ANTITRUST AND THE 99TH CONGRESS

After considering a broad array of proposed reforms of the U.S. antitrust laws, the 99th Congress adjourned on October 25 without passing any major legislation in the area. In one sense, the Congress was disappointing for those favoring antitrust reform. However, it may have been more successful for reformers than at first appeared. Although no major reforms were enacted, the formal proposal by the Reagan Administration of a set of reform measures was itself a major step, and established a foundation for further debate in the coming years. Moreover, advocates of more restrictive antitrust rules failed to achieve any measurable success. Despite congressional grumblings about the Administration's "lax" antitrust enforcement, no legislation to turn back the clock on antitrust policy progressed significantly.

Due to the impending Democratic takeover of the Senate, prospects for antitrust reform promise to be more difficult during the 100th Congress. The Senate Judiciary Committee, to be chaired by Senator Joseph Biden (D-Del.), would seem to offer a much more hostile environment for reform advocates. Voice, Senator Howard Metzenbaum (D-Ohio), a vociferous opponent of antitrust reform, is expected to chair a newly-constituted antitrust subcommittee.

Still, many remain optimistic. The continuing trade deficit will be a major issue during the new Congress, forcing it to look at ways to increase U.S. productivity — including antitrust reform. Surprisingly, Biden has spoken favorably of reform in this area, indicating it may indeed be on the agenda. (See "Quotable", p. 9).

Antitrust legislation considered by the 99th Congress included:

The Administration Proposals. These proposals were no doubt the major legislative development in antitrust during the 99th Congress. Throughout 1985, the question of whether to propose reform, and which reforms to advance, was a hotly debated topic within the Administration. Commerce Secretary Baldrige focused attention on the issue in March of 1985, when he proposed that Section 7 of the Clayton Act be abolished entirely. (He later modified his stance to advocate a relaxation of the Clayton Act). The Antitrust Division, under the leadership of Paul McGrath and Doug Ginsburg, preferred an assault on antitrust penalties. Last December, President Reagan approved a package of antitrust measures which embodied both approaches.
The major proposals in this package included modification of Section 7 of the Clayton Act, abolition of treble damages for non-price-fixing offenses, payment of defendant's attorney's fees by plaintiffs in frivolous antitrust suits, amendment of trade laws to allow the President to temporarily except particular industries from the antitrust laws as a remedy in "Section 201" cases, and a liberalisation of the Clayton Act restriction on interlocking directorates.

Except for S. 1300 (described below), no Administration-backed reform was reported out of committee. Nevertheless, Administration spokesmen remain hopeful, pointing out that the Senate held valuable and extensive hearings on the proposals. With the exception of the Section 201 proposal, each measure will be reintroduced next year.

Joint and Several Liability Reform. A bill to limit joint and several liability in antitrust suits, S. 1300, was approved by the Senate Judiciary Committee on May 8, on a 16-2 vote. Only Senators Kennedy and Metzenbaum opposed the measure. The legislation would have reduced the amount of damages which could be assessed in price-fixing cases by the share attributable to companies who settled out-of-court or who were not parties in the case. The bill was actively supported by a wide range of business organisations, as well as by the Administration, despite the latter's opposition to an earlier version of the legislation. Although the measure was not brought to a vote on the Senate floor, it will be reintroduced next year.

Railroad Antimonopoly Act. A bill to expand the antitrust laws to require railroads to allow competing railroads to use their track was adopted by the House Judiciary Committee last March, but it was effectively killed three months later when it was unfavorably reported by the House Energy and Commerce Committee (which has jurisdiction in rail regulation issues). Although supporters of rail reorganization now appear to be concentrating on more direct forms of regulation, this bill may yet be revived.

Foreign Trade Antitrust. S. 397, which would limit the application of U.S. antitrust laws in certain situations involving foreign trade, was reported by the Senate Judiciary Committee on September 18. The bill would have empowered federal judges to dismiss an antitrust action if they found it unreasonable in light of the significance of the violation compared to the same conduct abroad, its effects on the U.S., and other factors. The bill was not voted upon by the full Senate, but supporters intend to propose the measure again next year.

Physician Peer Review. Last November 24, President Reagan signed into law an omnibus health bill which included a provision protecting hospitals and physicians engaged in peer review from private antitrust damage suits. Many inside and outside the Administration urged Reagan to veto the legislation because it also set up a federally-funded no-fault compensation system for injuries caused by vaccines.

