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I. INTRODUCTION

CONTROVERSY OVER THE ROLE of antitrust law in guiding and protecting the economy, sharp divergence of opinion as to the quality of its connection to competition, and expressions of doubt over its capacity to effectively respond to the accelerating claims of business technology have been part of the American scene since the Sherman Antitrust Act[1] was enacted in 1890. The pyrotechnics of public dialogue encompass a wide range of views, including such recent examples as Galbraith's conclusion that the *fait accompli* of concentration makes antitrust outmoded, perhaps harmful, and at best a charade,[2] the Bork and Bowman thesis[3] (disputed by Professors Blake and Jones)[4] that the Sherman[5] and Clayton Acts[6] have recently been enforced in a way that distorts competition, and finally, the widespread view that the judiciary relies far too much on a priori economic theories.[7]

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Conglomeration is the latest entrant into the arena of debate. It appeared with so much vigor and with such a perplexing array of problems that it now completely overshadows all other topics of antitrust concern. Although it is still too early to ascertain the full import of the changes in the industrial fabric that this phenomenon will evoke, there has been a fruition of experience to the point that

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[1] 15 U.S.C. §§ 1-7 (1964).

[2] J. GALBRAITH, THE NEW INDUSTRIAL STATE (1967). For a brief rebuttal, see Turner, *The Merits of Antimerger Policy: A Reply to Professor Galbraith*, 19 CASE W. RES. L. REV. 201 (1968).

[3] Bork & Bowman, *The Crisis In Antitrust*, 65 COLUM. L. REV. 363 (1965).

[4] Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965).

[5] 15 U.S.C. §§ 1-7 (1964).

[6] Clayton Act, ch. 25, § 7, 38 Stat. 631 (1914), *as amended*, 15 U.S.C. § 18 (1964).

[7] Austin, *A Priori Mechanical Jurisprudence in Antitrust*, 53 MINN. L. REV. 739 (1969).

some significant alterations in antitrust jurisprudence can be anticipated on a level of discernment which permits projective discussion. The vigorous stresses produced by conglomeration point to one or a combination of the following effects: First, an absence of precedential guidelines, magnified by the thrust of some pressures to be described below, make it likely that the judiciary will embrace a prismatic set of proscriptive standards derived from particularized socio-economic value judgments on the appropriateness of conglomeration. This would represent a clear departure from the traditional focus on ascertaining whether competition has been lessened in specific markets. Second, the executive branch will gain a degree of leverage over the decision making processes of the nation's industrial complex to a degree heretofore unknown. Finally, there is the possibility that legislation will be enacted which would constitute a significant expansion of government regulation of business.

II. THE CONGLOMERATE MERGER: WHAT DOES IT DO TO COMPETITION?

The recent activities of the Justice Department cloak the issue of the applicability and the appropriateness of antitrust proscription of conglomeration with immediate priority.[8] Economists and antitrusters acknowledge that the peculiar relational consequences of the conglomerate merger raise difficult questions in the area of competitive effects. Since by definition the merging companies do not directly compete with each other nor stand in a buyer-seller re-

[8] Courts and most commentators mechanically assume that Congress intended that the Celler-Kefauver amendments of 1950, 15 U.S.C. §§ 18, 21 (1964), embrace conglomerates. There is legislative dialogue supporting this view. Blair, *The Conglomerate Merger in Economics and Law*, 46 GEO. L.J. 672, 673 (1958). Dissenters, however, argue that conglomerate mergers are without the coverage of the amendments because such mergers do not produce the effects envisioned by the congressional competitive effects standard of proscription. Professor Blair notes another dissenting view: "Congress did not really understand the nature of 'true' conglomerate mergers and therefore did not intend to reach them." *Id.* at 674. Professor Narver supports the conclusions that legislative concern with conglomerates — much less the consequences of conglomeration — was light and that Congress lacked a sufficiently precise definition of conglomeration to enable more penetrating formulation of policy. J. NARVER, CONGLOMERATE MERGERS AND MARKET COMPETITION 33-59 (1968). Narver observes:

> Unfortunately, the legislators seemed content to keep their analysis of implications at the socio-political level, a level to which the wording of the amended Act does not explicitly relate. As we have seen, even the FTC, the most actively interested agency, failed to undertake a study of the components and consequences of conglomerate mergers. *Id.* at 59.

It is interesting to note that until the 1930's courts assumed that diversification was beyond the reach of the antitrust laws. Hale, *Diversification: Impact of Monopoly Policy Upon Multi-Product Firms*, 98 U. PA. L. REV. 320, 324-27 (1950).

lationship,[9] many observers feel that traditional indicators shed little light on the crucial issue of market effects.[10] Professor Turner frames the problem:

> The rules developed for determining the validity of horizontal and vertical mergers clearly will not do for conglomerate acquisition generally. In the familiar types of horizontal and vertical merger cases, the Supreme Court has come to place important . . . weight

[9] E. SINGER, ANTITRUST ECONOMICS: SELECTED LEGAL CASES AND ECONOMIC MODELS 259 (1968).

Most observers define conglomeration in residual terms, *i.e.*, all mergers not falling within the horizontal or vertical categories are conglomerate. However, agreement on subclassifications varies. Professor Turner distinguishes "pure" conglomerates — no discernible economic relationship between acquiring and acquired firms — from "mixed" conglomerates. He divides the latter classification into: (1) Market extension mergers — both firms produce the same product but sell it in different geographic markets; (2) product extension mergers — the firms produce different products but they can be produced through the same facilities, or they can be sold through the same distribution channels, or the products can be absorbed into a unified research and development program. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1315 (1965). Davidow's view of the product extension merger is broader. He concludes that the "term covers any consolidation of the two firms whose products are so related that they may be distributed, advertised, or sold in the same manner, through the same outlets, or to the same customers." Davidow, *Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act*, 68 COLUM. L. REV. 1231, 1232 (1968). Narver continues the definitional expansion. After placing conglomeration in the usual residual context, he observes that the conglomeration "spectrum is exclusively a matter of the degree of technological and resource 'fit' between the merging firms." J. NARVER, *supra* note 8, at 4. Finally, on occasion the terms "diversification" and "multiproduct firm" have been employed to cover the end result of a conglomerate merger. *See* Hale, *supra* note 8. Even when conglomeration is viewed in this context, substantial differences exist. Many feel that a diversified firm is not necessarily a conglomerate. According to *Fortune* magazine, before a company can be classified as conglomerate it must engage in at least eight different business categories. Hruska, *Bigness and Diversification: The Conglomerate*, 38 ANTITRUST L.J. 192, 193 (1969). *Forbes* magazine resolves the problem by breaking down a broad "multicompany" classification into three subcategories. "Multi-industry" firms are those that have diversified internally over a long period of time. "Agglomerates" are financially oriented firms operating as holding companies. "Conglomerate" firms are widely diversified and are subject to fairly rigid centralized management control. FORBES, Jan. 1, 1970, at 96.

The lack of precision in defining the conglomerate merger and in analyzing its effects undoubtedly accounted for Congress' including all forms of mergers under a single standard. *See* note 8 *supra.*

[10] That is, conglomerate mergers do not create the type of effects that are relevant to, or measurable by, the antitrust notion of adverse competitive effects. Narver says: "All in all, then, the fundamental conclusion of this analysis is that conglomerate mergers are not inherently procompetitive or anticompetitive." J. NARVER, *supra* note 8, at 137. *See* Davidow, *supra* note 9, at 1238; Reilly, *The Conglomerate Merger: A Need for Clarity*, 29 OHIO ST. L.J. 290, 291 (1968); Rill, *Conglomerate Mergers: The Problem of "Superconcentration,"* 14 U.C.L.A.L. REV. 1028, 1053 (1967); Turner, *supra* note 9, at 1315-16.

Another view is that conglomerate mergers should be presumptively legal. Day, *Conglomerate Mergers and The Curse of Bigness*, 42 N.C.L. REV. 511, 557 (1964).

At least one Supreme Court Justice has expressed doubts as to whether Clayton 7 covers conglomerate mergers. FTC v. Procter & Gamble Co., 386 U.S. 568, 587 (1967) (Harlan, J., concurring).

