Reform of the antitrust laws

Kennedy sponsors 'legal' onslaught against U.S. industry

In January, the President's Commission for the Review of Antitrust Law and Procedures issued its report and recommendations for reform of the antitrust law. Legislation to implement the commission's procedural proposals was immediately introduced by Sen. Howard Metzenbaum (D-Ohio). Hearings are now being held in the Senate.

The report itself has left corporate attorneys and anyone else who has assessed its implications reeling. The commission went far beyond any mere procedural review of the difficulties of antitrust litigation and enforcement. Major changes were proposed in the very nature of the antitrust law as it was enacted in the Sherman Act of 1890.

If the recommendations become law, there would be a vast and radical reorganization of the American economy — a result largely predicated on Louis Brandeis's 60-year-old vision of the world as a collection of small villages, "freely interacting." The American industrial capacity would be decentralized, the ability of major coporations to generate and concentrate capital for investment would be vastly limited, forcing their reliance upon an increasingly centralized banking system — the British model. In fact, current trends in banking would indicate that such a centralized credit system *would be* dominated by British and Canadian banking institutions.

Needless to say, such a result would, for all intents and purposes, return the United States to its pre-1776 status as a British colony — a result supported only by a handful of radical environmentalists and the City of London. But various stages in the step-by-step process embodied by the commission report have far broader support. As Senator Edward Kennedy, Chairman of the Senate Judiciary Committee presiding over the implementation of the commission recommendations, announced at the August convention of the American Bar Association, he has welded together a coalition of liberals and conservatives, based on a commitment to "free enterprise," to back the recommendations of the committee. The Senator's staff told the *Executive Intelligence Review* last June that "divestiture is a growing trend."

The most solid evidence of the strength of this peculiar Kennedy "coalition" was an August report of the prestigious American Bar Association Committee

Who joined Kennedy on the National Commission

Almost 10 years in the making, the National Commission was established by President Carter six months ago without any input from Senator Kennedy's antitrust subcommittee. But Kennedy wasted no time to meet with Carter and muscle his way onto the commission. He helped to stack the deck with structural antitrust reformers:

- Senator Howard Metzenbaum, who, with Kennedy, is on the Senate Judiciary Committee.
- Senator Jacob Javits of the Joint Economic Committee.
- Rep. Peter Rodino of the House Judiciary Committee.
- Rep. Barbara Jordan also of the House Judiciary Committee.
- G. Michael Pertschuk, a Federal Trade Commissioner and a former close associate of Ralph Nader's Raiders.
- Maxwell Blecher, a Los Angeles attorney.
- Warren Sullivan, a University of California at Berkeley law professor.
- Eleanor Fox, a New York University law professor.
- John Shenefield, the Assistant Attorney General in the Antitrust Division of the Justice Department.

"Even if they had considered the other side of the question," one attorney has commented, "they wouldn't have had the votes on the commission to put it through."

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.

"significantly threatened competition." This effectively eliminates most of the traditional defenses to antitrust action and lowers the threshold for violations.

The purpose of this recommendation: restraining the growth of larger firms in favor of smaller ones, decentralization of industry. The commission is very specific in this regard. They suggest that Congress examine the reforms "in view of possible disincentives to business growth or public perceptions of unfairness." The courts "should not accept any form of relief that is inadequate to restore competition even though adequate relief may have adverse tax or other financial consequences for the divesting firm or third parties." The third party here is the American public, which will be paying inflated prices for obsolescent technologies and productive capacities.

The commission then proposes to end government's role in the development of the infrastructure that is vital both to industrial production in the United States and to exports. Antitrust immunities of the trucking industry and railroads should be eliminated and those industries be substantially deregulated, goes the proposal. The same is recommended for ocean shipping, if defense and diplomatic considerations make that feasible.

The American transportation grid, despite certain problems, is probably the best in the world. From at least 1919 on, it was developed as a joint government-private industry venture to permit the levels of investment and extent of services necessary for a growing industrial economy. This joint venture, the commission proposes, should be abolished and the industry thrown open to "free competition" — route cutting, price wars, and an end to capital investment as innumerable small companies attempt to establish a niche for themselves.

The deregulation policy coheres with the overall objectives of the commission's recommendations to decentralize the American economy. In their minds, this is a desirable *social* policy to be enacted by manipulation of the antitrust laws.

Hoping for nothing too drastic

Public scrutiny has been assiduously avoided in every step of the commission's operation. The commission was established with a six-months duration, extraordinarily short for the complex issues to be considered. Senator Kennedy's staff has explained to the *Executive Intelligence Review* that this is no problem because "the most effective way to get results would be to hammer out the guidelines before the commission began its work." These "guidelines" included a number of procedural recommendations, subsequently adopted by the commission, a proposal to review all regulated industries exempt from antitrust prosecution and eliminate those exemptions, and to facilitate divestiture. The work was well-prepared far in advance, the commission was stacked with trustbusting advocates and, by the time the recommendations were issued, legislation was already drawn up to begin implementing the recommendations.

An *Executive Intelligence Review* survey of House and Senate Judiciary Committee members, conducted six months ago, indicates that none of them, besides Senator Kennedy, has the least understanding of what is underway. Senator Paul Laxalt's office commented last June: "As far as we are concerned the commission will begin and end with no reforms proposed."

Corporate attorneys were playing the same game of biding their time and hoping that nothing too drastic will result, making a compromise here or there on procedure, airline deregulation and so forth. But the cards are on the table. Senator Kennedy and his allies have announced their platform: U.S. industry is to be divested and shrunk to tiny, decentralized entities, organizationally and financially incapable of making the necessary technological advances.

—Felice Gelman

The Metzenbaum bill

Senator Howard Metzenbaum (D-Ohio) has introduced legislation to amend the Antitrust Civil Process Bill in a first step toward implementing the National Commission's proposals. The bill deals entirely with the commission's procedural recommendations, all of which place great pressure on attorneys, judges, and corporations to avoid or settle antitrust litigation, while providing private trustbusters with a major incentive to sue.

The bill would:

- provide the government with access to discovery material on the record in separate private cases for use in prosecuting an antitrust action against a corporation;
- permit any judgement won by the government in an antitrust action to be introduced as *prima facie* evidence in a private antitrust action;
- increase sanctions against corporate attorneys who delay the prosecution of an antitrust case;
- permit a plaintiff who has won a private antitrust suit to collect interest on the amount of the judgement from the time the complaint was filed in court, thus increasing the pressure on corporations to settle fast, rather than fight litigation.