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Thomas M. Kerr

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A Quest for Some Certainty: Guideline (1968) and Task Force (1969) Approaches to Merger Law

*Thomas M. Kerr**

BACKGROUND

In the United States, there was not effective law respecting corporate acquisitions and mergers until the Celler-Kefauver Act amendments to Section 7 of the Clayton Act in 1950. Before 1950, the "assets loophole" in Section 7 of Clayton as passed in 1914 permitted corporate managers to acquire other firms at will simply by acquiring assets rather than stock. Congress closed the loophole and sought to have an effective merger law by the 1950 amendment.

The following discussion of the legislative history of Section 7, as amended in 1950, is taken from the majority opinion in *Brown Shoe Co. v. United States*,[1]

> In the course of the hearings conducted in both the Eightieth and Eighty-first Congresses, a more far-reaching examination of the purposes and provisions of §7 was undertaken. A review of the legislative history of these amendments provides no unmistakably clear indication of the precise standards the Congress wished the Federal Trade Commission and the courts to apply in judging the legality of particular mergers. However, sufficient expressions of a consistent point of view may be found in the hearings, committee reports of both the House and Senate and in floor debate to provide those charged with enforcing the Act with a usable frame of reference within which to evaluate any given merger.
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> The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy. Apprehension in this regard was bolstered by the publication in 1948 of the Federal Trade Commission's study on corporate mergers. Statistics from this and other current studies were cited as evidence of the danger to the American economy in unchecked

* Adjunct Professor of Law, Duquesne University School of Law; Lecturer in Industrial Administration and Law, Graduate School of Industrial Administration, Carnegie-Mellon University. A former Business Economist and then a Trial Attorney with the Antitrust Division, United States Department of Justice, he is a member of the Committee on Practice and Procedure, American Bar Association Section on Antitrust Law. A.B., 1940, Lafayette College; J.D., 1950, The George Washington University Law School.

1. 370 U.S. 294, 312-18 (1962).

> corporate expansions through mergers.[2] Other considerations cited in support of the bill were the desirability of retaining "local control" over industry and the protection of small businesses. Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose.
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> What were some of the factors, relevant to a judgment as to the validity of a given merger, specifically discussed by Congress in redrafting §7?
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> First, there is no doubt that Congress did wish to 'plug the loophole' and to include within the coverage of the Act the acquisition of assets no less than the acquisition of stock.
>
> Second, by the deletion of the 'acquiring-acquired' language in the original text, it hoped to make plain that §7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country.[3]
>
> Third, it is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum.

Most important to the inquiry and discussion in this article. Mr. Chief Justice Warren's discussion in his *Brown Shoe* majority opinion went on to consider the economic tests that seemed to be indicated by Congress when it amended Section 7 in 1950: The decision continued:

> [W]hile providing no definitive quantitative or qualitative tests[4]

2. The House Report on the amendments summarized its view of the situation: "That the current merger movement [during the years 1940-1947] has had a significant effect on the economy is clearly revealed by the fact that the asset value of the companies which have disappeared through mergers amounts to 5.2 billion dollars, or no less than 5.5 per cent of the total assets of all manufacturing corporations—a significant segment of the economy to be swallowed up in such a short period of time." H.R. REP. No. 1191, 81st Cong., 1st Sess. 3.

3. That § 7 was intended to apply to all mergers—horizontal, vertical or conglomerate —was specifically reiterated by the House Report on the final bill. H.R. REP. No. 1191, 81st Cong., 1st Sess. 11.

4. The House Report on H.R. 2734 stated that two tests of illegality were included in the proposed Act: whether the merger substantially lessened competition or tended to create a monopoly. It stated that such effects could be perceived through findings, for example, that a whole or material part of the competitive activity of an enterprise, which had been a substantial factor in competition, had been eliminated; that the relative size of the acquiring corporation had increased to such a point that its advantage over competitors threatened to be "decisive"; that an "undue" number of competing enterprises

by which enforcement agencies could gauge the effects of a given merger to determine whether it may 'substantially' lessen competition or tend toward monopoly, Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry. That is, whether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account.

. . . Congress used the words '*may be* substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties.[5] Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anti-competitive effect were to be proscribed by this Act. . . .[6]

There are two fundamentals basic to this discussion:

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had been eliminated; or that buyers and sellers in the relevant market had established relationships depriving their rivals of a fair opportunity to compete. H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8. Each of these standards, couched in general language, reflects a conscious avoidance of exclusively mathematical tests even though the case of Standard Oil Co. of California v. United States, 337 U.S. 293, said to have created a "quantitative substantiality" test for suits arising under § 3 of the Clayton Act, was decided while Congress was considering H.R. 2734. Some discussion of the applicability of this test to § 7 cases ensued, see, *e.g.*, S. Hearings on H.R. 2734, at 31-32, 169-172; S. Rep. No. 1775, 81st Cong., 2d Sess. 21; 96 Cong. Rec. 16643, but this aspect of the *Standard Oil* decision was neither specifically endorsed nor impugned by the bill's supporters. However, the House Judiciary Committee's Report, issued two months after *Standard Oil* had been decided, remarked that the tests of illegality under the new Act were intended to be "similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act." H.R. REP. No. 1191, 81st Cong., 1st Sess. 8.

5. In the course of both the Committee hearings and floor debate, attention was occasionally focused on the issue of whether "possible," "probable" or "certain" anti-competitive effects of a proposed merger would have to be proven to establish a violation of the Act. Language was quoted from prior decisions of the Court in antitrust cases in which each of these interpretations of the word "may" was suggested as appropriate. The final Senate Report on the question was explicit on the point: "The use of these words ["may be"] means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed [sic] effect. . . . The words 'may be' have been in section 7 of the Clayton Act since 1914. The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints." S. REP. No. 1775, 81st Cong., 2d Sess. 6.

6. 370 U.S. 294, 320-23.

1. Whether there are benefits to the economy and society to use legal sanctions to encourage corporations to expand by internal growth rather than by external acquisition; and
2. Whether a modern economy is capable of making such a decision, given the present state of available empirical data and economic evidence.

DEVELOPMENT OF CASE LAW, 1950-1967

Congress having made new and seemingly effective law in 1950 and having made its intent quite clear, as is indicated in the *Brown Shoe* excerpts above, it remained to the Federal Trade Commission and the courts in particular cases to determine the meaning of a statute so broad as to say that no corporation shall make an acquisition where, ". . .the effect of such acquistion may be substantially to lessen competition or to tend to create a monopoly. . . ." In this determination perhaps the key words Congress delivered to the courts and the Commission were "may be".