> on the share of the relevant markets controlled by the acquiring and acquired companies. . . . But whatever significance can be attached to market shares in these cases, quite clearly the significance becomes less when we deal with conglomerate mergers, and indeed may completely vanish.[11]

This is not to imply a total absence of judgmental reference points. There is broad agreement that conglomeration raises at least five *possible* consequences which might be translated into anticompetitive effects: (1) Reciprocal trading and tying arrangements, thought to be the natural concomitant of multiproduct production and distribution; (2) the conglomerator, in the process of acquisition, erases its influences as a potential competitor; (3) diversification which makes it possible to subsidize a given product or firm; (4) if the acquiring firm is large, the erection of barriers to entry; and (5) "conglomerate power" — a descriptive term for the advantages gained over rivals by virtue of diversification even though the firm does not exert monopolistic power, or anything similar, in any given market.[12]

With varying degrees of intensity the validity and utility of each of these points has been questioned. Professor Stigler skeptically remarks on conglomerate power: "I must confess that the exact mechanics by which the total power possessed by the firm gets to be larger than the sum of the parts (in individual markets) escapes me . . . ."[13] As to subsidization, one commentator noted that this "danger seems to have been more apparent than real, for since 1950 only one Section 7 case has arguably involved the kind of subsidized price-cutting envisioned by the Commission's 1947 report."[14] Doubts exist as to whether reciprocity,[15] tying arrangements,[16] and subsidiza-

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[11] Turner, *supra* note 9, at 1315-16.

[12] It is also argued that an increased number of diversified firms would engender a "quiet life" economy. "Like national states, the great conglomerates may come to have recognized spheres of influence and may hesitate to fight local wars vigorously because the prospect of local gain are [*sic*] not worth the risk of general warfare." *Hearings on Economic Concentration Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 1, at 45 (1964-65).

[13] Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 184 (1955).

[14] Davidow, *supra* note 9, at 1255. Turner says: "To sum up, predatory pricing seems so improbable a consequence of conglomerate acquisitions that it deserves little weight in formulating antimerger rules based on prospective effects." Turner, *supra* note 9, at 1346. *See* P. AREEDA, ANTITRUST ANALYSIS 519-21 (1967); E. SINGER, *supra* note 9, at 260-66.

[15] It is arguable that the degree to which reciprocity is practiced has been overstated. Stigler says: "[R]eciprocity is probably much more talked about than practiced, and is important chiefly where prices are fixed by the state or a cartel." Stigler,

tion are peculiarly the inevitable product of conglomeration. The mere fact that diversification results in patterns of corporate relationships making it possible to engage in certain activities implies nothing more than the existence of the relationships. Barriers to entry and potential competition are part of the "new antitrust" which focuses on market environment and employs oligopoly theory as a predicate for reaching conclusions as to probable adverse competitive effects. The a priori flavor and the paucity of empirical support for this perspective is a source of concern.[17] Even when employed in analysis of horizontals, verticals, and joint ventures, the concept of potential competition and the doctrine of barriers to entry require a high level of appreciation for the proper mixture of economic theory and law, modulated by a sense of judicial restraint.[18] This is a burden greatly increased by conglomeration.

All of the analytical reference points briefly described above have been embraced and utilized by the Justice Department and the Federal Trade Commission; varied interpretations have been etched in decisions, guidelines, and public pronouncements. Nevertheless, opinion varies from concern and dubiety to total disbelief regarding the efficacy of these standards in proscribing conglomer-

Working Paper for the Task Force on Productivity and Competition: Reciprocity, 115 CONG. REC. 6479 (daily ed. June 16, 1969).

Another argument is that reciprocity is repugnant to the "profit center" concept upon which conglomeration is based:

> Under this concept each division and subsidiary has its own separate decentralized purchasing and sales department. The compensation and promotion of the individuals who manage each profit center is determined by the performance of their own profit center, not by the performance of it as a whole. . . . [T]he management of each profit center would resist reciprocal dealing arrangements because they would only increase the volume and profits of other profit centers . . . . United States v. International Tel. & Tel. Corp., 5 TRADE REG. REP. (1969 Trade Cas.) ¶ 72,943, at 87,646-47 (D. Conn. Oct. 21, 1969) (footnotes omitted).

[16] Hale, *supra* note 8, at 344-48.

[17] Austin, *supra* note 7. One economist contends that the crux of the problem is that existing economic theory simply does not acknowledge or take into account the conglomerate merger. He says: "The theorists have completely ignored conglomerates. They're saying in effect that our theory doesn't explain conglomerates, so therefore conglomerates are wrong rather than our theory. But in fact the theory is woefully inadequate — and not just about conglomerates." FORBES, Jan. 1, 1970, at 104.

[18] Speaking of potential competition, Professor Cook says:

> The courts and the Commission are now moving to find proscribed effects in more exotic potential restraints. Thus, the existence of potential competition, which could suffice to block any merger, can produce the prohibited effect. The test of illegality seems to have graduated from being a probable lessening of competition to being a possible increase in concentration, brought about by the removal of a possible competitor, who possibly might not be replaced by others. Cook, *Merger Law and Big Business: A Look Ahead*, 40 N.Y.U.L. REV. 710, 713 (1965).

ation. The Task Force Report on Antitrust Policy (Neal Report), released on May 21, 1969, acknowledged that as to the conglomerate merger "existing knowledge provides little basis for forecasting adverse effects on competition that support application" of Clayton 7.[19] The Neal Report characterized the indicators now employed (mentioned specifically are potential competition, reciprocity, and deep-pocket subsidization) to fill precedential gaps as unresponsive to the point of encouraging speculation and conjecture on the part of the judiciary. The Report of President Nixon's Task Force on Productivity and Competition (Stigler Report) appeared on June 16, 1969.[20] There is a head-on clash of philosophy and conclusion between the Neal and Stigler Reports. Consequently, it is noteworthy that their single point of accord touches on the inability to formulate a rationale for contouring conglomeration into the antitrust mold. On this point, the Stigler Report is succinct in its skepticism: "The acquiring of an enterprise by a firm which has interest in other related enterprises, unlike a horizontal merger, has no direct anti-competitive effects. It leaves the competitive situation essentially unchanged. *Indeed, the main complaints about the conglomerate relate to other things.*"[21]

III. A Precis of the Non-Antitrust Tensions That Shape Judicial Attitudes on Conglomeration

The conglomerate merger is without doubt the most explosive issue to emerge in the business world since the disdainful machinations of the trust-builders sparked the nation's first antitrust crusade. One writer recently noted: "As the 1890's were the heyday of the trusts, so this decade is rapidly emerging as the golden age of the

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[19] TASK FORCE REPORT ON ANTITRUST POLICY, 115 CONG. REC. 5642 (daily ed. May 27, 1969) [hereinafter cited as NEAL REPORT].

Section 7 of the Clayton Act is, of course, the primary statute employed in antitrust merger litigation. It prohibits corporate acquisitions "where in any line of commerce in any section of the country, the effect of such acquisition . . . may be substantially to lessen competition, or tend to create a monopoly." Clayton Act, ch. 25, § 7, 38 Stat. 631 (1914), *as amended*, 15 U.S.C. § 18 (1964).

[20] REPORT OF PRESIDENT NIXON'S TASK FORCE ON PRODUCTIVITY AND COMPETITION, 115 CONG. REC. 6472 (daily ed. June 16, 1969) [hereinafter cited as STIGLER REPORT].

[21] Coase, *Working Paper for the Task Force on Productivity and Competition*, 115 CONG. REC. 6478-79 (daily ed. June 16, 1969) (emphasis added).

Donald Baker, Chief of the Antitrust Division Evaluation Section has written: "These kinds of [conglomerate merger] questions really raise what are broad political and legislative issues. They deal with the total impact on society rather than on the particular effects in individual markets which have been the general concern of antitrust." Baker, *How to Hook the Conglomerate*, TRIAL 12, 18 (April-May 1969).

conglomerates."[22] The pervasiveness of the conglomerate merger movement is indisputable — FTC figures indicate that during the period 1960-66, 71 percent of all mergers involving large manufacturing and mining firms were conglomerate.[23] The conglomerate technique has become familiar in such "noncommercial" areas as science[24] and higher education,[25] and has even made an appearance in the war on poverty.[26] Media attention has been expansive, at times pushing such permanent fixtures as war and civil rights to the background. Titles like *The Urge to Merge: The Time of the Conglomerates*[27] and *The Conglomerates' War to Reshape Industry*[28] are representative of the deluge of writings appearing in the popular press. In general, the conglomerate has received a bad press, so bad that in some circles it has become a term of disapprobation,[29] conjuring up images of sinister conduct and, thus, a designation to take public relations measures against. One of the largest and best known conglomerates, Textron, Inc., endeavors to "persuade shareholders and general public alike that it is a 'multi-industry' company quite different from more flamboyant conglomerates."[30]

The increasing ubiquity of the conglomerate accounts for much, but by no means all, of its notoriety. One of the surprising elements of this scenario is that an imposing amount of the most vehemently critical commentary comes from the business community itself. Much of the reason for this is that many of the conglomerate practitioners have invaded what were thought to be invulnerable enclaves of power. Large and financially powerful firms, relishing the "quiet life at the top" of the hierarchy and, until recent times, confidently secure from assault, can no longer rely on the defense of prestige and of being "in." As one experienced observer described the climate: "Proud old names have already been taken over. . . . Foreboding, frustration, and even fear are epidemic in

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[22] Davidow, *supra* note 9, at 1232.

