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## THE CASE AGAINST NO-CONDUCT MONOPOLIZATION

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Complex, costly industrial restructuring lawsuits are currently the subject of considerable handwringing.<sup>1</sup> These cases had their origins in the activist atmosphere of the '60s and represent an effort to reshape the business community more in the model of "perfect competition," a highly theoretical classroom concept.<sup>2</sup> Since many economists now doubt that the general welfare will be advanced by deconcentrating American enterprises,<sup>3</sup> it is not surprising that these experimental cases are hopelessly bogged in unending litigation. Some commentators would circumvent this problem by continuing the restructuring movement through the adoption of a no-fault monopolization standard. They would ease the burden of the prosecutors rather than confess error and urge that no more such suits be filed. Sober thought ought to be given to the adequacy of such counsel. This may be another instance where the lure of administrative expediency is a poor substitute for a thorough study of economic effects.<sup>4</sup>

The question is where does the truth lie? From whence do some of the notions arise? Are they, in fact, grounded in economic theories which are supported by reliable empirical evidence or are they appealing, but superficial, views of the world with little or no scientific basis?

As it turns out, the reasoning of the reformists is fundamentally flawed by the economic jargon upon which they rely. The economic assumptions

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<sup>1</sup> See, e.g., Dougherty, *Elimination of the "Conduct" Requirement in Government Monopolization Cases: A Proposed Revision of the Sherman Act*, 10 ANTITRUST L. & ECON. REV., No. 3, 37 (1978); Fox, *Monopoly and Competition: Tilting the Law Towards a More Competitive Economy*, 37 WASH. & LEE L. REV. 49 (1979) [hereinafter cited as Fox]; *Chronicle of Wasted Time*, Wall St. J., Oct. 16, 1979, at 20, col. 1 (editorial). Cases often mentioned in this context include: *United States v. American Tel. & Tel. Co.*, Civ. No. 74-1698 (D.D.C., filed Nov. 20, 1974); *United States v. International Bus. Mach. Corp.*, 69 Civ. 200 (S.D.N.Y., filed Jan. 17, 1969); *Exxon Corp.*, No. 8943 [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,388 (FTC, issued July 17, 1973); *Kellogg Co.*, No. 8883, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,898 (FTC, issued April 26, 1972).

<sup>2</sup> Perfect competition assumes a large number of buyers and sellers so that no one actor can influence price, easy market entry and exit, homogeneous products, perfect knowledge, full capacity operation, and that all other factors remain equal, including population, incomes, tastes, and prices of substitutes. Backman, *Holding the Reins on the Trust Busters*, in ANTITRUST POLICY ON ECONOMIC WELFARE 17 (Michigan Bus. Papers No. 56, W. Sichel ed. 1970) [hereinafter cited as Backman].

<sup>3</sup> See, e.g., Dewey, *The New Learning: One Man's View*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 1-14 (H. Goldschmid, H. Mann and J. Weston eds. 1974); McGee, *Efficiency and Economies of Size*, in *id.* at 55-97; Weston & Lustgarten, *Concentration and Wage-Price Change*, in *id.* at 307-332. See generally note 14 *infra*. See also McKinney, *Shared Monopolies and the FTC's Cereal Case*, 47 ANTITRUST L.J. 1127, 1133-34 (1979).

<sup>4</sup> In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the Supreme Court struck down a per se rule against nonprice vertical restrictions on distribution, emphasizing that the concern of the antitrust laws is with economic realities, not administrative ease.

underlying the reformists' proposals have not been adequately accepted in the economic community; empirical evidence has not proven their existence; and most of these assumptions are the product of nonscientific observations, conjured up during another era, involving an agrarian economy. This shaky ground is hardly the proper foundation for basic and far-reaching antitrust reform.