Beer Distributorships. Legislation which would have granted malt beverage manufacturers the right to grant exclusive territories to their distributors was withdrawn from the Senate floor in the closing days of Congress. The legislation, sponsored by Senator Dennis DeConcini (D-Ariz.), was approved by the Senate Judiciary Committee last March. On August 12, the Senate Appropriations Committee attached the bill as an amendment to the fiscal 1987 Treasury Department appropriations bill, thus bringing it to the
Senate floor. However, when opponents threatened to filibuster the measure, it was withdrawn on the condition that the bill be brought up for consideration in early 1987.

Illinois Brick. On June 5, the Senate Judiciary Committee rejected, 7–9, a bill which would have allowed states to bring price-fixing suits on behalf of consumers. This legislation would have partially overturned Illinois Brick v. Illinois, a 1977 Supreme Court decision holding that only direct purchasers of goods can recover damages for antitrust violations.

RECENT ANTITRUST RULINGS

No Absolute Rule Denying Competitors’ Standing

On December 9, the Supreme Court raised the threshold for competitors seeking to enjoin proposed mergers, but it declined to rule out their standing to challenge acquisitions on the basis of “necessarily speculative claims of post-acquisition predatory pricing.” In Cargill, Inc. v. Honsort of Colorado, Inc., a 6–2 majority overturned an injunction against the merger of the second-largest and third-largest firms in the beef-packing industry. Justice William Brennan’s majority opinion ruled that Honsort (the fifth-largest firm) had failed to show it faced a real anticompetitive threat “of the type the antitrust laws were designed to prevent.” Honsort’s allegations of a post-merger “price-cost squeeze” that would narrow its profit margins and constitute damage due to more vigorous competition, and was not forbidden by the antitrust laws. At the same time, the court stopped short of adopting the Justice Department’s basic argument that competitors should be denied standing to challenge mergers on predatory pricing grounds.

Physicians’ Peer Pressure

On September 30, the Ninth Circuit held in Patrick v. Burget that the state action doctrine shielded an Oregon peer review process from Sherman Act scrutiny. The court overturned a $1.9 million treble damage award for injuries suffered by an Oregon physician as a result of a peer review process which recommended suspension of his hospital staff privileges. The court ruled that the alleged bad faith of the defendants was irrelevant because (1) Oregon mandated peer review by statute, thereby giving an affirmatively expressed policy to replace pure competition with some regulation by competitors, and (2) the process was supervised actively by the state, through the Board of Medical Examiners and the Oregon courts.

Just three weeks before, on September 9, a federal district court in Pennsylvania has found that the state action doctrine did not apply to a hospital’s refusal to reappoint a physician to its medical staff and allow him an associate on the staff. Fopner v. Lebanon Hospital concluded that Pennsylvania’s Peer Review Protection Act did not clearly intend to permit “anticompetitive” activity (denial of medical staff privileges on other than professional or ethical grounds) as a necessary consequence of hospital regulation.

The budding legal controversy over private antitrust challenges to medical peer review, however, appears to have been neutralized by recent passage of the Omnibus Health Act (see “Antitrust And The 99th Congress”, above).
More Airlines' Urges To Merge

The Department of Transportation (D.O.T.) gave final clearance to three more airline merger proposals. On October 1, D.O.T. granted final approval to Texas Air's takeover of Eastern Airlines. The department cited Pan Am's ability to operate a competitive hourly shuttle service in the Northeast, after having purchased additional airport landing slots in New York and Washington from Texas Air. (See Washington Antitrust Report, No. 1, regarding D.O.T.'s reversal of earlier decision to reject the takeover).

On October 24, D.O.T. gave quick final approval to the acquisition by Texas Air of People Express and the assets of People's subsidiary, Frontier Airlines. The department speeded up its decision because of People Express' "extremely precarious financial condition." D.O.T. agreed with the Justice Department's view that the merger would not lessen competition substantially in the Newark and Denver markets, and concluded that People's current national market share "probably overstates its future competitive significance, and hence the likely effect of this transaction on concentration in the national market."