[23] ABA ANTITRUST DEVELOPMENTS 1955-1968, at 83 n.57 (1968).

[24] Lear, *Will the Science Brain Bank Go Conglomerate?* SATURDAY REV., July 5, 1969, at 37.

[25] Ridgeway, *Universities as Big Business*, HARPER'S, Sept. 1968, at 29.

[26] N.Y. Times, Nov. 17, 1968, at 66, col. 1.

[27] N.Y. Times, Oct. 27, 1968, § 6 (Magazine), at 32.

[28] TIME, March 7, 1969, at 75.

[29] The unfavorable connotations of the word have even been applied to the world of crime. *Time* magazine recently described La Cosa Nostra as *The Conglomerate of Crime.* TIME, Aug. 22, 1969, at 17.

[30] *Textron: Yankee-Style Conglomerate*, FIN. WORLD, July 9, 1969, at 5.

perhaps three out of five big corporate headquarters."[31] In keeping with the times, many of the most successful conglomerators are young and aggressive newcomers who deftly put together complicated deals with an air of insouciance and who frequently turn the establishment on its collective head with lightening-fast unorthodox takeover tactics.[32] Tender offers (whereby the acquiring firm seeks control by addressing an irresistible offer to the target company's shareholders),[33] sneak, and ambush attacks are now familiar terms used in describing the tactics of many conglomerators. Espionage is allegedly part of the game.[34] In distinguishing "defensive" from "offensive" conglomerates, one commentator says of the latter:

> This group has promoter-type managers, who are quietly reminiscent of the more colorful merger promoters of the past. They use the promoter's lingo and have a knack for verbally dressing up their divisions with such titles as "energy resource base," "recreation and leisure-time division," "education technology group," and so on.[35]

Many observers are worried about the possible deleterious effects on the stock market and on investors. Anticipation of takeover prompts, so it is charged, violent upswings in stock prices which exceed to a dangerous degree the economic value of the shares.[36] Another alleged dangerous possibility is the so-called "chain letter" effect. Generally, the investor's evaluation of a firm's profitability is determined by its price-earnings ratio, a term used to describe "the amount one must currently pay for each dollar of expected corporate earnings."[37] Anticipation that earnings per share will rise generates high stock prices and, of importance to the

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[31] Burck, *The Merger Movement Rides High*, FORTUNE, Feb. 1969, at 79.

[32] Of the "new breed" *Time* says:

> They have fought their way up from obscurity by innovating and taking risks in a way that flabbergasts conventional executives. They are seldom hired managers; most are founders and owners still in their 40's . . . . They are willing to dare much to gain a larger hold on the future. TIME, March 7, 1969, at 76.

[33] There are two basic criticisms of the tender offer technique: (1) Offerors are characterized as "corporate raiders who are set upon liquidating the companies over which they seek control." Fleischer & Mundheim, *Corporate Acquisition By Tender Offer*, 115 U. PA. L. REV. 317, 324 (1967). (2) The offeree frequently is not supplied with sufficient information for making a rational decision. *Id.* at 326.

[34] Burck, *supra* note 31, at 83.

[35] S. REID, MERGERS, MANAGERS AND THE ECONOMY 195 (1968).

[36] Jim Ling contends that by paying "substantial premiums over the market price . . . literally thousands and thousands of persons [have been given the opportunity to] have a better economic life." Ling, *An Insider Looks at Conglomerates*, 57 KY. L.J. 382, 395 (1969).

[37] E. DONALDSON & J. PFAHL, CORPORATE FINANCE 401 (2d ed. 1963).

conglomerator, the higher the market value of the shares the more he can borrow for acquisition purposes. At this point, it is obvious that for many firms to continue conglomerating, the price-earnings ratio must maintain a constant upward swing. One method of improving earnings, and presumably the price-earnings ratio, is by internal growth. Another and much faster method is to acquire a firm whose shares are selling at a lower price-earnings ratio. The consequence of this maneuver is a higher earnings per share than exhibited previously — at least on paper.[38] The sensitivity of the investor to the increase in earnings per share will inevitably prompt a jump in price-earnings ratio. It is the surmise of some that it is this dependence on an attractive price-earnings ratio that locks the conglomerator into the acquisition habit. More importantly, the increased price-earnings ratio springs from the mere fact of acquisition and not from the substance of growth. Hence, the argument that the investor gets fictitious value for his money, or, as one observer says: "[W]hen growth is entirely generated by acquisitions, the investor is playing a game of transfers or chain letters."[39]

There are additional complaints: Conglomerators use "Chinese money"[40] (securities of doubtful future value) to finance aggression; dedicated executives are milked for knowledge and then summarily dismissed; "creative" accounting methods are employed to boost stock share values;[41] and doubts have been raised as to the capacity of conglomerate management to effectively control an expansive empire.[42] This latter criticism is usually raised in connec-

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[38] Burck, *supra* note 31, at 81.

[39] *Id.* *See* Davidow, *supra* note 9, at 1238.

The Stigler Report concluded that any "chain letter" possibility is an SEC problem. STIGLER REPORT, *supra* note 20, at 6478.

There is not total agreement that financial trickery is involved. After examining 10 firms, one commentator said: "In general, the record suggests that the public's increasingly dark suspicions about conglomerate's earnings are unwarranted." Louis, *Ten Conglomerates and How They Grew*, FORTUNE, May 15, 1969, at 152.

[40] "Chinese money" most frequently used consists of debentures and stock warrants. TIME, March 7, 1969, at 79.

[41] For example, the "pooling of interest" technique recreates a balance sheet that assumes an ab initio relationship between the firms. The consequence is a tax savings to stockholders. Perhaps more significantly, acquired and acquiring firm profits from the year of merger are pooled, often boosting earnings for that year. Finally, "pooling" disguises an excessive payment by the acquiring company for the target company's shares. Burck, *supra* note 31, at 82.

[42] Willard F. Rockwell, Jr., Chairman of the Board of Directors of North American Rockwell Corp., one of the nation's largest multiproduct firms, expressed skepticism "of a corporate mixture where you throw together under one management many different kinds of unrelated business . . . ." Mr. Rockwell added: "Just because an executive is good at running a manufacturing concern doesn't mean he can take over

tion with the type of conglomerate that embraces totally unrelated businesses. Richard McLaren, Antitrust Division Chief, suggests that conglomeration has a human resource depletion effect. He argues:

> When the headquarters of one or two large companies are removed from the nation's smaller cities to New York or Chicago or Los Angeles, I think we all recognize that there is a serious impact upon the community. The loss is felt by its banks, its merchants, its professional and service people. . . . The community loses some of its best educated, most energetic and public spirited citizens.[43]

"Good" conglomerates acknowledge the validity of some of these criticisms but counter that they portray only the "bad" congloms — the "raiders" who are insensitive to the rules of the game. Another rebuttal is that in any movement of consequence and value some excesses must be tolerated. Sound financing, with shareholder interests in mind, and rational target company selection can, say the "goods," have a beneficial business and societal effect.[44] A properly structured conglomerate makes it possible to shift large amounts of capital to new fields of potential expansion, thus maintaining a responsive allocation of resources, raising standards of living, and creating new jobs. It has also been suggested that as a result of attractive tender offers the shareholder has for the first time an effective means of exerting influence over corporate destiny, in addition to getting top dollar.[45]

The free-swinging "bad" congloms consider the myriad of criticisms as part of a program of persecution and harassment instituted by the entrenched and conservative elements of an out-of-touch establishment. They feel that it is neither altruism nor concern over possible anticompetitive market effects that inspires the barrage of complaints and the pleas for government intervention; in-

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the operations of a bank or an insurance company." *Business Mergers — What's Right, What's Wrong*, U.S. NEWS & WORLD REP., May 19, 1969, at 71-72.