In its recent report, the National Commission for the Review of Antitrust Laws and Procedures [NCRALP or Commission] concluded that some form of no-conduct monopolization standard is desirable and recommended that Congress initiate an inquiry toward that end.<sup>5</sup> Procedural recommendations in the report have become part of the proposed Antitrust Procedural Improvement Act of 1979.<sup>6</sup> The Commission urged "the adoption of a standard enabling the government to obtain structural relief on a showing of persistent monopoly power without the need to prove culpable conduct. . . ." The Commission based this proposal on the belief that the primary objective of the Sherman Act is "dissipation of persistent monopoly power" and that such power "can be presumed to be maintained through deliberate conduct that would violate traditional Sherman [Act] Section 2 standards."<sup>8</sup>

"Bigness as badness" legislation is nothing new, but attempts to get it through Congress in recent years have been wholly unsuccessful.<sup>9</sup> Undaunted, proponents of the current movement press on, advocating legislative or judicial change. One of them is Professor Eleanor M. Fox, a NCRALP Commissioner and author of an article setting forth her views in another part of this issue.<sup>10</sup>

As its basic premise, Fox's article implicitly assumes a strong and direct relationship between industry structure and firm performance.<sup>11</sup> In other words, the structure of an industry determines the performance of the firms in it. The problem in accepting this supposed relationship is that its existence has never been proven. Past efforts at empirical verification

<sup>5</sup> NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 141-42 (Jan. 22, 1979) [hereinafter cited as COMMISSION REPORT] reprinted in 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 40.

<sup>6</sup> See S. 390, in S. REP. NO. 96-239, 96th Cong., 1st Sess. (1979).

<sup>7</sup> COMMISSION REPORT, *supra* note 5, at 142, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 40.

<sup>8</sup> *Id.* at 141, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 40.

<sup>9</sup> The Concentrated Industries Act, S. 2614, 92nd Cong., 1st Sess., 117 CONG. REC. 34,104 (1971), and the Industrial Organization Act, S. 3832, 92nd Cong., 2d Sess., 118 CONG. REC. 24,925 (1972), S. 1167, 93d Cong., 1st Sess., 119 CONG. REC. 7304 (1973), were never reported out of committee.

<sup>10</sup> See note 1 *supra*.

<sup>11</sup> Since social welfare is the ultimate concern of society, producers of goods and services are expected to exhibit good performance in achieving the societal objectives of productive and allocative efficiency, progressiveness, full employment of resources, and equitable income distribution. See F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 3-4 (1970) [hereinafter cited as SCHERER].

have been "inconclusive, conflicting, or tenuous."<sup>12</sup>

The principal reason for the dearth of empirical evidence is the inadequacy of the structure-performance model to approximate sufficiently the real world.<sup>13</sup> The model is based on applied price theory which itself is grounded on the dubious norm of perfect competition. In fact, many economists doubt the utility of this model as a meaningful tool for describing ideal competition.<sup>14</sup> It fallaciously assumes that consumer tastes remain constant over time and that all market participants act rationally with price and profit as their sole motivation. Finally, the model assumes that each firm produces only a single product in a long-run, static, equilibrium market. This means that price and income levels, demand, and the structure of the market cannot change for years at a time.

Just as the one theoretical extreme of perfect competition has no real-life equivalent, neither does the other extreme of theoretical monopoly. Yet Professor Fox, in her article, improperly uses "monopoly" and "monopoly power" interchangeably. The former is an economic concept based on another theoretical model,<sup>15</sup> while the latter term, "monopoly power," is a legal concept which has a much different meaning. Every departure from perfect competition permits the deviating firm some power.<sup>16</sup> But it is not necessarily monopoly power in a legal sense. The Sherman Act is concerned only with monopoly power that allows a firm to control prices or exclude competition.<sup>17</sup>

The law also distinguishes between whether the firm has acquired or maintained such power innocently or through predatory behavior.<sup>18</sup> Existing interpretations of the Sherman Act condemn only the predatory acquisition or maintenance of monopoly power. However, some members of the President's Commission, through the no-conduct standard, would condemn the innocent with the predator. They seem to rationalize this change

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<sup>12</sup> Stern & Grabner, *Competition: Its Meaning and Measurement*, in *MANAGERIAL ANALYSIS IN MARKETING* 91-92 (F. Sturdevant ed. 1970) [hereinafter cited as Stern & Grabner].

<sup>13</sup> See *id.* at 76-78, 91.

<sup>14</sup> See, e.g., Backman, *supra* note 2, at 17-18; Stern & Grabner, *supra* note 12, at 77; Wilson, *Restrictive Practices*, in *COMPETITION, CARTELS AND THEIR REGULATION* 119 (J. Miller ed. 1962). See also D. DEWEY, *THE THEORY OF IMPERFECT COMPETITION* (1969).