A third proposed acquisition, Delta Air Lines' takeover of Western Airlines, received final approval by D.O.T. on December 11. The department noted that Delta and Western compete in only a few markets, that each carrier has "at most only a minor presence" in hubs operated by the other, and that there was no evidence of barriers preventing other carriers from entering these markets.

Two other proposed acquisitions are awaiting D.O.T. approval. On November 17, American Airlines agreed to acquire AirCal. On December 8, USAir announced its plan to acquire Pacific Southwest Airlines.

RECENT WORKS

*Peter Boettke, Antitrust and International Trade, Citizens for a Sound Economy Issue Alert No. 12, December 17, 1986. Boettke, a doctoral candidate at George Mason University's Center for the Study of Market Processes, summarizes the Reagan Administration's proposed antitrust reforms, arguing that they are a step in the right direction. Available from Citizens for a Sound Economy, 122 "C" St., N.W., Washington, D.C. 20001, (202) 638-1401.

*Timothy Brennan, Understanding "Raising Rivals' Hosts," Economic Analysis Group Discussion Paper 84-16, U.S. Department of Justice, Antitrust Division, September 26, 1986. Professor Brennan argues that, as a relatively new theory of non-price predation, "Raising Rivals' Hosts (RRC) will add little that is not already subsumed in current antitrust theories, while increasing litigation, deterring otherwise efficient vertical contracts, and misdirecting analyses of potentially anticompetitive practices. He worries that RRC may be used to dress the erroneous doctrines of "foreclosure" and "exclusion" in the uniform of microeconomic theory. Available from Economic Analysis Group, Antitrust Division, U.S. Department of Justice, Judiciary Center Building, Room 11453, 555 4th St., N.W., Washington, D.C. 20001, (202) 724-6653.

Thomas W. Hazlett, "Is Antitrust Anticompetitive?," *Harvard Journal of Law and Public Policy* 277 (Spring 1986) & Yale Brown, "The Antitrust Tradition: Entrepreneurial Restraint", *Harvard Journal of Law and Public Policy* 239 (Spring 1986). In his article, Dr. Hazlett, an assistant professor of economics at the University of California, Berkeley, chronicles the rise and decline of the market concentration doctrine, from its beginnings in the 1930s, through the work of Demsetz rebuiting the theory, to its apparent rejection (among economists) today. Hazlett also comments on a range of allegedly restrictive business practices and particular court cases. He concludes that the antitrust laws "operate to the detriment of competition and the consumer," and that "perhaps the most effective proconsumer program would be to consider federal enforcement of the antitrust laws to be a per se restraint of trade."

In his comment on Hazlett's article in the same issue, Dr. Brown, professor of business economics at the University of Chicago, argues that antitrust has "itself become a restraint on trade." He also shows that although American industry was not becoming more concentrated during the last 50 years, the myth of increasing concentration led to a harmful strengthening of the antitrust laws and policies over the last generation. Brown concludes by advocating elimination of private enforcement of antitrust laws.


D. Bruce Johnson, *The Madison Oil Case: A Study of Cardiac Behavior*, unpublished, June 4, 1986. In this paper, Professor Johnson outlines his forthcoming dissertation on the landmark price-fixing case U.S. v. Socorro-Pampa, in which numerous Midwestern oil companies were found guilty of fixing prices in the Midwest during the depression. Available from D. Bruce Johnson, Texas A&M University, College of Business Administration, College Station, Texas 77843, (409) 845-4851.

Mark Leddy, "Recent Merger Cases Reflect Revolution in Antitrust Policy," *Legal Times*, November 3, 1986. In this article in Washington's weekly newspaper for the legal profession, Leddy, a former deputy assistant attorney general in the Reagan Administration, provides a thoughtful and balanced summary of the changes in federal merger policy over the years.

Fred S. McChesney, "Law's Honour Lost: The Plight of Antitrust," *The Antitrust Bulletin* 359, (Summer 1985). Professor McChesney, an Oil Fellow in Law and Economics at the University of Chicago Law School, terms the system of antitrust law and enforcement a vestigial organ, "increasingly seen as either irrelevant or, worse, deleterious to competition." He
singles out three continuing deficiencies of traditional antitrust analysis: 
(1) viewing the world in structural terms, (2) dogged adherence to par se 
rules, and (3) courts' inability to distinguish procompetitive from 
anticompetitive contracts. McChesney concludes that antitrust is a system 
manipulable by some producers and their politicians to the detriment of 
competing producers.