[43] Address by Antitrust Division Chief Richard W. McLaren, House Ways and Means Committee, March 12, 1969, in 5 TRADE REG. REP. ¶ 50,233, at 55,467 (1969), Representative Emanuel Celler, Chairman of the House Antitrust Subcommittee presently engaged in a study of conglomeration, agrees with this view. Celler, *Conglomerate Merger Investigations*, 38 ANTITRUST L.J. 184 (1969). This position has been criticized. Bork, *Antitrust in Dubious Battle*, FORTUNE, Sept. 1969, at 103; Hruska, *supra* note 9, at 201.

[44] U.S. NEWS & WORLD REP., May 19, 1969, at 70.

[45] Burck says: "Thus the stockholder, relegated by Adolf Berle and other noncontemporary economists to a limbo of impotent ownership, has found himself inadvertently practicing Stockholder Power." Burck, *supra* note 31, at 79-80. Of course, since a sale is effected the shareholder exercises this power only one time. Davidow, *supra* note 9, at 1281. *See also* Fleischer & Mundheim, *supra* note 33.

stead it can be attributed solely to the vulnerability of the establishment to takeover by the newcomers.[46] As far as the "mavericks" are concerned, the old guard is in many cases clinging to archaic business values and to methods of operation out of touch with a swiftly changing economy. They assert that business growth is stimulated by takeovers that expose and weed out inefficient, sluggish, and uninspired managements.[47] Since conglomerators are committed by instinct and necessity to innovation and growth, the argument is that they are less likely to become part of the "accommodative" syndrome. For example, it has been suggested that successful takeover of Jones & Laughlin, Inc. by Jim Ling's Ling-Temco-Vought, Inc. would have procompetitive effects because the price leadership of United States Steel Corp. would be disrupted by the injection of new life into a group of tired old dancing partners.[48] Thus, so the argument goes, while conglomeration does not alter the relative market shares of the firms, the immediate effect is the creation of "new" competition.

IV. The Evolution and Impact of Particularistic Ad Hocism: A Projection

One consequence of these new tensions is to thrust the judiciary into a vast labyrinth of value judgments. Of course, certain value judgments are permanent fixtures on the antitrust battleground and hence are not particularly indigenous to the conglomerate cipher. The "generality and adaptability" of the antitrust laws delegates to the courts a wide spectrum of responsibility to interpret.[49] "In the anti-trust field," Judge Wyzanski once said, "the courts have been accorded, by common consent, an authority they have in no other

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[46] *Fortune* observed:

> The events that triggered Washington into action are not hard to discern. It was not the number of mergers or the concentration ratios, but rather the threat to the established way of doing corporate business . . . . Suddenly, what had been accepted as proper depreciation and financing procedures — not to mention a prudent price-earnings ratio — became chinks in management's armor against stockholder attacks. FORTUNE, May 1, 1969, at 44.

[47] Burck, *supra* note 31, at 80. One economist approves of conglomerate power because of a possible countervailing effect on government power. "The government has such sheer power. It would be marvelous to have big companies push the government around a bit." *Clients and Conglomerates*, TRIAL 9, 10 (April-May 1969).

[48] TIME, April 4, 1969, at 89.

[49] Mr. Chief Justice Hughes once wrote: "We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. . . . Thus in applying its broad prohibitions, each case demands a close scrutiny of its own facts." Sugar Institute, Inc. v. United States, 297 U.S. 553, 600 (1936).

branch of enacted law."[50] The discretion inherent in this authority has not been overlooked. For example, in 1927 the Supreme Court, still clinging to an afterglow blend of social Darwinism, accepted the presence of the industrial giant and its immense power provided the power was not exerted in an "abusive" manner.[51] By 1948, perspectives had changed: "The mere existence of the power to monopolize, together with the purpose or intent to do so, constitute[d] an evil at which the [Sherman] Act [was] aimed."[52] Much of the reaction against the localization of brute corporate size in a given market arose as a result of the view that the imposition of antitrust strictures might on occasion embrace social objectives. Judge Learned Hand made the best known statement of antitrust societal regulation: "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."[53] Mr. Justice Black's *United States v. Von's Grocery Co.*[54] value judgment in favor of the "mom and popism" of the neighborhood store was in the social purpose tradition. In drafting the majority opinion which struck down a horizontal merger that would have resulted in 7.5 percent horizontal market control, Mr. Justice Black's remark echoed Judge Learned Hand: "Like the Sherman Act in 1890 and the Clayton Act in 1914, the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business."[55]

The impact of judgmental estimates like these cannot be ignored. There is, however, an important neutralizing factor. Over the years the judiciary has created and nourished a body of decisional guidelines — a set of analytical tools, some drawn from economics[56] — employed to resolve conflicts in a manner that permits the courts

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[50] United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 348 (D. Mass.), *aff'd*, 347 U.S. 521 (1954).

[51] United States v. International Harvester Co., 274 U.S. 693, 708 (1927).

[52] Schine Chain Theaters, Inc. v. United States, 334 U.S. 110, 130 (1948).

[53] United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945).

[54] 384 U.S. 270 (1966).

[55] *Id.* at 275.

[56] Some observers say that there is too much reliance on economic theory. McDaniel, *Antitrust and the Status Quo in a Changing Society*, 1967 N.Y. ST. B. ASS'N ANTITRUST L. SYMPOSIUM 1, 4; Handler, *The Twentieth Annual Antitrust Preview — 1967*, 53 VA. L. REV. 1667, 1679-80 (1967).

to maintain contact with a rational decisional framework cemented by a commitment to imposing remedial restraints only when the automatic mechanisms of the marketplace are disrupted or endangered. The inquiry focuses on two issues: First, a determination of the extent and character of market disruptions; second, a decision, in light of findings on the first issue, on whether proscription is necessary to restore the competitive balance.[57] Where horizontal and vertical mergers are concerned, measurements on market share, foreclosure, and concentration are employed to make readings on the probability of competitive effects.[58] These indicators have a restraining effect on the judiciary, serving to prevent a headlong plunge into ad hoc particularism and a morass of value judgments. An ingrained commitment to operating within the boundaries of the policy of the antitrust laws has kept the judiciary within earshot of Congress' call for relating proscription to actual or probable competitive effects. In essence, counterbalances exist that reduce significantly the chances of extreme dosages of value judgments surfacing frequently enough to take on the cast of permanent proscriptive guides.

Where the legality of a conglomerate merger is at issue, however, the efficacy and the restraining features of the traditional patterns of analysis are rendered useless. As to existing standards, conglomeration stands neuter. Recent guidelines — reciprocity, potential competition, etc. — are relevant too infrequently to be of significant value. Yet by statute and by case law, courts are required to scrutinize all mergers against the lessening of competition standard. As Mr. Justice Douglas said: "All mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other."[59] This leads the judiciary directly into a closed-ended dilemma: If they refuse to view conglomerate mergers as totally alien to antitrust analysis, courts commit themselves to a journey through uncharted waters where, of necessity, resort must be made to value judgments.

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[57] Some offenses, such as price fixing, are presumed to produce anticompetitive effects and are proscribed per se. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

[58] "Congress used the words '*may* be substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties." Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962).

[59] FTC v. Procter & Gamble Co., 386 U.S. 568, 578 (1967).

A. *Judicial Value Judgments on Conglomerate Mergers: A Case in Point*

A stark profile of the multidimensional consequences which underwrite the conglomerate drama is documented in the recent *Allis-Chalmers Manufacturing Co. v. White Consolidated Industries, Inc.* case.[60] The line of attack adopted by the "aggressor" company, White, was to gain an initial foothold by buying 31.2 percent of the outstanding Allis stock, with the intention of later cementing the acquisition with a tender offer. A defiant Allis resisted with a suit seeking to enjoin the tender offer on the basis that consummation of the merger would violate Clayton 7.[61] In a two-to-one decision, the Third Circuit proscribed the merger and granted Allis relief based on four reasons: (1) Product extension effects; (2) reciprocal trading; (3) elimination of potential competition; and (4) certain other effects.

