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on Law and the Economy, chaired by John J. McCloy. That committee proposed the elimination of major areas of regulatory authority, in favor of "free enterprise" — all made feasible by "more effective" enforcement of the antitrust laws.

A prescription for divestiture

The commission report proposes to rewrite the antitrust law to make it "more effective." Its most important recommendations would amend the Sherman Antitrust Act to establish proofs of monopoly or conspiracy to restrain trade that are purely structural: What is the corporation's percentage of market share? Are there similarities in pricing? Nowhere would it have to be shown that the corporations involved were either likely to succeed in their efforts to monopolize trade or actually engaged in predatory business behavior. This, in itself, is a prescription for divestiture of many major corporations, and will have a significant impact on corporate decision-making concerning growth and the development of new technologies.

Consider Section 2 of the Sherman Antitrust Act of 1890: "Any person who shall monopolize, or attempt to monopolize ... any part of trade or commerce ..." may be fined or imprisoned for violating the antitrust laws. The courts have always ruled that an antitrust case has to be proven. How? By showing that the corporation intended to create a monopoly and had a "dangerous probability of success" in doing so. The commission has made recommendations that would abolish such standards of proof and substitute structural determinations of the nature of that particular economic sector for proof of actual intent to monopolize.

"Persistent monopoly power can be *presumed* (emphasis added) to be maintained through deliberate conduct that would violate traditional Sherman Act Section 2 standards," says Recommendation 2 (b). The commission's rationale here is that any proof of predatory pricing or other "bad business conduct" simply "illuminates" the monopoly power of a corporation. By implication, a "monopoly" is simply a function of the market share of any particular corporation, whether or not that corporation does anything to discourage other corporations from competing with them for the same market. A number of large corporations, whose growth has been based upon technological innovation, like IBM, Xerox, and Kodak, have already been subjected to antitrust actions by both the federal government and private individuals because of the large market share their innovations have obtained.

One well-connected corporate attorney pointed out that these recommendations, if implemented, would act as a restraint on corporate growth and the rate of technological innovation. If corporations fear to cross some ill-defined "magic line" by expanding their marketing or financing research and development to create a new product line, they will necessarily hold back on growth and aggressive competition for fear of drawing antitrust action down upon them. Aggressive competition was never placed in the same category as anticompetitive business conduct by the Sherman Act. Multinational corporations which tend to expand their foreign markets based upon research, development, and marketing in the United States, will be particularly hampered in their efforts to compete with aggressive, foreign trading consortia.

Disincentive to growth

The second major structural recommendation of the commission has equally dire consequences for American industry. The commission suggests that prosecutions for attempts to monopolize, under Section 2 of the Sherman Act, should not have to depend, as they do now, upon showing that the attempt has a "dangerous probability of success." The only requirement should be for the government to show that the corporation had

Kennedy's Illinois Brick bill

With the National Commission's proposals out, Senator Kennedy has now introduced his long-promised *Illinois Brick* bill, named after the famous case that set the precedent preventing consumers other than those buying directly from a company in violation of antitrust laws to collect damages. Kennedy's bill would permit the purchasers of every loaf of bread, for example, to sue and collect treble damages from a flour mill that had supplied bakeries with flour at an inflated price because of antitrust violations.

This is a Ralph Nader dream of a bill with 22 cosponsors in the Senate. Any company that loses an antitrust action faces bankruptcy at the hands of angry consumers.

Another example: if IBM loses the 10-year long antitrust suit which the Justice Department is prosecuting against it, then IBM, under Kennedy's bill, would be liable to pay treble damages to potentially every individual who received services from a bank relying on IBM equipment.

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