Although slow in coming at the beginning, the cases came down In 1962 the court in *Brown Shoe* spoke clearly and decisively respecting both horizontal mergers (mergers between direct competitors) and vertical mergers (those between firms which are in a direct line from raw materials to sales). Brown was the fourth largest shoe manufacturer in the country producing about four per cent of the nation's total footwear product. The top four manufacturers produced approximately 23 per cent of the nation's shoes. Kinney, which Brown acquired, was a retail shoe store chain, making about 1.2 per cent of all national retail shoe sales by dollar volume. Before and at the time of the acquisition there had been a "definite trend" among shoe manufacturers to acquire retail outlets. Brown Shoe had participated actively in this industry trend. The Supreme Court's decision noted the effect of the acquisition on competition:

> At the time of the merger, Kinney bought no shoes from Brown; however, in line with Brown's conceded reasons for acquiring Kinney, Brown had, by 1957, become the largest outside supplier of Kinney's shoes, supplying 7.9 per cent of all Kinney's needs.[7]

The Supreme Court had noted a similar effect flowing from a vertical acquisition in 1957 when deciding the appeal of a case brought

7. *Id.* at 303-04.

under Section 7 of the Clayton Act, before the 1950 amendment. In *United States v. E. I. DuPont de Nemours & Company* (General Motors)[8], Mr. Justice Brennan's majority opinion observed:

> . . . .that DuPont purposely employed its stock [a 23% stock interest in General Motors Corporation] to pry open the General Motors market to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics.[9]

Thus the effect of vertical acquisitions upon competition was clear: the opportunities of competing suppliers or outlets were excluded by the common interest between the acquiring and the acquired firms. Quantitative factors (see the Brown and Kinney percentages) considered were relatively small.

The developing cases began to give quantitative indicia to managers and counsel advising corporations. *Brown Shoe* indicated that an acquisition by Brown, manufacturing four per cent of the nation's shoes, of Kinney, manufacturing 0.5 per cent, and by Brown possessing 7.2 per cent of shoe stores of Kinney having 1.2 per cent of national retail shoe sales, was considered beyond the pale. The Supreme Court said:

> The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market. In an industry as fragmented as shoe retailing, the control of substantial shares of the trade in a city may have important effects on competition. If a merger achieving 5 per cent control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved. Furthermore, in this fragmented industry, even if the combination controls but a small share of a particular market, the fact that this share is held by a large national chain can adversely affect competition. Testimony in the record from numerous independent retailers, based on their actual experience in the market, demonstrates that a strong, national chain of stores can insulate selected outlets from the vagaries of competition in particular locations and that the large chains can set and alter styles in footwear to an extent that renders the independents unable to maintain competitive inventories. A third significant aspect of this merger is that it creates a large national

8. 353 U.S. 586 (1957).
9. *Id.* at 606.

chain which is integrated with a manufacturing operation. The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.[10]

In 1964, the Supreme Court handed down another horizontal acquisition decision. *United States v. Aluminum Company of America* (Rome Cable),[11] Aluminum Company of America had acquired the stock and assets of Rome Cable Corporation. Alcoa, the leading producer of aluminum conductor, controlled 27.8 per cent of the market. Rome had, in the words of the majority decision, "only 1.3" per cent of the aluminum conductor market. The court noted an oligopolistic market in which Alcoa was the leader, since Alcoa and its competitor, Kaiser, controlled 50 per cent, and Alcoa and its three leading competitors controlling more than 76 per cent of the aluminum conductor market. The court said:

The acquisition of Rome added, it is said, only 1.3 per cent to Alcoa's control of the aluminum conductor market. But in this setting that seems to us reasonably likely to produce a substantial lessening of competition within the meaning of §7. It is the basic premise of that law that competition will be most vital "when there are many sellers, none of which has any significant market share." . . . . It would seem that the situation in the aluminum industry may be oligopolistic. As that condition develops, the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge. That tendency may well be thwarted by the presence of small but significant competitors. Though percentagewise Rome may have seemed small in the year prior to the merger, it ranked ninth among all companies and fourth among independents in the aluminum conductor market; and in

10. 370 U.S. 294, 342-44 (1962).
11. 377 U.S. 271 (1964).

> the insulated aluminum field it ranked eight and fourth respectively. Furthermore, in the aluminum conductor market, no more than a dozen companies could account for as much as 1 per cent of industry production in any one of the five years (1955-1959) for which statistics appear in the record. Rome's competition was therefore substantial.[12]

Then in 1966, seemingly in order to make things crystal clear, the Supreme Court examined the 1960 horizontal merger between two retail grocery chains in Los Angeles. The retail sales of Von's Grocery Co. ranked third in the area and Shopping Bag's ranked sixth. Von's sought to merge with Shopping Bag, and in 1960 their combined sales amounted to 7.5 per cent of the retail groceries sold in the Los Angeles market.The merger created the second largest grocery chain in Los Angeles with sales of about $170 million annually. The Supreme Court found the Von's-Shopping Bag merger violative of Section 7 in *U.S. v. Von's Grocery Co.*[13]

These and other horizontal and vertical cases developing in the years after the 1950 amendment made it clear that the United States Supreme Court was carefully reading the intention of Congress and the vast broadness of its words, prohibiting any acquisition whose ". . .effect. . .may be substantially to lessen competition."

It became clear to managers and their counsel that horizontal and vertical mergers were dangerous business. Accordingly these kinds of merger activities declined. Horizontal and vertical mergers represented 48 per cent of all mergers from 1952 to 1959; 39 per cent of all mergers from 1960 to 1963; 22 per cent from 1964 to 1967; and only 9 per cent in 1968.[14] Conversely, conglomerate mergers sharply increased from 38.1 per cent of all mergers in 1948 to 1951; to 91 per cent of all mergers in 1968.[15]

Obviously the conglomerate merger trend is the response of corporate counsel to the warnings given by the courts in the vertical and horizontal cases cited, as well as in other cases. Early in this period the advice of corporate counsel assumed great trepidation. His employer, the manager, often had merger aspirations and it was up to counsel to assay the risks. As the cases developed, it became more and more evident

12. *Id.* at 280-81.
13. 384 U.S. 270 (1966).
14. Address by Attorney General John Mitchell before Georgia Bar Association, June 6, 1969.
15. *Id.*

that risks in the horizontal and vertical area were exceedingly great and counsel must often say "No" and be confident that he had given the best advice.

There were dire pitfalls, however. The tale is reliably repeated about the general counsel of a medium size manufacturing organization who during this period advised his managers that they could not make a horizontal acquisition of a small competitor. Also immediately thereafter the largest, and much larger, competitor of our counsel-hero's manufacturer obtained a release from the government to permit them to acquire the small firm, by advocating the failing company doctrine. *International Shoe v. Federal Trade Commission;*[16] *Citizen Publishing Company v. United States.*[17] The story ends that counsel-hero went to seek other employment.

With significant vertical and horizontal acquisitions clearly prohibitive, the conglomerate remained. As has been seen, conglomerate activity burgeoned. As might have been predicted, alarm grew. In January, 1969, a "Cabinet Committee on Price Stability" released a report stating that 200 firms hold 58.7 per cent of the nation's manufacturing assets, and that only 100 firms hold 47.6 per cent of such assets.[18] Referring to ". . .special financial and speculative considerations. . ." rather than technological imperatives of efficiency as explaining this degree of concentration, the report went on to call for vigorous antitrust enforcement. The legal technician must ask the following question: How does the conglomerate act so that, ". . .the effect of such acquisition may be substantially to lessen competition. . ."? The Cabinet Committee on Price Stability asserted that conglomerates, ". . .weaken competition by removing significant competitors, raising entry barriers, and increasing business reciprocity opportunties. . ."

Among its recommendations, this Committee suggested that conglomerate firms submit financial reports division by division. The Committee felt that the Clayton Act needed to be strengthened and was inadequate to cope with the "conglomerate problem." The first six months of 1969 were replete with similar reports from many different sources.

About the same time the AFL-CIO took a position on the matter.