A White subsidiary, Blaw-Knox, manufactures steel rolling mills. Blaw-Knox controls 20 percent of the market, making it the third largest firm in an oligopoly where the top four firms control 80 percent of the market. The cost of producing a completed mill is allocable to three sources: (1) Design, construction, and building; (2) electrical drives and controls; and (3) "other" equipment. Electrical drives and controls are not manufactured by the mill manufacturers but are purchased from six firms — General Electric Co., with a 45 percent share of the market, Westinghouse Electric Corp., with 40 percent, Allis with 6 percent, and three others with 5 percent, 3 percent, and 1 percent, respectively. The court reasoned that product extension consequences were likely. The putative merger would afford Blaw-Knox access to the Allis electrical controls, thus creating a package deal to steel producing customers which would result in raising barriers around the steel rolling mill

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[60] 414 F.2d 506 (3d Cir. 1969), *cert. denied*, 38 U.S.L.W. 3254 (U.S. Jan. 13, 1970).

[61] The conflict started on December 6, 1968, when White acquired 31.2 percent of the outstanding stock of Allis from Gulf & Western. Twelve days later Allis filed its complaint seeking a preliminary injunction and a temporary restraining order. An ex parte temporary restraining order prohibiting White from pursuing its takeover efforts was issued by the district court. On January 22, 1969, the court denied the motion for a preliminary injunction because there was "no showing of reasonable probability of success on final trial of the anti-trust allegations . . . ." Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 294 F. Supp. 1263, 1268 (D. Del. 1969). In addition to preventing an immediate takeover, Allis wanted time to solicit aid, reorganize its corporate structure, and effect image-enhancing accounting changes. *See* FORBES, Aug. 1, 1969, at 22; FORTUNE, May 15, 1969, at 234.

manufacturing industry.[62] "The potential entrenchment of the market power of a merged Allis-Chalmers-White industrial complex as a 'full-line manufacturer' in the field of metal rolling machinery is an example of 'product extension' consequences which may be anticompetitive . . . ."[63]

Allis' yearly steel purchases average $44 million, $30 million of which is purchased from the 10 steel companies that buy mills from Blaw-Knox. Such a pressure, reinforced by White's annual steel purchases of $42 million, would produce a structural environment "conducive to reciprocal trading."[64] The court surmised that the mere existence of this purchasing power would be sufficient to induce steel companies to buy mills from Blaw-Knox.[65]

Allis argued that the merger would eliminate them as a potential competitor of Blaw-Knox. Three factors were cited in support of this position: (1) Allis manufactured components and sub-assemblies used by Blaw-Knox; (2) there was evidence that Blaw-Knox had expressed the opinion that Allis possessed the capacity to manufacture 10- or 12-inch mills; (3) Allis was in the process of negotiating with a foreign firm for a license which would enable them to manufacture machinery capable of producing the same end products as produced by the Blaw-Knox mills.[66] The court apparently agreed with the Allis-Chalmers' position, holding that "further inquiry into Allis' status as a potential entrant into this industry is necessary."[67]

The court touched on two additional points. Concern was expressed over the possibility that Allis, as a leading manufacturer of road construction equipment and asphalt pavers, would use its marketing experience and dealer contacts in these fields to sell asphalt plants manufactured by Blaw-Knox. Also discerned by the

[62] The court noted the "already significant barriers to the entry of others into the various segments of the metal rolling mill market." 414 F.2d at 518.

[63] *Id.*

[64] *Id.*

[65] It was on the single issue of reciprocal trading that Judge Seitz concurred. He based his conclusion on an affidavit of Allis' general manager who stated that none of Blaw-Knox's rivals approached the $30 million worth of steel purchased annually by Allis. *Id.* at 526 (concurring opinion).

[66] The dissent questioned the factual correctness of all three conclusions. As to the first point, Judge Aldisert noted that the only support for Allis' claim was that they sold "two heavy-duty tool container block assemblies for use at Alcoa on helicopter blades as a sub-contract with Blaw-Knox." *Id.* at 534 (dissenting opinion). As to point two, the dissent implied that supportive data was nonexistent. The third point relied upon by Judge Stahl was described as drawn from "a vague self-serving declaration by one of Allis' officers." *Id.*

[67] *Id.* at 514.

court was a vertical relationship. Allis, as a manufacturer of cone and gyratory crushers and grinding mills, uses steel castings. Since White produces steel castings and is presently one of Allis' suppliers, the court suggested that a merger would result in foreclosing White's competitors from the Allis market.

The court's difficulty in isolating and identifying areas of competitive disruption serves to erect around it the walls of a dilemma. The product extension relationships made possible by the merger fail to produce discernible negative competitive effects. Economists and court decisions (at least until *Allis-Chalmers*) do not automatically attribute undesirable consequences to product extension mergers.[68] A change in the coloration of the antitrust litmus paper depends upon the coalescence of three factors: (1) The merger results in "node commonality," *i.e.*, "the potential for performing an activity more efficiently as a merged firm than as two separate entities;"[69] (2) one of the firms has the resource capacity to effect a meaningful transfer of power; and (3) a market structure exists in which the power transmittal would produce undesirable effects either internally (the acquired firm draws from its new resource base to "undercut and ravage the less affluent competition"[70]) or externally (*i.e.*, raising barriers to entry).

As to the particulars of "node commonality," the court proceeded no further than a bland definitional conclusion.[71] Analysis of the leverage resource base was equally sparse. Given the extent of control that each had in its respective market — Blaw-Knox's market share of 20 percent and Allis' 6 percent share — the capacity of either to effectively transfer power with noticeable re-

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[68] Indeed it is possible that the capacity to offer a full line of equipment might benefit consumers — and presumably would heighten competition. Moreover, it is possible that the products involved are highly complementary so that economies of scale in production, distribution, selling, or management are achieved. Turner theorizes that efficiency-creating mergers can be procompetitive in two ways: "First, they make it less costly for a firm to enter, thereby promoting entry that otherwise might not take place; and second, they give promise of putting added pressures on other firms to improve their economic performance." Turner, *supra* note 9, at 1328.

[69] Narver, *supra* note 9, at 5.

[70] Reynolds Metals Co. v. FTC, 309 F.2d 223, 229-30 (D.C. Cir. 1962).

[71] 414 F.2d at 518. Two of the cases cited for support involved a form of "node commonality" obviously lacking in a steel rolling mill, electrical control, and drive relationship. In FTC v. Procter & Gamble Co., 386 U.S. 568 (1967), and General Foods Corp. v. FTC, 386 F.2d 936 (3d Cir. 1967), promotional advantages, particularly in advertising, allegedly resulted from the complementary nature of the products. In the other case cited, United States v. Wilson Sporting Goods Corp., 288 F. Supp. 543 (E.D. Ill. 1968), the court looked to Wilson's credit and distribution influence over thousands of retailers. If, in the *Allis-Chalmers* case, distribution node commonality existed, the court failed to describe it. *See* Davidow, *supra* note 9, at 1269.

sults appears both improbable and unlikely.[72] The deep-pocket argument is likewise inappropriate. Any challenge by Allis in the electrical drive and control market would not go unnoticed by General Electric and Westinghouse which, as conglomerates, would presumably have deep-pocket resources of their own and could be expected to fend off any "full-line" efforts by Blaw-Knox and Allis. Conversely, and this demonstrates the susceptibility of conglomerate evaluation to forced conclusions, it could be argued that the merger would have the *procompetitive* effect of disturbing the leadership position of General Electric and Westinghouse, thus lending more symmetry to the market structure.[73] These same criticisms are equally applicable to the court's conclusions regarding the product extension effects of connecting Allis' road construction equipment trade with Blaw-Knox's asphalt plant business.[74]

The reciprocity analysis is even more tenuous. None of the usual threshold questions were explored. No mention was made of either the presence of an intent to engage in the practice or a past history of reciprocity by either firm. The conclusion on "conducive structure" was not supported by the type of examination conducted in *Consolidated Foods*,[75] the case used as supportive authority. The foreclosure potential that would come from the 10 Blaw-Knox customers against whom the purchasing power would be directed was not calculated. Nor was the capacity of these customers to resist leverage discussed. No competitive effect projection was estimated from Blaw-Knox's share of the market and no interest was expressed in ascertaining the likelihood that reciprocity pressures would lead to structural alterations. Likewise, the bald assumption that the mere existence of purchasing power itself is sufficient to promote unilateral decisions on the part of suppliers to reciprocate purchases was unattended by further inquiry.[76]

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[72] As the dissent pointed out, the Allis-White market share figures do not conform to FTC v. Procter & Gamble Co., 386 U.S. 568 (1967) (acquiring firm controlled over 50 percent of the complementary market; acquired company, 48.8 percent); General Foods Corp. v. FTC, 386 F.2d 936, 937-38 (3d Cir. 1967) (acquiring firm, "S.O.S., one of the largest producers," 51 percent overall; "monopoly position in many areas"); and United States v. Wilson Sporting Goods Corp., 288 F. Supp. 543 (E.D. Ill. 1968) (Wilson, "the nation's most prominent producer and marketer of sporting goods" acquiring the "leading manufacturer and seller of gymnasium equipment in the country."). 414 F.2d at 536-37. *See* Davidow, *supra* note 9, at 1253.