<sup>15</sup> As a practical matter, there are probably no monopolies comparable to the economist's model. The government may grant a "monopoly" to a utility, but not without regulating the prices it charges. In addition, a patent holder may have a "monopoly," but its duration is finite, and the patentee is limited in the ways it may use its "monopoly." Notwithstanding government involvement, the "monopoly" held by a railroad is circumscribed by the availability of substitute modes of transportation.

<sup>16</sup> Schmalensee, *On the Use of Economic Models in Antitrust: The ReaLemon Case*, 127 U. PA. L. REV. 994, 1005 (1979) [hereinafter cited as Schmalensee].

<sup>17</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (quoting *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956)). However, even this Sherman Act standard may be overly broad. Schmalensee points out the difference between short-term and long-term monopoly power, noting that the presence of the former need not result in excess profits. Schmalensee, *supra* note 16, at 1007 n.51.

<sup>18</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

on the basis that persistent monopoly power is so pervasive that the current antitrust standard cannot deal with the problem.<sup>19</sup>

The validity of the assertion that persistent monopoly power is a major economic problem depends on the definition of "persistent monopoly" and a review of the data based thereon—important tasks which both Fox and the Commission have neglected. Moreover, it is not clear to me or some members of the Commission that such a problem actually exists.

In his separate statement, Commissioner Hatch stated that substantiation as to the existence and extent of the problem is conspicuously absent:

We have not been supplied with even a "guess" about where [the current law] has failed. In the absence of any factual support and because of their logical inconsistencies, unanswered questions, and clear potential for public harm, the "principles" set forth by the majority should not be accepted by the courts or by the Congress.<sup>20</sup>

One of these unanswered questions concerns proof that the Federal Trade Commission Act and the other antitrust laws have failed to control the perceived problem.<sup>21</sup> In light of the fact that such laws were designed to cure deficiencies in the Sherman Act, such a showing is a logical and reasonable prerequisite for those demanding wholesale Sherman Act change.

Areeda and Turner, to whom the advocates of such change look for support, demonstrate a belief that some monopolies deserve to persist,<sup>22</sup> where a competitor gains so-called monopoly power simply by doing the best job of serving the consumer. This conclusion is consistent with the fact that consumer welfare, not condemnation of monopoly power per se, is the focus of the Sherman Act.<sup>23</sup> The "whole concept of efficient resource allocation is built upon the fundamental belief that the consumer is sovereign,"<sup>24</sup> and while competition is preferred generally for this reason, restraints of trade and monopolistic conduct are antisocial only when they have harmed consumers, not when they add to their welfare.

Currently, by requiring the government or private plaintiff to show that the defendant possesses monopoly power and has deliberately acted with

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<sup>19</sup> COMMISSION REPORT, *supra* note 5, at 151-54, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 45-47.

<sup>20</sup> *Id.* at 365, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 104 (separate statement of Commissioner Hatch with Commissioner Wiggins concurring).

<sup>21</sup> The role of the FTC Act is particularly important in view of the Supreme Court's determination that the Act's application is not fettered by the letter or the spirit of the antitrust laws. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972). *See FTC v. Brown Shoe Co.*, 384 U.S. 316, 321-22 (1966).

<sup>22</sup> 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 614-624 (1978) [hereinafter cited as AREEDA & TURNER].

<sup>23</sup> *See* R. BORK, THE ANTITRUST PARADOX 20, 50-71 (1978).

<sup>24</sup> SCHERER, *supra* note 11, at 19.

<sup>25</sup> *See United States v. Grinnell Corp.*, 384 U.S. at 563, 571 (1966). At least one commentator argues that this focus is misplaced. Schmalensee, *supra* note 16, at 1011-16.

the general intent to acquire or maintain it, section 2 of the Sherman Act contains both a structural and a behavioral component. Monopoly power typically turns on the structural variable of market share,<sup>25</sup> while the "willfulness" requirement looks to conduct in that market. This historical emphasis is a sound one, as examination of conduct as well as structure results in a more realistic picture of the marketplace and how consumers are being served.