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16. 280 U.S. 291 (1930).
17. 394 U.S. 131 (1969).
18. 394 BNA ANTITRUST AND TRADE REGULATIONS REPORT A-2, June 28, 1969.

In the February, 1969 issue of *The American Federationist*, its official monthly magazine, an article reviewed some of the reasons for the Federation's current concern with business conglomerates. Noting that the concern is not with large conglomerate corporations merely because they are large, the author, Ray MacDonald, examined the effects. His immediate questions concern plant close down, collective bargaining and impact on the local community. Beyond this, he asked what does the concentration of economic power do to the political system and economic system, in terms of prices, competition, efficiency, and investiveness?[19]

The article also touched on the accounting aspect of conglomerate takeovers and remarked about the lack of divisional reporting by the huge corporations. MacDonald noted that while the lack of divisional reporting unquestionably affects the ability of security analysts to evaluate conglomerates, it "also muddles the waters of collective bargaining."[20] He added: "Evaluation of a firm's financial position ranks high in priority on the collective bargaining checklist. As firms conglomerate—and there is no reporting on the operations of the separate and varied divisions—'ability to pay' becomes tangled in arguments over the operations of each division, with relevant facts usually withheld from stockholders, workers, and public."[21]

MacDonald suggested that the Securities and Exchange Commission "should require corporations to report in detail on the operations of their different divisions, in addition to the present requirement of general financial reporting on the operations of the corporation as a whole."[22]

In closing, MacDonald offered this view:

> The details that may become available through the FTC study and congressional investigations should indicate much more clearly than is now known the impact and problems of the conglomerate mergers and the trend toward increasingly concentrated economic power. This information should lead to a careful review of government policy tailored to the needs of the health and vigor of the national economy and a democratic society.[23]

Counsel had been perplexed before with respect to vertical and hor-

19. MacDonald, *A Conglomerate: Corporate Octopus*, THE AMERICAN FEDERATIONIST, February, 1969.
20. *Id.* at 22.
21. *Id.* at 22.
22. *Id.* at 23.
23. *Id.* at 23.

izontal mergers pending the development of cases. Now the managers, deprived of their opportunity for vertical and horizontal activity, were clamoring for advice from their counsel so that they could make conglomerate acquisitions. Here once again counsel had little to guide him. It was clear that if the acquisition resulted in reciprocal business arrangements that it was likely to fall. *Federal Trade Commission v. Consolidated Foods Corp.*,[24] *United States v. General Dynamics Corp.*[25] It was also likely that if a conglomerate was of the "product extension" variety, enabling an already established firm untoward opportunities for distribution and marketing of the acquired firm's products, that the acquisition might be seriously attacked. *Federal Trade Commission v. Procter & Gamble Co.*[26] "Deep pocket" aspects too were dangerous. *Reynolds Metals Co. v. Federal Trade Commission.*[27] Amid this perplexity in 1969, a new administration turned the burner up further. In an address on March 6, 1969, the new Assistant Attorney General in Charge of the Antitrust Division, Richard W. McLaren, said:

> There is one phase of substantive antitrust law on which I have already expressed some views that differ from those of the prior Administration. That is on the question of mergers, and particularly conglomerate mergers. I have expressed serious concern over the severe human and economic dislocations which are resulting from the current tax-propelled merger mania. I do not think we know at this time whether or not the Celler-Kefauver Act will reach so-called 'pure' conglomerate mergers. But I believe we can and should go after some big-company mergers of a somewhat 'purer' conglomerate nature than have been ruled on by the Supreme Court thus far. In my view, many such mergers have a dangerous potential for substantially lessening competition—in a variety of ways—as well as for unduly increasing concentration. You can expect that we at the Antitrust Division will be examining such mergers with the utmost care. And it is only fair to say—as I indicated last week—that we expect to move rather promptly in some such cases.[28]

During the preceding administration, McLaren's predecessor, Donald F. Turner, on behalf of the Department of Justice, had at one

24. 380 U.S. 592 (1965).
25. 258 F. Supp. 36 (S.D.N.Y. 1966).
26. 386 U.S. 568 (1967).
27. 309 F.2d 223 (C.A.D.C. 1962).
28. Some Tentative Views on Antitrust Organization and Policy, Address before the National Industrial Conference Board, New York.

point suggested proposed legislation that would prohibit any company among the largest 50 or 100 to acquire any other company, unless it simultaneously divested itself of other assets of comparable size![29]

By mid-sping, 1969, the new Assistant Attorney General, McLaren, was making repeated appearances similarly opposed to conglomerate activity, and the manager and his counsel considering a conglomerate were clearly playing a game in an undefined arena.

A Call for Guidelines

Some degree of certainty or predictability in application of Section 7 of the Clayton Act has long been the hopeful dream of lawyers advising managers, as well as an essential need of government enforcement agencies. Several years ago, Commissioner Phillip Elman, of the Federal Trade Commission, proposed at a Federal Bar Association briefing conference in Washington, D.C., that the Commission study merger economics in particular industries and prepare rules or guidelines defining the type or size of merger it would proceed against in each industry. Also, when former Assistant Attorney General Donald F. Turner, who had his Ph.D. in economics as well as a law degree, was appointed to his post in mid-1965, he stated that he would soon issue merger guidelines, as well as other types of "guidelines."

Actually the Federal Trade Commission began to issue some very limited guidelines in 1967. These were the first merger guidelines or acquisition guidelines issued by any government agency. As a result of studies in four, and only four, industries—food, manufacturing and distribution, ready-mixed concrete, and textile mill products—the Commission has released statements of enforcement policies for these industries since January, 1967. These will be further discussed below.

Perhaps the most prestigious outcry for guidelines or standards was that of Mr. Justice Harlan concurring in 1967 in the *Procter & Gamble* conglomerate-product extension merger case.[30] He said:

> I. . .believe that it is incumbent upon us to make a careful study of the facts and opinions below in this case, and at least to embark upon *the formulation of standards* for the application of Section 7 to mergers which are neither horizontal nor vertical and which

29. New York Times, Feb. 13, 1968, at 31 col. 1.
30. 386 U.S. 568 (1967).

previously have not been considered in depth by this Court. . . . My prime difficulty with the Court's opinion is that it makes no effort in this direction at all, and leaves the Commission, lawyers, and businessmen at large as to what is to be expected of them in future cases of this kind.[31]

. . . .

At the outset, it seems to me that there is a serious question whether the state of our economic knowledge is sufficiently advanced to enable a sure-footed administrative or judicial determination to be made *a priori* of substantial anticompetitive effect in mergers of this kind. It is clear enough that Congress desired that conglomerate and product-extension mergers be brought under §7 scrutiny, but well-versed economists have argued that such scrutiny can never lead to a valid finding of illegality.[32]

. . . .

Thus, while fully agreeing that mergers of this kind are not to be regarded as something entirely set apart from scrutiny under §7, I am of the view that when this Court does undertake to establish the standards for judging their legality, it should proceed with utmost circumspection. Meanwhile with this case before us, I cannot escape the necessity of venturing my own views as to some of the governing standards.[33]

. . . .