[73] Turner, *supra* note 9, at 1367.

[74] 414 F.2d at 537 n.21.

[75] FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965). *See* Austin, *A Survey of the Problems Encountered in Combating Reciprocal Trading Under Existing Trade Regulation Laws*, 41 IND. L.J. 165 (1966).

[76] "Clearly the opportunity for reciprocity is not alone enough to invalidate a

Even when dealing with the question of potential competition — perhaps the most speculative and elastic concept developed since conspiracy, and certainly the quickest avenue to conglomerate proscription — the struggle to stretch points of contact between the merging firms into the calculus of anticompetitive effects is apparent. Departing from prior potential competition decisions, the court relied mainly on subjective indicia. Objective criteria, such as the possession of the necessary technical resources, the existence of an adequate financial base,[77] the managerial capacity, and the proclivity toward market entry, coupled with an evaluation of Allis' impact as an independent entrant on market structure and pricing, were ignored. The existence, the distance from the edge of the market, and the possible entrance of other firms were similarly overlooked.

In glossing over these points, the court ignored its earlier conclusion reached in the product extension analysis that "significant barriers to entry"[78] already circumscribed the metal rolling mill industry. In addition to suggesting an analytical contradiction or oversight, this conclusion raises two points of relevance: (1) The higher the barriers to entry, the greater the resources needed to break through the wall; (2) paired against "significant" barriers, does Allis exert meaningful "potential competition" pressures on the firms in the rolling mill market?[79] Are the pressures strong enough to justify preservation of Allis as a separate entity? Absent an examination of these issues and given its failure to answer the other questions posed above, the court's potential competition analysis constitutes either a journey into speculation or a preface to value judgments.

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merger under § 7. The Clayton Act was not passed to outlaw diversification." FTC v. Consolidated Foods Corp., 380 U.S. 592, 603 (1965) (Stewart, J., concurring). The court could have explored another point, *i.e.*, whether White employed the "profit center" concept. *See* note 15 *supra*. It is interesting to note that Allis, in its program of revitalization, has adopted with much publicity the profit center method. *See* Allis' full-page advertisement in the Wall Street Journal, Fri., Oct. 10, 1969, at 13.

[77] There is some evidence indicating that Allis was not in a financial position to take on the new burdens of expansion. FORBES, Aug. 1, 1969, at 22; FORTUNE, May 15, 1969, at 234.

[78] 414 F.2d at 518. *See* note 62 *supra* & accompanying text.

[79] The Supreme Court has described the rationale of the potential competition doctrine as follows:

> [P]otential competition . . . as a substitute for [actual competition] may restrain producers from overcharging those to whom they sell or underpaying those from whom they buy. . . . Potential competition, insofar as the threat survives . . . may compensate in part for the imperfection characteristic of actual competition in the great majority of competitive markets. United States v. Penn-Olin Chem. Co., 378 U.S. 158, 174 (1964).

The point that *Allis-Chalmers* brings home is that judicial confrontation with the conglomerate merger carries with it the likelihood that judgmental variables of unknown quantity and quality will seep into antitrust jurisprudence.[80] The inference is clear that value judgments have been rendered on questions beyond the scope of antitrust inquiry. In the face of an absence of a set of responsive evaluative guidelines for reaching, much less measuring, competitive effects, the court nevertheless *does* set forth a conclusory schedule of adverse consequences. In *Allis-Chalmers*, any doubts as to the court's tendencies on this point were removed when Judge Stahl expressly adopted, with extensive quotation, the FTC's version of conglomerate transcendentalism set forth in a complaint to be filed against White:

> There is a vital connecting link between growing aggregate concentration and the market power conferred by concentration in individual markets. Many of the largest conglomerate corporations occupy leading positions in numerous industries, particularly the most concentrated ones. *These positions confer economic power and potential economic advantage beyond that associated with sheer bigness alone.*[81]

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[80] A warning against the use of a subjective test for ascertaining potential competition was issued by the Supreme Court in *Penn-Olin*. *See* Davidow, *supra* note 9, at 1244.

[81] 414 F.2d at 523 (emphasis added). On the issue of "conglomerate bigness" the dissent said:

> This hypothesis is nothing more than a restatement of a "Brandeisian bias in favor of human sized institutions," a nostalgic attempt to equate bigness with badness. But Congress has not written this theory into its anti-trust legislation; nor should any court attempt to legislate such a doctrine into it. So long as the legislative proscription of anti-trust activities turns on factors beyond the mere "possibilities" of anti-competitive effects, the courts must be diligent not to substitute the Brandeisian bias for sound analysis. *Id.* at 538.

Senator Hruska says: "[O]ver-all concentration does not seem to me to have much if any relationship to competition within a particular industry. It is difficult to see how competition can be studied unless we look at particular products and markets rather than gross figures by themselves." Hruska, *supra* note 9, at 195.

The Justice Department has recently developed its own version of "aggregate transcendentalism." In Brown Shoe Co. v. United States, 370 U.S. 294, 322 (1962), Mr. Justice Warren stated that one of the cluster of factors bearing on the probability of a lessening of competition in a relevant market was whether the merger occurred or was to occur in a market "that had seen a recent trend toward domination by a few leaders." Complaints recently filed by the Justice Department indicate that the "trend toward concentration in a particular market" standard has been expanded to a "trend of mergers in the aggregate" standard. The latter test has been expressed in the following terms:

> The current trend of mergers of large firms will be furthered and encouraged, thereby (i) increasing the concentration of control of manufacturing assets, (ii) reducing the number of firms capable of entering concentrated markets, (iii) reducing the number of firms with the capability and incentive for competitive innovation, (iv) increasing the barriers to entry in concentrated markets, and (v) diminishing the vigor of competition by increasing

The range of value judgments is not restricted to visceral assumptions on the evils of aggregate concentration. *Allis-Chalmers* demonstrates the probability of the surfacing of a species of corporate "protectionism" — a Monroe Doctrine for "good" companies, keyed to new values such as "freedom from aggression" or a right to "corporate independence" from raiders. Unquestionably, the *Allis-Chalmers* court made more than a feint in this direction when it stated: "Basically what is at stake . . . is the life or death of Allis, a viable independent company, eager to continue as such, pitted against White, an aggressive, fast-moving acquirer of many diverse businesses. . . . To deny preliminary relief could very well mean the end of the road for appellant as an independent economic entity."[82]

The drift into conclusory subjectivism has particular significance to preliminary injunction actions. In a private action for injunctive relief the plaintiff must establish sequentially a violation of the antitrust laws[83] and then show that if the injunction is not issued he will suffer irreparable harm.[84] When the plaintiff is seeking to enjoin a conglomerate merger the difficulties confronting the court in making a satisfactory determination on the first requirement are manifest. As a result, courts are likely to change the sequence of analysis and focus initially on the irreparable harm issue. Consequently, factors such as the effects of a takeover on "professional and management employee recruitment, morale and performance"[85] of the target company will emerge as the prime determinants of the action, obliterating the antitrust violation issue.

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actual and potential customer-supplier relationships among leading firms in concentrated markets. United States v. Northwest Indus., Inc., Complaint of B.F. Goodrich Co., Civil No. 69-C1102, at para. 39(d) (N.D. Ill., filed May 21, 1969).

For a similar clause, see United States v. Ling-Tempco-Vought, Inc., Complaint of Jones & Laughlin Steel Corp., Civil No. 69-438, at para. 33(c) (W.D. Pa., filed April 14, 1969). For a discussion of some dangers in reading too much into concentration figures, and for an analysis of the differences between concentration in a particular industry and "megacorp" concentration, see Rose, *Bigness is a Numbers Game*, FORTUNE, Nov. 1969, at 113.