As justification for moving away from a behavioral standard, the Commission dwells on a belief that such proof "unduly" protracts section 2 litigation and "reduce[s] the effectiveness of structural relief."<sup>26</sup> The latter complaint is a derivative of the first. According to Commissioner Fox: "At the end of this whole process [extended litigation] the judge and the teams of lawyers are so exhausted that, if liability is found, relief becomes a tag-on issue likely to be addressed as a question of appropriate punishment rather than as a central task to restore competition."<sup>27</sup>

This statement seems to suggest that the bench and bar, rather than the laws, fall short. I seriously doubt the accuracy of that indictment, but even if judges and lawyers are not up to their jobs, it seems to me a preposterous basis for altering a century of substantive precedent. In any event, abandoning the conduct requirement may produce only an insignificant saving of litigation time. Based on my own experience in antitrust litigation, evidence of conduct will remain in great demand during pretrial discovery, whether or not a no-conduct liability standard is adopted.<sup>28</sup>

Commissioner Fox relies on the *ipse dixit* that the costs of monopoly make it "almost always in the public interest to dissipate substantial, persistent monopoly power."<sup>29</sup> She states that monopoly is thought by most economists to distort resource allocation and lessen consumer welfare.<sup>30</sup> The fact is that assumption of superiority in allocation of resources under pure competition is subjective, and economies of scale may yield costs and prices lower under monopoly than under competition. The only distinction necessarily implied by the pure theory of competition and its monopoly counterpart is the fact that the monopolist's price exceeds the cost of producing the last unit of output, while the competitor's equals it.

Professor Fox sweeps aside concern about consumer welfare loss with a cavalier brush, stating: "I am not concerned about the claim of a possible

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<sup>25</sup> COMMISSION REPORT, *supra* note 5, at 151-52, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 45.

<sup>27</sup> *Id.* at 340, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 97 (separate statement of Commissioner Fox).

<sup>28</sup> As the Commission's Report notes: "Such evidence would most likely be relevant to a definition of markets, a finding of monopoly power in those markets and a determination of whether or not efficiencies of scale exist in the operation of the defendant." *Id.* at 153, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 45.

<sup>29</sup> *Id.* at 341-42, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 97 (separate statement of Commissioner Fox).

<sup>30</sup> Fox, *supra* note 1, at 57. Again, she is confusing monopoly with monopoly power. See text accompanying notes 15-17 *supra*.

loss of efficiencies. . . . Moreover, the forces of competition, when restored, are likely to bring about efficiency gains."<sup>31</sup> This logic seems circular. If she would include within the reach of the proposed standard those monopolies based on economies of scale or individual scarce resources, what kind of remedy would she offer? Areeda and Turner, upon whom she relies heavily, see these as irremediable monopolies and, absent predatory behavior, properly exempt from antitrust coverage.<sup>32</sup> If she would exempt these monopolies but include others founded on superior skills alone, it is highly debatable whether it will even be in the public interest to dissipate their power.

The firm whose "monopoly" position is the result of superior performance alone should be a source of pride, not a target. It is the best kind of winner that economic competition can produce. As long as such a firm avoids restrictive practices and serves the consumer well—i.e., offering customers a good price-quality balance—it will remain dominant. If a competitor can improve on this balance, the monopolist's position will erode. If not, the competitor's offering is not truly competitive, and the monopolist will prevail. In other words, the monopolist's price will be the competitive price so long as restrictive practices are not involved, and its product or service remains the best available. This price, or limit price, will reflect the probability of entry to maintain the proper balance.<sup>33</sup> This is not monopoly power in the antitrust sense.

Bork properly observed that the best way to safeguard consumer welfare is to encourage such entrepreneurial effectiveness, not discourage it.<sup>34</sup> Areeda and Turner concluded that even though the innocent monopolist may have some discretion in setting price,<sup>35</sup> that firm which has achieved its position through superior skill deserves the protection of a behavior standard.<sup>36</sup> Moreover, the existence of dynamic markets means that self-

<sup>31</sup> COMMISSION REPORT, *supra* note 5, at 344, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 98 (separate statement of Commissioner Fox).

<sup>32</sup> 3 AREEDA & TURNER, *supra* note 22, at ¶ 623(a)(4).

<sup>33</sup> For a similar discussion, see *id.* at ¶ 622(e).

<sup>34</sup> COMMISSION REPORT, *supra* note 5, at 172 n.41, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 46 n.41 (citing *Prepared Statement of Prof. Robert H. Bork to the Commission* 3 (Sept. 13, 1978)) [hereinafter cited as *Bork Statement*].

<sup>35</sup> 3 AREEDA & TURNER, *supra* note 22, at ¶ 614.