Only by focusing on market structure can we begin to formulate standards which will allow the responsible agencies to give proper consideration to such mergers and *allow businessmen to plan their actions with a fair degree of certainty*.[34]

In the lengthy concurring opinion Mr. Justice Harlan attempted to promulgate some such guides or standards. He summarized:

[F]our important guides to the adjudication of conglomerate or product-extension mergers under §7 seem to come forward. First, the decision can rest on analysis of market structure without resort to evidence of post-merger anticompetitive behavior. Second, the operation of the premerger market must be understood as the foundation of successful analysis. The responsible agency may presume that the market operates in accord with generally accepted principles of economic theory, but the pre-

31. *Id.* at 583.
32. *Id.* at 587.
33. *Id.* at 589.
34. (Emphasis added). *Id.* at 592.

> sumption must be open to the challenge of alternative operational formulations. Third, if it is reasonably probable that there will be a change in market structure which will allow the exercise of substantially greater market power, then a prima facie case has been made out under §7. Fourth, where the case against the merger rests on the probability of increased market power, the merging companies may attempt to prove there are countervailing economies reasonably probable which should be weighed against the adverse effects.[35]

In this 1967 opinion Mr. Justice Harlan undertakes an evident struggle with the problem of creating some standards for conglomerate mergers. It may be said that he did more in this opinion to create some effort toward guidelines than the Department of Justice and the FTC put together up to that time. Also, his opinion obviously goaded them into issuing the standards they later produced.

With respect to Mr. Justice Harlan's "four important guides," he noted first that if the admission of post-merger evidence is permitted the acquiring company can dissimulate market power during the period of the observation between acquisition and hearing or trial. It would be unrealistic, he noted, to assume that market power would be used adversely during an investigation pending a proceeding.

Next, Mr. Justice Harlan discussed two separate structural considerations: The degree of concentration in the existing market and the "condition of entry."

The pre-merger market in *Procter & Gamble* had been asserted to be one of high concentration with a large market share enjoyed by the leading firms. But the contrary view had noted the presence in the market of 200 small competitors, (Clorox had 48.8 per cent of the national market; Purex had 15.7 per cent, and was second largest. There were 200 or more small, local, regional competitors). Harlan pointed out that ". . . domination is an elusive term, for dominance in terms of percentage of sales is not the equivalent of dominance in terms of control over price or other aspects of market behavior."[36] "The determinative issue is," he added, "how the sellers transact and establish the pattern of market behavior. The significance of concentration analysis is that it allows measurement of one easily determined variable to serve as an opening key to the pattern of

35. *Id.* at 598-99.
36. *Id.* at 594.

market behavior."[37] Mr. Justice Harlan concluded that where oligopolistic behavior is charged and is offered in evidence as a matter of structure or as a pattern of behavior, he would allow the defendent to introduce evidence designed to show that the actual operation of the market did not accord with oligopolistic theory or whatever other theory the proponents of the case desired to apply. But most important, *Mr. Justice Harlan would want the defendant to be able tc offer proof of "efficiencies."*[38]

The courts have not always felt or held that Congress was necessarily seeking only "efficiencies" under the monopoly or merger laws. The words of Learned Hand in *Alcoa* are recalled. "[Congress] . . . was not necessarily activated by economic motives alone. It is possible because of its indirect social or moral effect to prefer a system of small producers each dependent for his success upon his own skill and character, to one for which the great mass of those engaged must accept the direction of a few."[39] Or, from the majority opinion in *Proctor & Gamble*: "Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."[40]

It will be remembered that in *Brown Shoe*, Mr. Chief Justice Warren's decision said, ". . . we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."[41]

This Jeffersonianism is a thread woven through many monopoly and merger decisions. Thus, in *Bethlehem-Youngstown*, District Judge Weinfeld says, ". . . demonstrable benefits are irrelevant and afford no defense."[42]

Mr. Justice Harlan makes some sensible cry for consideration of economies. He urges that economies achieved by one firm may stimulate matching innovations by others. Where this is present, competition has obviously not been lessened. Also the advantages of com-

37. *Id.*
38. *Id.* at 597.
39. United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945).
40. 386 U.S. 568, 580 (1967). The court here also referring to *Brown Shoe.*
41. 370 U.S. 294, 344 (1962).
42. 168 F. Supp. 576, 617 (S.D.N.Y. 1958).

petition have not been lost, but instead, are present. He asks, citing Turner, that the record in any particular case be open to receive such indications.[43] Thus he gave his fourth "guide," that the merging companies may attempt to prove that there are countervailing economies reasonably probable which should be weighed against the adverse effects, if any, of the merger.

Of course, it is a very fundamental question whether Mr. Justice Harlan's call for economic standards of the kinds which have been cited are at all relevant in the face of the Jeffersonian pronouncements which seem to overlook, or at least subordinate, mere economic considerations.

"GUIDELINES"

Of the two government agencies directly concerned, the Federal Trade Commission was the first to attempt to publish guidelines or standards to assist managers and their counsel toward some certainty in these perplexities. The Federal Trade Commission publications began on January 3, 1967, with successive publications thereafter.[44] In addition, the Federal Trade Commission attempted to be of help and assistance by making public, on February 13, 1968, digests of 26 pre-merger advisory opinions which had been made for particular industrial inquirers by the Commission. These were, ". . . released pursuant to a recent Commission decision to publish significant and pertinent pre-merger clearance actions. . . ."[45]

The FTC releases each refer to a particular narrowly defined industry. Each refers to a particular problem which has been before the Commission. Given this narrow compass for each effort, the Commission is able to offer precise determinations. For instance, in the cement and ready-mixed concrete manufacturers policy statement, the Commission states that as a matter of its enforcement policy it will

43. 386 U.S. 568, 598 (1967).

44. They were:

"Enforcement policy with respect to vertical mergers in the cement industry" (FTC, January 3, 1967), TRADE REG. REP. Vol. 1, Par. 4510.

"Enforcement policy with respect to mergers in the food distribution industries" (FTC, January 3, 1967), TRADE REG. REP., Vol. 1, Par. 4520.

"Enforcement policy with respect to product-extension mergers in grocery products manufacturing" (FTC, May 15, 1968), TRADE REG. REP., Vol. 1, Par. 4530.

"Enforcement policy with respect to mergers in the textile mill products industry," (FTC, November 11, 1968), TRADE REG. REP., Vol. 1, Par. 4540.

All of the above are available from the Secretary, Federal Trade Commission, Washington, D.C. 20580.

45. FTC News Release.

investigate every future acquisition by a cement manufacturer of any substantial ready-mixed concrete firm in any market to which such acquiring cement producer was an actual or potential supplier. The Commission states that in general the acquisition of any ready-mixed concrete firm ranking among the leading four non-integrated ready-mixed producers in any market, or the acquisition of any ready-mixed producer regularly purchasing 50,000 barrels of cement or more annually would be considered a substantial acquisition.

In its release respecting mergers in the food distribution industry, the Commission said it would give specific enforcement consideration to acquisitions by retail food chains which result in a combined annual food store sales of more than $500 million annually. They said that retail food store chain acquisitions which result in combined sales of less than $500 million annually would not be immune from attention, but that they would reserve their "greatest diligence" for those over $500 million. (It will be remembered that in *Von's Grocery*, the sales of the merged firms totaled $170 million annually.)