[82] 414 F.2d at 525.

[83] Clayton Act § 16, 15 U.S.C. § 26 (1964) provides:

> [A]ny person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief . . . is granted by courts of equity . . . .

[84] MacIntyre, *Antitrust Injunction: A Flexible Private Remedy*, 1966 DUKE L.J. 22; Note, *Preliminary Injunctions and the Enforcement of Section 7 of the Clayton Act*, 40 N.Y.U.L. REV. 771 (1965).

[85] 414 F.2d at 515-16.

Allis-Chalmers is an open window to the analytical approach provoked by the conglomerate mystique.[86] Structuring of industrial society will coincide with a particular court's perspective of the peculiar "equities" of the acquisition. Methods of takeover, the form and degree of resistance offered by the target company, the impact on personnel or on customers, methods of financing, plus a myriad of other factors, will emerge as vital influences on proscription. Moreover, in embarking on this course, courts are ignoring the congressional mandate to bar only those mergers that raise the probability of disruptive effects on competition sufficient enough to justify prohibition. Finally, the wide choice of value judgments available to the judiciary and the absence of a transcending point of reference render it unlikely that forthcoming decisions will manifest anything close to a sense of regularity and predictability.

B. *Administrative Agency Control of the Marketplace*

It is becoming increasingly evident that in government-instituted antitrust suits holdings of illegality are close to inevitable.[87] Mr. Justice Stewart once complained that the only consistency that he could discern in Clayton 7 litigation was that "the Government always wins."[88] The experience of sifting through a maze of complex facts and relating findings to decisional constraints has had perhaps a cumulative effect on the judiciary.[89] Courts have apparently adopted, albeit subconsciously, the theory that if the government investigates and analyzes market data and then files suit, it is logical and easier to begin scrutiny under a presumption of illegal-

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[86] The denial of certiorari by the Supreme Court of White's petition for appeal enlarges the significance of the Third Circuit's treatment of the conglomerate merger. 414 F.2d 506, *cert. denied*, 38 U.S.L.W. 3254 (U.S. Jan. 13, 1970). The Wall Street Journal commented:

> Even though the one-line order, in a case involving Allis-Chalmers Manufacturing Co., is unlikely to be the court's last word on the conglomerate controversy, it was greeted with enthusiasm by Government antitrusters. Richard W. McLaren, head of the Justice Department's Antitrust Division, said that "psychologically, this may have an effect" on Federal judges who thus far have taken a dim view of his anticonglomerate drive. Wall Street Journal, Jan. 13, 1970, at 4, col. 7.

[87] Some observers feel that proscription *is* mechanical. Cook, *Merger Law and Big Business: A Look Ahead*, 40 N.Y.U.L. REV. 710 (1965); Sullivan, *Politics, Planning and Trade Regulation: A Glance Toward An Emerging Utopia*, 16 U.C.L.A.L. REV. 1 (1968).

[88] United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (dissenting opinion).

[89] One noticeable effect of antitrust complexity is an increasing reliance on economic theory to bridge the gap between "facts" and adverse competitive "effects." Austin, *supra* note 7, at 742.

ity. The pressures, mostly non-antitrust, accruing from conglomeration are magnifying this impression. There is an unarticulated tendency to assume that tipping the balance in favor of illegality would, at worst, maintain the existing balances of power and, at best, conceivably improve the competitive environment. The attraction of "being on the safe side" increases in inverse proportion to the dearth of relevant decisional guidelines.

The possibility is extremely remote that the judiciary will exercise restraint by imposing sanctions only after making a meaningful search for a probability of a lessening of competition. The cascade of demands for action, the diversity of its sources (*e.g.*, the unusual coalition of business and labor),[90] along with the persistent prompting from the government, will continue its influence in shaping the courts' treatment of conglomeration. The unlikelihood of a detached competitive effect interpretation of the antitrust laws is compounded by the possibility of a curious ad hoc alliance between the Justice Department or the FTC and some of the target companies. When a target company is resisting a takeover and at the same time the government takes action against the aggressor an atypical adversarial milieu is created. Two of the three parties in the action are out to prevent the merger. It is obvious that under these conditions the government can count upon the target company to serve as a bountiful source of mutually self-serving testimony.[91] This type of evidence, *i.e.*, the views of corporate officials, would have a crucial effect on all issues, but particularly on elusive and subjective points such as reciprocity (or reciprocity "effect") and potential competition.[92]

Even when not working in partnership with the government, the pressures exerted by the resisting target company could play a significant role in decreasing the likelihood of judicial restraint. While generally encouraged, private antitrust enforcement has been deterred in the Clayton 7 area because of the difficulty of proving damages and the length of litigation. Since these impediments do

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[90] To facilitate bargaining, labor unions prefer dealing with large firms in concentrated industries. The atomistic structure of the conglomerate firm makes it difficult to exert leverage. A strike against a single subsidiary representing a low portion of the firm's profits provides a low base for pressure.

[91] Another possibility is that the target company might have the benefit of a pending government suit. For the dissent's view on the effect of this possibility, see 414 F.2d at 530.

[92] The Supreme Court has cautioned against reliance on "lay evidence" from rivals "on so complex an economic-legal problem as the substantiality of the effect" of the merger. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 367 (1963).

not exist where injunctive relief is sought, increased Clayton 7 private action can be expected. In seeking injunctive relief, the target company resembles an extra-governmental antitrust agency. The line of attack adopted by the targets will be more aggressive than that of the government, because, with the vested interest of survival at stake,[93] the management of the resisting firm would overwhelm the court with every conceivable line of argumentation. Hence, any gaps in attack theories overlooked by the government or left open because of policy reasons would be filled in by the target companies.

This foretells a consistent series of victories for the government, making litigation a battleground of dilatory tactics reminiscent of Charles Dickens' *Bleak House*. The likelihood of consistently successful anticonglomerate litigation, effectuated by the demise of meaningful judicial implementation of the antitrust laws as they relate to mergers, will localize immense new powers of leverage in the executive branch.[94] To be sure, the various arms of the executive branch already possess significant means to shape the general mood of the economy and to affect trends of industrial growth in particular areas — the very presence of office exudes the power to influence. Specific methods, such as tax policies, distribution of defense spending, the selection of personnel to head the agencies, along with other techniques, can be employed to shape and institute economic policy, but these methods are at best oblique in thrust. The varying intensity of commitment to implement these techniques and the fact that their efficacy is frequently diluted by pressures unrelated to economic planning and organization reduces their range of impact. On the other hand, when, as a result of automatic proscription, the courts transfer decision making responsibilities to the FTC and the Justice Department the consequence is the creation of a new power unencumbered by diluting intrusions. In particular, it is a type of restructuring power that is

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[93] Management's instinct for survival cannot be underestimated. Peter Drucker contends that corporate survival, not profit maximization, is the firm's basic objective. H. ANSOFF, CORPORATE STRATEGY 33 (1965).

[94] It should be noted that there exists a fairly widespread view that the issues raised by antitrust cannot be adequately treated in an adversarial system. Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385 (1964). Mr. Justice Jackson once remarked:

> I regard it as unfortunate that the Clayton Act submits such economic issues to judicial determination. It not only leaves the law vague as a warning or guide, and determined only after the event, but the judicial process is not well adapted to exploration of such industry-wide and even nation-wide questions. Standard Oil Co. v. United States, 337 U.S. 293, 322 (1948) (dissenting opinion).

unencumbered by antitrust constraints. Antitrust evaluative considerations would become, at best, a secondary influence in whatever decisions are made in industrial restructuring. Instead, the direction and character of the structuring process would be molded by political and social value judgments.[95] This absence of dilutive effects provides the executive branch with the capability of effecting immediate, direct, and far-reaching transformations in the industrial topography.