<sup>36</sup> *Id.* at ¶ 624(d). Areeda and Turner concluded:

Were we concerned solely with equitable relief against persistent monopolies not attributable to scale economies, indivisible resources, or legal license, bad behavior would be irrelevant, and a rule of presumptive illegality appropriate. But presumptive illegality is plainly inappropriate for criminal sanctions or treble damages; blind luck may merit no reward, but neither does it deserve penalties. And even where only equitable relief is sought, presumptive illegality would give inadequate protection to superior skill. Fortuitous factors must be treated in the defendant's favor. One who innocently obtains monopoly will usually have been more skillful than those he competed against, and we cannot ask for more than a plausible claim to that effect. Once such a claim is made, presumptive illegality would have to be modified to impose on the plaintiffs the burden of persuasion that

correcting forces may make market power transient in nature so that monopoly profits may or may not be earned by the perceived monopolist. As Scherer has noted: "[W]hile firms with market power *may* earn monopoly profits, they need not, especially under the plausible conditions of monopolistic competition."<sup>37</sup>

Taking all this into account, I am left with the impression that the proposed no-conduct standard can realistically be applied only to those monopolists which have "substantial and persistent" monopoly power without superior skill, economies of scale, individual scarce resources, or lawfully-obtained and exploited patents.<sup>38</sup> Such reasoning brings me back to my earlier skepticism as to whether this type of monopoly power is really a widespread economic problem requiring a drastic break from precedent. I agree with Professor Bork that inevitable and innocent monopolization is probably more prevalent,<sup>39</sup> and where it is otherwise, the existing Sherman Act standards are up to the task. Assuming the prevalence of innocent monopoly, the question is whether an arbitrary no-conduct standard is the appropriate device to mask the shortcomings which may exist in current trial techniques.

Clearly, in the current wave of protracted economic litigation, there is a tremendous need for some innovative, socially-desirable improvements. These improvements will not be achieved by legislating more layers of new laws or by ramming more cases through the system regardless of due process considerations. On the substantive side, antitrust prosecutors and academicians must test more rigorously and understand economic concepts before urging them as a basis for multi-million dollar lawsuits.<sup>40</sup> Procedurally, counsel for plaintiffs and defendants must move these cases more aggressively through the litigation process.

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unacceptable behavior made a significant contribution to the monopoly.

So modified, the presumptive illegality approach would approximate the traditional behavioral requirement, but the traditional approach on balance seems preferable even though only equitable relief is sought. *First*, requiring the plaintiff to plead and prove that the monopoly is based on unacceptable behavior would promote a more rational and economical use of enforcement resources. It would (1) deter baseless suits; (2) prolong few, if any, because it would be a rare if not non-existent case in which the defendant could make no plausible claim of inevitability or superior skill; (3) shorten the trial of cases where clear proof of bad behavior eliminates the superior skill issue. *Second*, requiring proof of bad behavior reduces somewhat the danger that the prospect of antimonopoly litigation would reduce the incentives for achieving scale economies or superior skill.

*Id.* (footnote omitted).

<sup>37</sup> SCHERER, *supra* note 11, at 15.

<sup>38</sup> Federal Trade Commissioner Robert Pitofsky conceded that there would probably be only "one or two" prosecutions per decade raising the no-conduct standard under these circumstances. Speech by Robert Pitofsky, Columbia Law School Alumni Assn., summarized in Daily Rep. for Executives (BNA) A-13 (No. 64, April 2, 1979).

<sup>39</sup> COMMISSION REPORT, *supra* note 5, at 173 n.44, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 46 n.44 (citing Bork Statement, *supra* note 34, at 5-7).

<sup>40</sup> See generally Schmalensee, note 16 *supra*.



Another needed reform is a professional commitment that attorneys will stay with these cases once filed. Otherwise, perpetual motion has arrived, especially on the government side. New generations of staff will appear on the scene as their predecessors become discouraged or obtain better-paying jobs with businesses fearful of similar litigation.<sup>41</sup> Each new staff may introduce a different pet legal concept to make its mark and argue for time to flesh it out.