In its May, 1968, release respecting product-extension mergers in grocery product manufacturing, the Commission said it would give specific merger enforcement consideration to such mergers where the combined company would have assets in excess of $250 million and where the acquiring company engages in extensive promotional efforts and is among the top eight producers of any one important grocery product or accounts for more than five per cent of a relevant market.[46]

The fourth Federal Trade Commission enforcement policy announcement in the merger area was released November 22, 1968, respecting mergers in the textile mill products industry. The Commission stated that the enforcement policy was ". . . issued to provide business organizations with guidance as to the kinds of future mergers in the textile mill products industry most likely to raise questions . . ."[47] under Section 7 of the Clayton Act, as amended by the Celler-Kefauver Act. Here again, the Commission was relating its efforts to a narrow spectrum of industry and was exceedingly precise in its enforcement policy statement.[48]

46. *Cf.* F.T.C. v. Proctor-Gamble-Clorox, 386 U.S. 568 (1967).
47. FTC News Release.
48. It said it would examine prospective and future mergers as follows:
1. Any merger between textile mill product firms where the combined sales or assets of the firms exceeds $300 million and the sales or assets of the smaller firm in the merger exceeds $10 million.
2. Any horizontal merger in a textile mill product submarket where (1) the combined

Of course, it should be made clear in considering either Federal Trade Commission or Department of Justice guidelines that both government offices still maintain their availability to offer approval or disapproval prior to the consummation of any prospective merger or acquisition. Both agencies have indicated that they will continue to provide advisory opinions regarding the legality of particular proposed mergers and that they invite those contemplating mergers to avail themselves of these programs in any situation where they are uncertain as to the legality of a prospective merger.

To implement some of these industry guides, the Commission announced that it would each year send a FTC Act Order (Section 6(b)) which would require each cement producer and every food retailer and wholesaler to give the Commission at least 60 days advance notice of any proposed acquisition covered by the policy statements.

Interesting legal problems could arise out of this unorthodox use of the Commission's authority under Section 6(b) of the FTC Act. It is to be remembered that the Commission and the Justice Department have been asking Congress for many years to pass a law requiring companies to give advance notification of merger plans. Now by this announced procedure, applicable at least to the two industries for which FTC early issued guides, the Commission seems to be asserting that it has the power to require pre-merger notification under its existing statute. They have not included this direction in the two later guides.

But then the Commission went much farther in April, 1969, by issuing a pre-merger notification resolution.[49] This resolution announced that for each merger or acquisition involving firms with

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firms rank among the top 4 or (2) have a combined market share of 5 per cent or more of any submarket in which the four largest firms account for 35 per cent or more of the market.

3. Any vertical merger, either "backward" into the supplying market or "forward" into a purchasing market, where a particular acquisition or series of acquisitions may involve market shares of 10 per cent or more of the relevant market or where the acquisition or series of acquisitions may tend significantly to raise barriers to entry in either market or to disadvantage existing non-integrated or partially integrated firms in either market by denying them fair access to sources of supply or markets.
4. Any acquisition of a textile mill product firm with sales or assets of $100 million or more and ranking among the four largest producers of a textile mill product by a non-textile mill product firm with sales or assets in excess of $250 million and with a substantial market position in another industry. A substantial market position is defined as being one of the top four sellers of a product or service in which the four largest companies account for 40 per cent or more of the market.

News release.

49. Resolution, Federal Trade Commission, Notification of Large Corporate Mergers, April 8, 1969, TRADE REG. REP., Vol. 1, Par. 4455.

assets of $10 million or more and if the total assets of the firms involved exceeded $250 million that the firms must notify the Commission of the transaction and render special reports to the Commission about it within ten days after any agreement or understanding is reached to merge and no less than 60 days prior to the consummation of the merger or acquisition. Also, any acquiring corporation with assets of $250 million or more which obtains ten per cent or more of the voting stock of another corporation with assets of $10 million or more is to file a special report with the Commission within ten days after that event. The resolution also provided that where an acquiring corporation effects a stock acquisition which will result in it holding 50% or more of the voting stock of another corporation with assets of $10 million or more, any such acquiring corporation with assets of $250 million or more shall file a special report with the Commission and notify it.

This time the Commission's Resolution did not refer to any particular clause in its statute, although its Merger Notification Report Form "broadly asserts" "[This Report] is mandatory under the authority of the Federal Trade Commission Act (15 U.S.C. 46)."[50]

It will be interesting to observe whether merging firms comply with this Resolution—issued, again, although Congress has often considered but has not passed a pre-notification statute.[51]

ANTITRUST DIVISION GUIDELINES

In the meantime, on May 30, 1968, the Department of Justice Antitrust Division released its guidelines outlining its standards for determining whether to oppose corporate acquisitions or mergers under Section 7 of the Clayton Act.[52] This important document entails an entirely different approach than that of the Federal Trade Commission in that the Department does not focus on any particular defined industry but

50. *Id.*

51. See, for example, H.R. 2511 (Celler), 90th Congress, and predecessor bills in earlier Congresses. It will be remembered that an apparent attempt by the Department of Justice, Antitrust Division, to seek preacquisition information using a Civil Investigative Demand under 15 U.S.C. § 1312 was not permitted by a U.S. District Court, *In Re Petition of Union Oil Co.*, 225 F. Supp. 486 (S.D. Calif., 1963).

There is a respectable question whether the F.T.C. can find specific legal support in its Act for this notification requirement, or can combat the assertion that the release constitutes rule-making. *See N.L.R.B. v. Wyman Gordon Co.*, U.S. Supreme Court, April 23, 1969, 37 U.S. LAW WEEK 4365.

52. "Merger Guidelines," U.S. Department of Justice, May 30, 1968, TRADE REG. REP., Vol. 1, Par. 4430.

instead attempts general guidelines for any horizontal merger, vertical merger, or conglomerate merger. The policy announced entailed a market structure analysis approach. The department said:

> Within the over-all scheme of the Department's antitrust enforcement activity, the primary role of Section 7 enforcement is to preserve and promote market structures conducive to competition. *Market structure is* the focus of the Department's merger policy chiefly because the conduct of the individual firms in a market tends to be controlled by the structure of that market, *i.e.*, by those market conditions which are fairly permanent or subject only to slow change (such as, principally, the number of substantial firms selling in the market, the relative sizes of their respective market shares, and the substantiality of barriers to the entry of new firms into the market). Thus, for example, a concentrated market structure, where a few firms account for a large share of the sales, tends to discourage vigorous price competition by the firms in the market and to encourage other kinds of conduct, such as use of inefficient methods of production or excessive promotional expenditures, of an economically undesirable nature. Moreover, not only does emphasis on market structure generally produce economic predictions that are fully adequate for the purposes of a statute that requires only a showing that the effect of a merger 'may be substantially to lessen competition, or to tend to create a monopoly,' but an enforcement policy emphasizing a limited number of structural factors also facilitates both enforcement decision-making and business planning which involves anticipation of the Department's enforcement intent. Accordingly, the Department's enforcement activity under Section 7 is directed primarly toward the identification and prevention of those mergers which alter market structure in ways likely now or eventually to encourage or permit noncompetitive conduct.[53]

In its attempt to be helpful in indicating to managers and their counsel what they may or may not assay, the Antitrust Division attempted to be quite precise.[54] The Department of Justice also spells

53. *Id.*

54. Here is an excerpt from the guideline with respect to horizontal acquisitions:
Market Highly Concentrated. In a market in which the shares of the four largest firms amount to approximately 75% or more, the Department will ordinarily challenge mergers between firms accounting for, approximately, the following percentages of the market:

Acquiring Firm	Acquired Firm
4%	4% or more
10%	2% or more
15% or more	1% or more

out what it will do with respect to mergers which affect at least two categories of economic activity as a result of a conglomerate acquisition. One of these is mergers involving potential entrance and the other is mergers creating a danger of reciprocal buying. The Department also has important remarks included with respect to so-called "deep pocket" effects of conglomerate mergers.