*Sheldon L. Richman, "Beer and the Antitrust Laws", unpublished. Richman, 
director of public affairs at George Mason University's Institute for Humane 
Studies, argues in favor of legislation permitting exclusive territories for 
beer distributors. Available from Sheldon Richman, Institute for Humane 
Studies, George Mason University, 4210 Roberts Road, Fairfax, Virginia 
22030, (703) 323-1055.

*Harius Schwartz, The Pareto Effects of the Robinson-Patman Act, Economic 
Analysis Group Discussion Paper 86-12, U.S. Department of Justice, Antitrust 
Division, July 30, 1986. In this paper, Professor Schwartz argues that the 
ambiguity of the Robinson-Patman Act and its case law induced uncertainty 
about the legality of competitive pricing and various business practices, 
and created a tendency to "play it safe" and preserve the status quo. 
Reviewing the act on its 50th anniversary, he finds that it condemns 
legitimate price differences, strikes down efficient business arrangements, 
 stifles promotional activity, induces inefficient buying practices, and 
overprotects competitors. Schwartz contends that Robinson-Patman may have 
weakened the competitive position of many small buyers by inducing practices 
(vertical integration, exclusive dealing, product differentiation) which are 
 generally more readily available to large firms. Available from Economic 
Analysis Group, Antitrust Division, D.S. Department of Justice, Judiciary 
Center Building, Room 11453, 555 4th St., N.W., Washington, D.C. 20001, 
(202) 724-6665.

*William F. Shughart II and Robert D. Tollison, The Employment Consequences 
of the Sherman and Clayton Acts, unpublished, Center for Study of Public 
Choice, George Mason University, March 1986. In this empirical study of 
antitrust enforcement activity from 1947 to 1981, Shughart and Tollison find 
that an increase of 1 percent in Sherman and Clayton Act cases instituted 
was matched by a rise in the unemployment rate of between 0.14 percent and 
0.20 percent. They conclude that Justice Department antitrust enforcement 
is unpredictable but, more often than not, attacks efficient contractual 
arrangements in the economy. Available from William F. Shughart II, George 
Mason University, 4400 University Drive, Fairfax, Virginia 22030, (703) 321- 
2790.

*F. Thomas Sullivan, The Antitrust Division as a Market Regulator, Center 
Sullivan, a professor of law at Washington University, reviews the 
legislative history of the antitrust laws, concluding that the Antitrust 
Division was intended to be a law enforcement agency, not a regulatory 
agency. The division's current practice of negotiating rather than 
litigating merger cases, he argues, has made it a regulatory agency. Under 
a deregulation-minded administration, says Sullivan, this is more efficient 
for both government and business. In another administration, he warns, such 
a practice could become a form of industrial policy. Available from the 
Center for the Study of American Business, Washington University, Campus Box 
1208, St. Louis, Missouri 63130, (314) 889-5650. An expanded version of 
this article will also be appearing in volume 64 of the Washington 
University Law Quarterly, to be published early next year.
*Stephen J. K. Walters, "Reciprocity Reexamined: The Consolidated Foods Case," 29 Journal of Law and Economics 423 (1986). Dr. Walters, a professor of economics at Loyola College in Baltimore, reviews the 1965 Supreme Court case P.T.O. v. Consolidated Foods, and argues that the reciprocal dealing the court found illegal actually contributed to economic efficiency. He concludes that the "presumption of evil that now attaches to [reciprocal dealing] is ill founded and unsupported in theory or in fact."

**OPINION & EDITORIAL**

*Warren Brookes, "Beware of Boecky Backlash", The Washington Times, November 26, 1986. Syndicated columnist Brookes warns that the Boecky case may stiffen opposition to the Administration's proposed antitrust reforms, and, citing the IBM case, argues that most antitrust cases are just corporate "protectionism."

*Terry Calvani, "Antitrust Policy And The Common Man", The National Law Journal, November 24, 1986. In this faceoff for the common man, FTC member Calvani argues that an efficiency-oriented antitrust policy that protects the interests of consumers will be far more helpful to the average citizen than policies seeking to protect small business or redistribute wealth. Since the larger fortunes Americans must devote a greater portion of their income to consumption, notes Calvani, they have the most to lose from antitrust policies that discourage innovation, raise costs and prices, or otherwise restrict consumer convenience and choice.