Even if one believes that monopoly power is a problem, there are other good reasons to doubt the wisdom of a no-conduct standard. First, it is highly debatable whether officials could properly identify those instances of persistent monopoly power requiring government intervention. In his separate statement, Commissioner Paul Rand Dixon asserted the propriety of regulation or remedial action where a single firm "for whatever reasons, is able to and does charge above-competitive prices for an indefinite length of time."<sup>42</sup> However, he also added: "Unfortunately, . . . it is not clear to me that we as yet have the knowledge to enable us to identify with the precision necessary for a law of the sort proposed here, those single firms that are in the position I have described."<sup>43</sup>

Second, a no-conduct standard may prove inequitable and socially counterproductive. Commissioner Dixon noted:

A law that permits corporations to be dismembered by the government in the absence of abnormal conduct on their part should, at a minimum, give clear notice to affected parties as to what circumstances will trigger its application (so as to permit a corporation to avoid, legitimately, the consequences of the law by procompetitive readjustment), while at the same time separating out for coverage (with substantial, if not absolute, precision), only those situations in which harm is occurring and in which lower prices or improved performance will result from the drastic relief allowed. If these conditions cannot be satisfied, the law is likely to be perceived, at best, as capricious and unfair in extreme measure.<sup>44</sup>

Third, a no-conduct monopolization standard would have the effect of creating perverse disincentives for firms approaching whatever levels of size, market position, or profitability are finally determined to constitute a demonstration of "monopoly power."<sup>45</sup> For instance, a firm approaching the thresholds inherent in the no-conduct standard would have little incentive to compete aggressively. Some may feel that no harm is really

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<sup>41</sup> The gist of my point is illustrated by the fact that the seven employees designated by the FTC as 1979 winners of Distinguished Service Awards (the highest honorary award given) have all left the agency. FTC: Watch, Oct 19, 1979, at 40.

<sup>42</sup> COMMISSION REPORT, *supra* note 5, at 410, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 116 (separate statement of Commissioner Dixon).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 410, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 116-17.

<sup>45</sup> See 3 AREEDA & TURNER, *supra* note 22, at ¶¶ 614, 622.

done since the firm is noncompetitive even when it is near the threshold. The problem remains that such a firm may have achieved its status through superior skill and aggressive competitive behavior rather than through predatory conduct and, therefore, be competitive.

Honestly competitive behavior will better serve the consumer than government intervention, particularly given the existence of self-corrective market forces that will erode and eventually destroy monopoly power where the innocent monopolist is not effectively serving its customers. It is, of course, possible that an honest monopolist will begin to use predatory behavior to preserve its position. Current antitrust standards, however, are wholly adequate to handle this eventuality.

It is a very difficult task to identify the monopolist which has the type of monopoly power that might lend itself to attack under a no-conduct standard. So difficult, in fact, that the Commission could never agree on a definition for persistent monopoly power nor on the basic wisdom of such a standard. Instead, the Commission passed the entire quandary to Congress.<sup>46</sup> In other words, as a result of a bit of Potomac gymnastics, the body of antitrust and legislative expertise assembled by the President in the form of NCRALP has found some of the questions too difficult. Instead of admitting this, the Commission has virtually forced Congress to spend its time hearing the same debate that NCRALP has already witnessed.

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<sup>46</sup> The Commission recommended that a congressional inquiry be called based on the following principles:

- (a) The chief goal of the Sherman Act monopolization provision is the dissipation of persistent monopoly power;
- (b) persistent monopoly power can be presumed to be maintained through deliberate conduct that would violate traditional Sherman Section 2 standards;
- (c) the current litigation process under Sherman Section 2 does not effectively remedy persistent monopoly power, in part because the need to prove culpable conduct leads to much evidence not relevant to the proof of monopoly power or the nature of effective relief and creates strong incentives for the government to focus its resources on the liability stage of a monopolization proceeding rather than relief;
- (d) the adoption of a standard enabling the government to obtain structural relief on a showing of persistent monopoly power without the need to prove culpable conduct would rationalize monopolization litigation in accordance with the preceding principles, but would also raise the following issues, which should be examined by Congress before any specific statutory change is enacted:
  - (1) the definition of monopoly power to be applied in using the standard;
  - (2) the type and scope of defenses to be permitted and the stage of the litigation at which they should be permitted;
  - (3) whether efficiency considerations should be permitted to affect the availability of structural relief where anticompetitive conduct has created or maintained the monopoly; and
  - (4) the advisability of adopting a conduct-free liability standard in view of possible disincentives to business growth or public perceptions of unfairness.

COMMISSION REPORT, *supra* note 5, at 141-42, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 40.

If the experts can't agree, why should laymen in Congress dare to act—especially when there is reason to believe their actions will do more harm than good.