The Department of Justice's "Merger Guidelines" are an excellant compilation of existing merger law—and that accomplishment should not be deprecated, but they offer nothing new. They constitute a summation of recent cases brought together as their accumulated result. They provide a convenient "numbers game" of market sale figures. But at least the manager and his legal counsel have some criterion against which to compare their intended acquisition. In some cases they can see that they are sure to be right; and indeed in others they will see that they are sure to risk litigation.

The guidelines offer at least one concept in better form than appears in any of the cases. This would inquire into the concentration ratio existing in the market in determining whether or not an acquisition—in this case horizontal—would be allowed. With respect to this consideration, the Division said:

> *Market With Trend Toward Concentration.* The Department applies an additional, stricter standard in determining whether to challenge mergers occurring in any market, not wholly unconconcentrated, in which there is a significant trend toward increased concentration. Such a trend is considered to be present

(Percentages not shown in the above table should be interpolated proportionately to the percentages that are shown.)

Market Less Highly Concentrated. In a market in which the shares of the four largest firms amount to less than approximately 75 per cent, the Department will ordinarily challenge mergers between firms accounting for, approximately, the following percentages of the market:

Acquiring Firm	Acquired Firm
5%	5% or more
10%	4% or more
15%	3% or more
20%	2% or more
25% or more	1% or more

(Percentages not shown in the above table should be interpolated proportionately to the percentages that are shown).

Merger Guidelines, U.S. Department of Justice, May 30, 1968, TRADE REG. REP. Vol. 1, ¶ 4430.

With respect to this kind of a measurable quantitative approach, the Department similarly made its guidelines precisely clear on vertical acquisitions. (This paper does not attempt to fully review the content of these or the Federal Trade Commission's guidelines. That has already been done elsewhere. See, for instance, *Mergers and Markets: 7*, by Betty Bock, National Industrial Conference Board, 1969).

> when the aggregate market share of any grouping of the largest firms in the market from the two largest to the eight largest has increased by approximately 7 per cent or more of the market over a period of time extending from any base year 5-10 years prior to the merger (excluding any year in which some abnormal fluctuation in market shares occurred) up to the time of the merger. *The Department will ordinarily challenge* any acquisition, by any firm in a grouping of such largest firms showing the requisite increase in market share, of any firm whose market share amounts to approximately 2 per cent or more.[55]

MORE GUIDANCE STILL NEEDED?

But still under the guidelines, as they are used, the issue in every case will be the question of the definition of the relevant market. We may recall from *Brown Shoe* that "Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets . . ."[56] The basic questions then universally remain—what economic criteria are available other than those developed on an *ad hoc* basis, and are there any economic criteria or empirical data available which will assist us in achieving a rational and useful national economic concentration and merger policy?

Mr. Justice Harlan in the *Proctor & Gamble* concurring decision might have given tacit approval to fairly precise structural guidelines. In that decision he seemed to think that the development of cases up to that time had taken us to a point where we did at least have useful guidelines with respect to horizontal and vertical acquisitions. He said that with respect to these two types of acquisition, ". . . the responsible agencies have moved away from an initial emphasis on comprehensive scrutiny and have opted for more precise rules of thumb which provide advantages of administrative convenience and predictability for the business world."[57]

Surely in the present proliferation of conglomerate acquisitions there is need for strenuous research for empirical data respecting the effects of such acquisitions upon the economy and society and the nation.

We are entering a period in which we are building more and more of a novel form of corporate structure far from anything the founders of

55. *Id.* at 6684.
56. 370 U.S. 294, 321 (1962).
57. 386 U.S. 568, 589-90 (1967).

the Republic may have intended a corporation to become and which entails economic consequences not yet analyzed or pondered.

As a concept, the conglomerate merger replaces the managerial revolution which took control away from the owners and invested it in managers, replacing it, in turn, with a system in which control is taken away from managers and invested in financiers. Whether this will produce the kind of economic system the people of the United States want for their country is a question which goes to the heart of the American free enterprise philosophy. If control at one remove from ownership is open to serious question, what is control at two removes?

THE 1969 TASK FORCES

In December, 1967, President Johnson appointed a Task Force on Antitrust Policy to study the antitrust laws and determine how antitrust policy might be strengthened by new legislative or administrative measures. The Task Force reported back to the President on July 5, 1968, but the report was not released until May 21, 1969. The Chairman of this Task Force was Phil C. Neal, Dean of the Law School, The University of Chicago.

Within two weeks yet another "task force" suddenly surfaced. It called itself the Task Force on Productivity and Competition, and it is being called the "Nixon Task Force."[58] The chairman of this Task Force was Professor George J. Stigler.

THE "JOHNSON" TASK FORCE ON ANITITRUST POLICY

This report recommends changes in the antitrust laws dealing with concentrated industries, conglomerate mergers, the Robinson-Patman Act having to do with price and services and facilities discriminations, certain aspects of patent licensing, and the improvement of economic data relevant to antitrust matters.

The Task Force[59] chose to make its recommendations in the form of proposing specific legislation. With respect to Section 7 of the Clayton Act they made the following recommendation:

58. There is little or no real importance in the "Johnson" and "Nixon" presidential labels except that they are being used in discussion by some for identification purposes.
59. This Task Force consisted of: Phil C. Neal, Chairman, William F. Baxter, Robert H. Bork, Carl H. Fulda, William K. Jones, Dennis G. Lyons, Paul W. MacAvoy, James W. McKie, Lee E. Preston, James A. Rahl, George D. Reycraft, Richard E. Sherwood, and S. Paul Posner, Staff Director.

> Passage of a statute which would flatly prohibit any acquisition by a large firm (a firm with $500 million in annual sales or $250 million in assets) of any "leading firm" (a firm with a market share greater than 10 per cent in a market where four or fewer firms have 50 per cent of the market and industry sales exceed $100 million).[60]

This suggestion may well have been at least partially adopted by the Nixon administration in the speech made by Attorney General John N. Mitchell on June 6, 1969, when he said,

> The Department of Justice may well oppose *any* merger among the top 200 manufacturing firms or firms of comparable size in other industries. The Department of Justice will probably oppose *any* merger by one of the top 200 manufacturing firms with any leading producer in any concentrated industry.

