worked very quickly and covered a lot of ground, not all of it thoroughly. A somewhat more careful analysis cannot hurt, especially in an area such as antitrust, where reason is so often clouded by emotion and different social values frequently dictate very different conclusions. Certainly in the important substantive areas of the Commission's Report — no-fault monopoly and attempt to monopolize — a lot more work is needed before a persuasive case can be built for the Commission's recommendations. Unless that is done (and I have serious doubts it can be), NCRALP's substantive recommendations are not likely to bear fruit.

It's still too early, therefore, to fully measure NCRALP's contribution. All that is certain is that the Commission finished on time and generated

¹⁰⁰ Letter from President Carter to Senator Inouye (July 20, 1979). The amendments to the Shipping Act introduced by Sen. Inouye, the Shipping Reform Act of 1979, S. 1463, 96th Cong. 1st Sess. (1979), move well beyond the President's recommendations. This bill would make agreements among water carriers, intermodal carriers or shippers councils "presumptively, in the public interest" and would grant antitrust immunity for such agreements irrespective of whether they are approved by the FMC. Only the FMC would have authority to penalize unauthorized agreements. *Id.*

¹⁰¹ Motor Carrier Ratemaking Reform Act of 1979, S. 710, 96th Cong. 1st Sess. (1979).

considerable debate over its conclusions and recommendations. On that basis alone, the National Commission must be considered successful. Only time will tell whether NCRALP's conclusions can be described as influential.