*Matthew C. Nash, "U.S.'s 'Fix-It' Antitrust Policy", The New York Times, September 16, 1986. Nash argues that the current policy of antitrust enforcement — trying to "fix" otherwise objectionable mergers by negotiating specific divestitures — has made the antitrust agencies regulators rather than prosecutors. The result is "a kind of hidden industrial policy."

*Thomas Sowell, "The Monopoly Sopranos", The Washington Times, October 20, 1986. In this article, Dr. Sowell argues that despite recent concern over newspaper "monopolies", there has never been such a diversity of newspapers available across the country.

*"Predatory Fantasies", The Wall Street Journal, December 11, 1986. This editorial on the Cargill decision concludes that "respect for economic realities is necessary... if a country wants to avoid swimming stubbornly toward oblivion on the sea of its own rhetoric."

(Copies of each of the above are attached to this issue of the Washington Antitrust Report.)
CONGRESSIONAL HEARINGS


Antitrust Remedies Reform: Hearings of the Committee on the Judiciary, United States Senate, 99th Cong., 2nd Sess. (1986). Transcript of hearings on the Administration's antitrust remedy reform proposals held last March, April, and May.


(The above hearings are available from the U.S. Government Printing Office).

PROJECTS UNDERWAY

*Geoffrey Swaab, Jr., an attorney with the New York State Department of Justice, is preparing a paper on "The Diverging Paths of Federal and State Antitrust Enforcement Authorities", to be published by the Washington Legal Foundation. Swaab will argue that the differing antitrust policies now being followed by federal and state authorities create difficulty for businesses trying to follow the law. For more information, contact Mike McDonald, Washington Legal Foundation, 1709 N St., N.W., Washington, D.C. 20036, (202) 887-0240.

*Tom DiLorenzo of the Center for the Study of American Business is preparing a paper on "The Origins of Antitrust: Reasons for Reform". He will argue that the "trusts" of the late 19th century, contrary to popular opinion, actually caused prices to fall and output to expand. Their effect on efficiency, he will maintain, was similar to today's corporate takeovers. For more information, contact Thomas J. DiLorenzo, Center for the Study of American Business, Washington University, Campus Box 1208, St. Louis, Missouri 63130, (314) 869-5630.

NOTABLE

"The First Thing We Do, Let's Kill All The Lawyers ..."

In response to a surge in merger filings by companies trying to avoid tax charges taking effect on January 1, the Justice Department has transferred initial antitrust screening of all proposed mergers from its lawyers to its economists. An, comprehensive Washington Post ("Justice Shifts Antitrust Responsibilities", December 11, 1986) quotes Washington attorney Jack Blum: "They're asking the people least likely to object to a merger and giving them the first review, and taking the people most likely to object out of the picture." Another triumph of comparative advantage.
The antitrust laws were written for a different era. For steel and even chemicals, it's no longer competition for domestic markets, it's competition on a global scale.

Senator Joseph Biden, incoming chairman of Senate Judiciary Committee, saying that "antiquated" U.S. antitrust laws should be overhauled, during interview with Wilmington News-Journal, November 13, 1986.

"[T]rue predatory pricing is about as rare as a trustworthy Soviet — and we have learned to be very skeptical of both."

FTC Chairman Daniel Oliver, September 23 speech to Antitrust & Trade Regulation Section, Dallas Bar Association.

"For a system of law that has been around for 100 years, inflicting less damage than before is not much to brag about. There is no evidence whatsoever that the world is better off with an antitrust system than it would be without one — and some evidence that the reverse is true."


EDITORS' NOTE

The Washington Antitrust Report plans to compile an Antitrust Reader, composed of the leading antitrust reform articles of the last two decades. The editors would appreciate your recommendations regarding the five most influential articles that shaped your current view on antitrust. Please direct your comments to Editors, The Washington Antitrust Report, Competitive Enterprise Institute, 677 Pennsylvania Avenue, S.E., Washington, D.C. 20003, (202) 347-1010.
The demise of Ivan Boesky has revived popular antitrust litigation against American firms, as well as the debate about whether corporate management is becoming more competitive or merely hollow.

Last week's angry exchanges between Ohio congressman Demo- crat and Sen. James Goldsmith, the first of a series of actions to stem the ever-increasing tide of criticism, suggest that the public is becoming more aware of the potential dangers to competition.