In his speech the Attorney General acknowledged that this position may be regarded, ". . . as something of an expansion of the published anti-merger guidelines of the Department, ..."[61]

Most importantly, the Neal Task Force also proposed improvement in the quality and availability of economic and financial data relevant to the formulation of antitrust policy, the enforcement of the antitrust laws, and the operation of competitive markets. Specifically, they recommended the formation of a standing committee of representatives of the Census Bureau and other government agencies which gather or use economic information to consider the following:

> (1) improving the gathering and presentation of economic information within the statutory limits on disclosure of information on individuals; (2) new interpretations of existing laws or, eventually, new legislation to minimize restrictions on disclosure of types of information which are not highly sensitive from the point of view of individual firms but are of great value in the formulation of policy and the application of law; and (3) machinery for developing information on the competitive structure of relevant markets. . . .[62]

THE "NIXON" TASK FORCE ON PRODUCTIVITY AND COMPETITION

This Task Force[63] recommended administration support of a policy of competition employing the Antitrust Division and the reg-

60. White House Task Force Report on Antitrust Policy, submitted July 5, 1968 (reprinted in BNA ANTITRUST & TRADE REG. REP., No. 411, May 27, 1969, Part II at 15) (hereinafter cited as Neal Report).
61. Emphasis added. See note 14 *supra*.
62. Neal Report *supra* note 59.
63. Members of the Task Force on Productivity and Competition were: George J.

ulatory commissions, free entry into regulated industries, and increased emphasis upon economic factors and the advice of economists in implementing antitrust policy. The emphasis of enforcement, in their view, should be upon price-fixing violations and Section 1 Sherman Act situations, accompanied by increased fines for such violations. With respect to oligopoly they said:

> We cannot endorse, on the basis of present knowledge of the effects of oligopoly on competition, proposals whether by new legislation or new interpretations of existing law to deconcentrate highly concentrated industries by dissolving their leading firms. But we urge the Department to maintain unremitting scrutiny of highly oligopolistic industries and to proceed under section 1 of the Sherman Act—which in our judgment reaches all important forms of collusion—in instances where pricing is found after careful investigation to be substantially noncompetitive.[64]

They strongly criticized the Department of Justice Merger Guidelines as ". . . extraordinarily stringent, and in some respects indefensible." And they emphatically recommended against a program of action against conglomerates, ". . . pending a conference to gather information and opinion on the economic effects of the conglomerate phenomenon."[65]

They also recommended review of existing antitrust decrees and a policy of inserting a termination date in decrees, which are now often in effect in perpetuity. They called for repeal of the Expediting Act[66] and the Webb-Pomerene Act,[67] and for substantial revision of Robinson-Patman.

THE TWO REPORTS TOGETHER

Last year, 1969, began with the opening of a new Congress which had few important recommendations for antitrust law revision.[68]

Stigler, Chairman, Ward S. Bowman, Jr., Ronald H. Coase, Roger S. Crampton, Kenneth W. Dam, Raymond H. Mulford, Richard A. Posner, Peter O. Steiner, Alexander O. Stott.

64. Task Force Report on Productivity and Competition (reprinted in BNA ANTITRUST & TRADE REGULATION REP., No. 413, June 10, 1969, at X-1) (hereinafter cited as Stigler Report).

65. *Id.*

66. 15 U.S.C. § 28, 29.

67. 15 U.S.C. § 61-65.

68. It seemed probable that the Expediting Act (which accords a direct appeal from the trial court to the U.S. Supreme Court in civil equity antitrust suits brought by the United States as plaintiff) might be repealed to reduce the case load burden of the Supreme Court. But otherwise most recommended legislation given any chance of serious

These two Task Force reports, issued since the opening of Congress, together constitute the most comprehensive overview of national antitrust policy since the Report of the Attorney General's Committee in 1955.[69] If discussion of these two reports develops they may prove to be as important as the 1955 Report, or as its pre-war predecessor, T.N.E.C.[70] The Neal group's report is far more thorough and its recommendations are more specific. However a far more important conclusion must be that where the two make parallel recommendations, e.g., major surgery upon the Robinson-Patman Act, they are making far weightier proposals for antitrust change than Congress, the business community, or the antitrust bar has been contemplating. There can be no doubt that these recommendations merit, and will receive, considerable examination and study.

The two groups are directly opposed in their recommendations respecting concentration. The Neal group suggests a stunning new proposal, a "Concentrated Industries Act," employing divestiture to reduce concentration in industries where monopoly power is shared by a few large firms, to supplement Section Two of the Sherman Act. On this subject the Stigler group demurs. Stigler reserves his attack for classic hard core restraints, including, of course, price-fixing, but argues lack of data to support new policies opposed to concentration.

The Administration's recent vigorous anti-conglomerate policy[71] is not supported by the Stigler group, but, as previously mentioned, is more in accord with Neal group suggestions. Here again Stigler's Task Force argues that there is lack of sufficient information.

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consideration seemed to be in the consumer-protection area rather than dealing directly with the antitrust laws.

69. Report of the Attorney General's National Committee to Study the Antitrust Laws, U.S. Government Printing Office, March 31, 1955.

70. Hearings and Report of the Temporary National Economic Committee, Washington, D.C.: Government Printing Office, 1939.

(In a larger sense, of course, neither the 1955 Committee Report nor the two current Task Force Reports are comparable to T.N.E.C. Where both the current reports call for additional quality and availability of economic and financial data relevant to the formulation of antitrust policy, T.N.E.C. stood alone in that it sought its data during its extended investigation).

71. Beginning promptly after the inauguration in the Spring of 1969 the new administration has sought to block the take-over of the Jones & Laughlin Steel Corporation by Ling-Tempco-Vought; to stop Northwest Industries, a railroad-based conglomerate, from continuing with its efforts to take over the B. F. Goodrich Company; late in June, 1969, the Justice Department announced that it planned to oppose the projected merger of the International Telephone and Telegraph Corporation with the Hartford Fire Insurance Company, one of the nation's largest casualty insurers; two months before, the Department filed a suit against the same I.T.T.'s acquisition of Canteen Corporation, three days after that deal had been completed. At the same time, the Federal Trade Commission has been trying to block White Consolidated Industries from taking over the Allis-Chalmers Manufacturing Company.

Stigler would have the Department of Justice decline to undertake a program of action against conglomerate mergers and conglomerate enterprises, pending a conference to gather information and opinion on the economic effects of the conglomerate phenomenon.

The Stigler group sharply criticizes the Department of Justice, May 1968, Merger Guidelines, the magnum opus of Donald Turner. Still the recent Guidelines are the first and only secure set of criteria upon which managers and their attorneys may depend for measurement and guidance since the Celler-Kefauver Act was passed in 1950.

In its recommendation concerning conglomerate mergers, the Neal Report further builds upon a foundation provided by the 1968 Merger Guidelines. However, *the groups concur that better economic data and its availability for research are essential.*

The Need for More Adequate Economic Data

In the antitrust area, and certainly in the merger and acquisition area, the law exists only for economic purposes and reasons. It is economics with which we are dealing.

In all of the background described above, the pre-1950 period in which we had no effective merger law; the period after the amendment of 1950 during which we developed such indicia as were offered to managers and counsel by case law; the development of "guidelines"; and now the present advice of Task Forces, there has been a noticeable scarcity of applicable economic factual data relevant to the problem.

Both the Neal and Stigler Task Force Reports, although they have disagreements on other issues, were in accord with respect to this need.