Warren Brookes is an economics columnist.

BROOKES
From page 1D

This week, the administration took a decisive step towards antitrust reform with the announcement that IBM would be required to divest its Xerox and Digital Equipment Corp.

The move is a significant step forward in the battle against the monopolistic practices of these two companies, which have been accused of suppressing competition through their horizontal and vertical integration strategies.

In particular, the decision to force IBM to divest its holdings in Xerox and Digital Equipment Corp. is a clear indication of the government's commitment to ensuring fair competition in the marketplace.

This move is welcome news for consumers and businesses alike, who have been waiting for concrete action to address the growing concerns about antitrust violations.

In conclusion, the decision to divest IBM's holdings in Xerox and Digital Equipment Corp. is a positive step towards promoting fair competition and ensuring a level playing field for all businesses.

The Washington Times
November 26, 1986

Beware
of Boesky
backlash

Use, especially Japan and Korea, a
real competitive edge.

Four years ago last summer I
made a "bargain purchase" of a U.S.-made personal computer with 64 kilobytes of internal memory for $2,400. IBM was not then even in the primitive PC market.

Last week computer stores all over the East Coast were flooded with pull-out offers of a Korean-made, IBM-compatible system with 768 kilobytes of internal memory and 20 megabytes of external memory for just $2,995, including a massive package of "free" software.

see BROOKES, page 2D

"It was clear from the start that this was a good buy."
Reagan Administration Holds
Common Man in High Esteem

Continued from page 12
that it promotes too much in fact, we have the line to tell you about the actual identity of consumers and producers. While giving data relating to the average income of consumers is less than the average income of other groups, to the contrary, this data shows that a far larger proportion of the total spending is in fact on small firms. In our view, therefore, regulatory policy will bring about a more equitable distribution of income.

In some industries, corporate shareholders may not seem to be large concern or group, but many small businesses are owned by individuals or small partnerships. At the same time, small businesses and small manufacturers are often at risk if a large firm can take advantage of subsidies to produce goods. For example, small manufacturers were more likely to produce only if they could afford to buy many of the small manufacturers that were in business. In fact, many small manufacturers could actually close the businesses if a large concern was involved. 

THE ANTI-TRUST ACT aims to promote competition in the economy and thereby to maintain competition among businesses by protecting the variety of goods and services to consumers. Antitrust enforcement is designed to prevent consumers from being hurt by a competitive advantage in the market. As a result, the laws are no longer viewed as protective, but rather as hurting the companies in the competitive process.

An antitrust policy that professes to promote the interests of consumers is more harmful than the policies that can actually harm consumers.
Who picks up the tab if the beer monopoly bill passes?

Putting limits on competition

A proven way to market sales

The Washington Times
September 24, 1986

STEWART CHAPMAN

Thebeer monopoly would be a great step forward in achieving a more equitable distribution of the economic benefits of beer production. This is not only good for consumers, but also for producers who would benefit from a more level playing field. The current system is rife with inefficiencies and distortions, which are detrimental to both sides of the equation.

The proposed legislation would introduce a form of taxation that would help to redress some of the inequities in the current system. This is a necessary step towards creating a more balanced and sustainable market environment.

In conclusion, the beer monopoly bill is a welcome development that would bring about significant improvements in the beer industry. It is hoped that the necessary legislation will be enacted soon, thereby ensuring a fairer and more equitable market for all stakeholders.
Business and the Law

U.S.'s 'Fix-It' Antitrust Policy

WASHINGTON

Aug. 23, the Federal Government rejected the proposed $75 million acquisition of Eastern Air Lines by the Texas Air Corporation, asserting that it would significantly reduce competition in the Northeast shuttle markets. But in rejecting a deal that would have created the nation's largest airline, the Department of Transportation clearly signaled to the two carriers that there was a way to "fix" the merger to make it acceptable to the Reagan Administration.

Last Friday, two and a half weeks later, Texas Air announced that it had agreed to sell additional landing and takeoff slots at La Guardia Airport in New York to Pan American World Airways, a move that would reportedly enable Pan Am to operate a fully competitive shuttle service with Eastern and thereby reverse the Government's objections. Approved by the Transportation Department last week, although it is not immediately clear if yesterday's offer by Texas Air to acquire Airliner Express would complete the Eastern deal.