The Neal Report noted:

> In the course of preparing this Report, we have been struck by the need for improved collection, organization and availability of financial and economic data. Such information plays several roles in antitrust law. *First,* it is essential in the formulation of antitrust policy. *Second,* it may be essential in the application of the antitrust laws, in facilitating observance of the law by businessmen and enforcement of the law by the government. *Third,* it may have an effect on the operation of competitive markets and thus have direct antitrust implications.
>
> The formulation of economic policy requires a variety of financial and economic information. Such information may, for example, cast light on the competitive structure of industries, on the

> relation between prices and costs, on industry performance, on merger activity and plant construction, and on numerous other facts of obvious relevance in the formulation of economic and antitrust policy.[72]

It also recommended:

> *We recommend that steps be taken to improve the quality and availability of economic and financial data relevant to the formulation of antitrust policy, the enforcement of the antitrust laws, and the operation of competitive markets.*
>
> Specifically, we recommend formation of a standing committee of representatives of the Census Bureau and other Government agencies which gather or use economic information to consider (1) improving the gathering and presentation of economic information within the statutory limits on disclosure of information on individual firms; (2) new interpretations of existing law, or, eventually, new legislation to minimize restrictions on disclosure of types of information which are not highly sensitive from the point of view of individual firms but are of great value in the formulation of policy and the application of law; and (3) machinery for developing information on the competitive structure of relevant economic markets, because such markets do not necessarily coincide with Census industry and product classifications. These recommendations could be implemented immediately, without new legislation or appropriations.
>
> In addition, the role of financial information in the operation of competitive markets should be reflected in the formulation of financial reporting requirements by the Securities and Exchange Commission. These requirements are now imposed pursuant to the Securities Exchange Act of 1934, which is oriented to investor protection. We recommend that the Act be amended to recognize the role of financial information in the operation of a competitive economy, and to require that the SEC consult with antitrust enforcement agencies in formulating reporting requirements.
>
> Pending adoption of this recommendation, the antitrust enforcement agencies should be requested to consider submitting recommendations to the SEC in connection with the current divisional reporting inquiry.[73]

And, as we have already seen respecting the Stigler report, it urged the government to decline to continue its vigorous program against conglomerates until there had been a conference ". . . to gather informa-

72. Neal Report *supra* note 60 at 11.
73. Neal Report *supra* note 60 at 4.

tion and opinion on the economic effects of the conglomerate phenomenon."

Discussing *"The Utilization of Economic Knowledge,"* they recommended:

> We anticipate little opposition to the proposition that the Antitrust Division make full and effective use of economists and their special skills. These skills are often necessary to understand the effects of economic practices (an example is market-sharing in fixed proportions), to assess the economic importance of individual cases, and to assist in devising remedies that will not shatter on economic realities. We endorse the policy of having a highly professional economist serving as adviser to the head of the Division, and a strong permanent staff of economists.
>
> The problem is not the goal of an economically sophisticated antitrust policy, but its implementation. A division charged with the enforcement of a statute must of course be directed and largely staffed by lawyers. Unless there are substantial incentives to the staff to utilize economics—whether by central direction, or vastly more powerfully, by demonstrated assistance in winning cases—the non-lawyer will often be viewed by the lawyers as a mysteriously necessary obstacle to smooth operations. The Assistant Attorney General will have succeeded in making a truly major contribution to antitrust policy if he establishes the relevance of economic knowledge.[74]

Again, it is evident that we have been proceeding without data as particular as both of these groups and many others would desire. Indeed, it would seem that we have been proceeding in this important field involving enormous resources guided only by an instinctive Jeffersonianism. A constant reiteration of this Jeffersonianism by the courts has already been noted. This writer is not disinclined to trust an instinct for the Jeffersonian-Brandeisian-Learned Hand preference for many producers of modest size. "It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few."[75] When Learned Hand said this he directly distinguished it from economic measurement, saying, ". . . [Congress] was not necessarily actuated by economic motives alone."[76] But if there is other data than such instinct

74. Stigler Report *supra* note 64 at X-2.
75. 148 F.2d 416 at 427.
76. *Id.*

available, and I am sure the economists would now inform us that there is at least more available than ever before, it would seem that it should at least be consulted and possibly used in making these decisions.

There have not been any important economic investigations in the area since T.N.E.C., and perhaps the 1948 Federal Trade Commission investigation which preceded the 1950 amendment to Section 7 of the Clayton Act. The 1955 inquiry into the antitrust laws by the Attorney General's Committee was largely a legal affair. The 1969 Task Force Reports of the Neal and Stigler groups were not based upon new economic inquiry, they merely concurred in calling for such new economic investigation. It may be hoped, it may hereby be respectfully recommended, that the two 1969 Task Force Reports will spur knowledgeable persons in the economic-legal community to obtain better data to support the economic decisions we have been making.

If economic data to support present policy or to recommend changes in present policy or to recommend changes in present policy is brought forward, of course, it will have to be constantly noted that such data may well vary from industry to industry and from market to market. This may be the most sensitive critical point in the Department of Justice's valiant attempt to furnish us "merger guidelines." Four per cent of an economic market for motor trucks may be quantitatively quite different than four per cent of a horizontal market for toys. Here, the Neal report calls for some compromise with what is practicable. They suggest that we must limit the economic issues within boundaries defined by the availability and manageability of economic information.

Certainly the policies of government should be designed to obtain the objectives of the economy, including efficiency in production of goods and services with a minimum expenditure of the economy's resources, and opportunity for growth for those enterprises which perform relatively more efficiently, an opportunity for growth for those enterprises which show ability to innovate in production methods and in products, and finally insurance that the fruits of these efficiencies and innovations are passed on to the benefit of the society in general.

But presently we are allowing such decisions to be made sometimes for other, more narrow, effects. One may form a conglomerate to smooth out peaks and valleys in that particular conglomerate enterprise, or to invest idle cash, or to obtain effective power and publicity, or because of a possible, perhaps temporary, effect upon stock market price, or for tax considerations which may or may not be related to economic advantages or disadvantages to the society as a whole, or to obtain certain wanted real estate sites or certain wanted personnel or technical know-how or patents. It has not been unusual in recent conglomeration history for a merger to occur in order to forestall some other unwanted take-over—that is, unwanted by the managers of one of the enterprises for any of their own particular reasons including some of those just given. These motives are inappropriate to the objectives of the economy just stated. Our decisions here should not be based on these considerations.

On the other hand, the conglomerate is not "all bad." It may well produce some effects which may be substantially *to improve* competition. The conglomerate acquirer may be the only free person in the economy having enough capital to overcome entry barriers in an industry. The entering conglomerate acquirer may furnish management techniques not previously practiced in the industry which will provide more vigorous competition than the unaffiliated acquired firm formerly furnished. A conglomerate may well not be a monopolist or oligopolist in all or many or even a few of the industries and markets in which he participates. He may be relatively small in each of his markets but still furnish some of the advantages of composite strength.

So it comes down to who is making the decisions and what data is he using to help him make those decisions. We have chosen a system in which the large number of decisions are made by free individuals in the marketplace. The Stigler Task Force says, "The American Way, as we are constantly told, is to rely upon competitive private enterprise to do most of the work of allocating resources to industries and firms, organizing production, and providing economic progress." In his Georgia Bar Association address, Attorney General Mitchell noted, "We only oppose about 20 out of every 1,000 mergers because the vast majority are not anticompetitive." But where the effect is thought to be anticompetitive, our government acts. We have seen that the Congress has authorized broad discretion here in the language it chose for Section 7 of the Clayton Act as amended. We have seen that we presently have vigorous administrative enforcement. It is the conclusion of this paper that this is acceptable policy, but with the admonition, beneficially derived from the work of both of the recent Task Forces, that there be increased use of already available, more recently sophisticated, economic data in carrying out this policy.