More and more, as Congressmen seek ways to grow by merger, this scenario of reorienting what is an "acceptable" deal under the Government's interpretation of the nation's merger laws on "a fly-by-wire" of the Reagan Administration's antitrust enforcement policy. "Unlike any past administration," said Charles F. Roth, Deputy Assistant Attorney General at the Justice Department's antitrust division, "why stop at merely merging the assets? A merger's objectives need to be examined to see whether they could be achieved by other means."

Antitrust lawyers observe that the Administration has shown a remarkable willingness to negotiate with companies that are preparing mergers both because of its ideological preference for leaving the marketplace as much as possible and because many of its officials believe strongly that mergers can cause efficiencies within the economy and should be encouraged. "Rather than try to block the entire merger, they target to see some particular problem and ask that a business be spun off," said Susan Bermanfield, an attorney at Wilkie Farr & Gallagher and a former official at the Federal Trade Commission.

Mr. Roth noted that, in the past, if the Government thought that a merger would result in competition in some area, it generally had opposed the merger. This meant that large deals had to be completely undone or prevented even when the offending companies were small. He cited as an example the $3 billion merger in 1985 between the Allied Corporation and United. "After analyzing it, we decided that there were 35 different markets with potential overlap," Mr. Roth said. "But after looking into those markets, we found that only the market for jet engine startstop created antitrust problems." He noted that, after negotiations with the Government, the companies had to spin off only $10 million worth of assets, a small amount compared with the entire merger.

But some are concerned with the "fix-it" approach. They say it encourages companies to experiment with unorthodox mergers in the hope that, after negotiations with the Government, the companies might be able to acquire more than they would have thought possible otherwise. They also question the long-term competitiveness of the components that are either spun off or added and suggest that, in the end, competitors may be lost anyway. They note that the Government cannot make the company acquiring the components continue operating them and that the acquiring company may be much less inclined to invest in capital if it is required.

"I don't know if we have enough accumulated evidence of what has happened in all these spinoffs that have been done to accomplish that purpose, but then you would get an indication of how much you really preserve competition," said Sanford M. Litvak, a partner at Dornin, Leibowitz, Newton & Irvine in New York and President Carter's top antitrust official from 1979 through 1981.

The Administration's "fix-it" policy on mergers has also been described as a kind of hidden industrial policy by which the shape of entire industries can be altered by the Government. Some antitrust lawyers also questioned whether the Justice Department and the F.T.C. were playing two separate roles in negotiating a "fix" of a merger with the business community. "The fix it policy turns the Justice Department into a provocateur into a regulator," Ms. Bermanfield said. "It's no longer the adversary, but rather the negotiator, and they end up doing it with a very light hand."

Mr. Litvak also questioned whether the Justice Department, the F.T.C. or even Transportation Department officials had sufficient expertise to make the kinds of value judgments about particular industries that are needed in this context. "We want to categorize the market for jet engine startstop created antitrust problems," he said. "But we no longer have the Civil Aeronautics Board because of deregulation, so now the Transportation Department is acting as a regulatory agency, the very thing the Administration says it should not be."

Mr. Litvak added that, despite the concerns, "nothing breaks the fix it policy of the White House, and I love it as a private lawyer."
THOMAS SOWELL

People may argue about Keynesian economics, monetarist economics, or supply-side economics. But the actual decisions made by politicians and judges are dominated by bogeyman economics.

It would be impossible to understand these travesties of logic-known as antitrust cases without understanding the bogeyman lurking in the background of the judge's thinking.

The hard evidence in many of these cases would not be enough to sustain a conviction for fraud, but if a prosecutor who can waste time getting statistics and theories in such a way as to conjure up the specter of an antitrust chance of monopoly is well on his way to winning the case.

Courts have broken up mergers in which the two companies put together had less than 10 percent of the sales in the industry. One business firm convinced of an antitrust violation had fewer than 30 employees and more than 70 competitors.

When judges believe that such de
defend

cases "potentialistically" become

The Washington Times

people may argue about

monopoly bogeyman

The monopoly bogeyman

In reality, there has never been such a diversity of newspapers available all across the country — even in the boondocks — as during the present era of local newspaper "monopoly."

Statistically, however, Palo Alto is included among those brightened communities where one locally produced daily newspaper has "monopoly." In reality, there has never been such a diversity of newspapers available all across the country — even in the boondocks — as during the preceding era of local newspaper "monopoly."

Transportation and electric communication have vastly increased the area that can be served by a given newspaper, reducing the necessity for locally produced papers.

It is only when this single economic fact is seen through a fog of bogeymen, that political and legal hysteria is generated.

According to bogeyman economists, monopolies are a constant threat to jack up prices and "rip off" the consumer. The truth is that far more antitrust cases have been prosecuted against companies for lowering prices than for raising them. When a more efficient company cuts out prices and its competitors lose business because they cannot afford to follow suit, then that is when they turn to the feds.

Some monopolies and cartels do in fact jack up prices beyond what they would be in a competitive market. But this is almost invariably with the help of government.

Government-regulated and subsidized sectors — from agriculture to the maritime industry — charge prices far above what the market would tolerate if purchasers did not submit competition.

One of the few genuine monopolies to arise independently of government was the Aluminum Company of America, which was the only producer of virgin ingot aluminum in the United States from the late 19th century until World War II. However, after half a century of Alcan monopoly, the price of aluminum had fallen to less than a tenth of what it was originally, and Alcan's rate of profits was a modest 10 percent.

Why? Because many things that are made of aluminum could also be made of tin, steel, copper, wood, and many other materials. Potential substitute reduce overall monopoly's opportunity to act. The way bogeyman economics operates. Competition does much more effective job of protecting consumers than government.

Thomas Sowell, an economist, is a senior fellow at the Hoover Institution.

Oct 20, 1986

The Wall Street Journal
Predatory Fantasies

By a vote of 6 to 2 Tuesday, with Justice William Brennan Jr. writing the majority opinion, the Supreme Court cleared one more antitrust cobweb out of the national site. The court said that when a company rises under the antitrust laws to block a merger by a competitor, it must show that it is threatened with injury "that flows from that which makes defendants' acts unlawful." That means the complaining company can't just run to court claiming that the merger will squeeze its profits.

The court could have gone further. But even as it stands, the opinion is not a bad day's work. "The case that produced the opinion started when Excel, the second-largest firm in the very competitive beet-packing industry, agreed to buy company number three, Monfort of Colorado, number five in the beet-packing industry, in 1979. Monfort claimed that the new, larger Excel would pay more for its cattle and sell its beef for less in order to put competitors into a damaging price-cost squeeze. On this basis, and to say, Monfort got an injunction against the merger. An appeals court affirmed the decision, finding Monfort threatened by a form of predatory pricing." But the Supreme Court reversed. In its Braniff decision the court had already said that a plaintiff seeking antitrust damages had to show injury from a real antitrust violation. This time Justice Brennan declared that the same was true for a plaintiff seeking injunctive relief.

Moreover, the "price-cost squeeze" threat complained of by Monfort was not the same as the predatory pricing that violated the antitrust laws.

For one thing, Monfort had never really claimed that Excel was going to sell its beef below cost. No "below cost" means no predatory pricing. Even if Monfort had alleged real below-cost predatory pricing, said Justice Brennan, "we doubt" whether the facts supported the claim. Even after the merger, Excel wouldn't have one market power or capacity to wage a successful campaign of predation. The Justice Department submitted a brief urging the court to go further and rule out suits based on "necessary speculative claims of post-acquisition predatory pricing." The court declined but said, quoting a prior decision, "Predatory pricing schemes are rarely tried, and even more rarely successful." "Claims of predatory pricing must," warned a footnote, "be evaluated with care."

So if you want to go before the court claiming a threat of predatory pricing, you'd better take along some documents to prove your case.

Judges have always written about the antitrust laws in two languages—the language of distrust toward people abe to exercise economic power and the language of markets, rationality and efficiency. Depending on which language you choose, you will view a competitor squeezing over a merger either as a sign that there's something wrong about it or as merely the predictable outcome that accompanies any market-efficient acquisition.

The distrust is probably unavoidable in a democracy. The respect for economic realities is necessary, though. If a country wants to avoid undermining its authority toward oblivion on the sea of its own rhetoric.

The justices have taken one more step to adjust the balance, with the decision itself and the type of reasoning they used to get there. It's good to know the courts are capable of this kind of self-correction.