Replacing the competition preserving orientation of antitrust with the shifting and vacillating tides of social and political judgments would obviously constitute a fundamental departure from the traditional perspective; it is certainly a departure which would raise some significant issues. The ad hoc creation of norms for industrial conduct and economic development, bypassing Congress in the process, violates entrenched constitutional principles of predetermined allocation of governmental responsibility. Along with usurping congressional prerogatives, the executive branch, in its evaluation of the success of corporate groups or individuals in satisfying its norms, would be functioning as an extra-judicial body. To those affected, due process safeguards — the right to an open hearing, an opportunity to rebut, and access to appeal — inherent in the adversary system would be unavailable.[96]

The ephemeral cadence of political and social judgments unfettered by the restraints of established enforcement standards would impose formidable problems of planning on the business community. Anticipation and preparation would be hindered by the omnipresence of a plethora of competing value judgments; clashes would thus be frequent, and the results — both over the short and long run — would be quite indecisive. Agreement on social priorities is always hard to attain even, or particularly, within political parties. Changes in administrations would precipitate automatic changes in the velocity and direction of leverage.[97] Moreover, the routes for curing economic and social ills are diverse and susceptible to accommodating many positions. Segments of the economy would

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[95] For a discussion of this consequence, see Cook and Sullivan, *supra* note 87.

[96] Sullivan, *supra* note 87, at 34.

[97] Some commentators hold the view that the crackdown on conglomerates is politically motivated. The theory is that the Republican administration is attacking only those conglomerates headed by large contributors to the Democratic party. The Cleveland Press, July 11, 1969, at C-11, col. 7. Another view is that some conglomerates owe much to defense contracts and are therefore part of the military-industrial complex. Segal, *The Time of the Conglomerates*, N.Y. Times, Oct. 27, 1968, § 6 (Magazine), at 151.

compete in endeavoring to obtain unofficial exemption from the imposition of executive leverage. All of this adds up to a surrealistic bent heretofore unknown in the public regulation of the economy.

C. *Conglomerate Legislation: Acquisition Determinism*

Any prediction on the enactment of new legislation must take into account the realities of contemporary merger methodology. The effect of nuances yet to be discovered growing out of an acquisition technique that only recently has been fully exploited renders it impossible for the courts to rationally fulfill their delegatory responsibilities under the "may be substantially to lessen competition" norm. Hence, by necessity, Congress would have to create new criteria for proscription. Whatever standards emerge will constitute a clear value judgment on industrial bigness. It is, therefore, the type of value judgment that is bound to provoke controversy and to arouse the vigorous energy of diverse pressure groups each espousing its own particular plan for antitrust salvation. The pressure for legislation must, therefore, be strong enough to overcome the politician's intuitive reluctance to expose himself to the unpredictable crosscurrents of a controversial issue.

There are signs, however, that the vibrations from a distraught business community have pricked the ever sensitive congressional political antennae. The House Antitrust Subcommittee recently initiated hearings on conglomeration.[98] Both the Johnson and Nixon administrations solicited reports from blue-ribbon groups.[99] Academicians persist in a barrage of commentary, adding to the ever present chant for antitrust reform.[100] Consequently, an argument could be made that the pressures are crystallizing to a point where it is now advisable to anticipate the range and character of the options that Congress would be prone to follow if the enactment stage is reached.

It is safe to assume that Congress would be unwilling to take the drastic and impolitic course of imposing blanket strictures on all

[98] N.Y. Times, July 31, 1969, at 45, col. 2. *See* BNA ANTITRUST & TRADE REG. REP. No. 403 (April 1, 1969).

[99] STIGLER REPORT, *supra* note 20; NEAL REPORT, *supra* note 19. The FTC just recently released its *Economic Report on Corporate Mergers*, BNA ANTITRUST & TRADE REG. REP. A-22 (Nov. 4, 1969).

[100] Much of the clamor for reform is directed toward the FTC. *See* REPORT OF THE ABA COMM. TO STUDY THE FEDERAL TRADE COMM'N (1969). The fact that many of the antitrust laws, such as the Robinson-Patman Act, 15 U.S.C. § 13a (1964), are not consistent with the purposes of antitrust causes some of the pressure for reform.

merger activity. Corporate merger celibacy would satisfy few and antagonize a multitude. Even the most zealous of economic planners would hesitate to deny that mergers can have salutary competitive consequences and in some instances, such as a failing company situation, might be a welcome necessity.[101] Just as unlikely is legislation in the mold of the Public Utility Holding Company Act,[102] where firms operating in unrelated fields seeking to merge would be required to obtain permission from an agency. Since the Justice Department and the FTC are in the process of gaining (if they do not already possess) powers similar in scope, the redundancy of this approach is apparent.[103] Given this background the probability is that Congress would chart a drafting path that would strike a balance between a complete merger embargo and the present mode of attack. The inevitable result of this balancing process would

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101 Nationalization would be the most extreme remedy. Professor Galbraith recommends that firms specializing in government defense work be nationalized. Galbraith, *The Big Defense Firms Are Really Public Firms and Should Be Nationalized*, N.Y. Times, Nov. 16, 1969, § 6 (Magazine), at 50. This would effect those conglomerates, such as Ling-Tempco-Vought, Inc., having divisions engaged in defense work.

102 The Public Utility Holding Company Act of 1935, 15 U.S.C. § 79a (1964). Section 11 of this act gives the SEC the power to:

> limit the operations of the holding company system . . . to a single integrated public utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* that the Commission shall permit a registered holding company to continue to control one or more additional integrated public utility systems, if, after notice and opportunity for hearing, it finds that—
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> (A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;
>
> (B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and
>
> (C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.
>
> The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems. *Id.* § 79k.

See Trienens, *The Utility Act as a Solution to Sherman Act Problems*, 44 ILL. L. REV. 331 (1949).

103 Also unlikely ever to receive congressional approval is Turner's recommendation that the top 50 or 100 firms be required to spin off assets comparable to those obtained in an acquisition. Turner, *Conglomerate Mergers and the Future*, 37 ANTITRUST L.J. 318, 344 (1968).

be an endeavor to develop a systematic plan of channeling the conglomeration urge into predetermined niches.

The most logical and feasible method of effecting merger determinism is to set up an acquisition flow scheme keyed to a structural frame of reference. Benchmark levels of sales, assets, and market shares would delineate the permissible range of acquisition opportunities. Thus a firm with assets, sales, or a market share which exceeded certain levels would be permitted to acquire only firms with sales, assets, or market shares under a specified level. This is the approach adopted in the Neal Report,[104] where it was recommended that Congress enact laws precluding mergers between "large" firms (sales exceeding $500 million or assets exceeding $250 million) and "leading" firms (companies whose market shares exceed 10 percent and which are part of a group of four concerns controlling 50 percent of the market).[105]

This is a relatively convenient approach, capable of removing from the shoulders of the judiciary much of the present analytical burden. Focusing on market structure is compatible with the current view that structure plays a significant, if not dominant, role in determining the level of competitive vigor.[106] It is also likely that acquisition engineering would engender a degree of support from the academic community. Another attractive feature of this form of legislation springs from the rationale that in addition to containing conglomeration legislative guidelines would have a rehabilitative effect on market structures. The assumption is that the conglomerator would enter the market himself or that his power and energy, channeled into an acquired "small" and "underprivileged" firm, would instill the urge and capacity to challenge larger firms. This would produce realignments of market shares — the ultimate consequence being a more symmetrical structure.

Beyond the philosophical conflict over its debilitating impact

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[104] NEAL REPORT, Appendix B, *Merger Act*, *supra* note 19, at 5651. Under a similar recommendation "leading-firm conglomerate mergers" would be presumptively unlawful. Campbell & Shepherd, *Leading-Firm Conglomerate Mergers*, 13 ANTITRUST BULL. 1361, 1363 (1968). This rule would embrace mergers where the acquiring and the acquired firms are among the four largest in at least one concentrated industry (four firms control 40 percent of the market) large enough to be significant (assets of at least $100 million).

[105] NEAL REPORT, *supra* note 19, at 5652.

[106] *See* J. BAIN, BARRIERS TO NEW COMPETITION (1965); R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE (rev. ed. 1967); C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1965); Brodley, *Oligopoly Power Under the Sherman and Clayton Act — From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285 (1967).

on business initiative, acquisition determinism raises a number of issues. Needless to say, setting up acceptable standards of "large" and "small" is a formidable task. This is new ground with little more to serve as guidelines than the a priori meanderings of commentators and *Fortune* magazine's annual list of the "500 largest." Statistical data is often unavailable and frequently unreliable.[107] Another problem is that shifting the emphasis to measuring assets, sales, and market shares does not totally dispense with analytical problems. The intricacies and the fast-paced technologies of today's marketplace makes rote and mechanical measurement of these three elements virtually impossible. For example, mass media techniques are constantly being utilized in an increasingly sophisticated manner to create intense interindustry competition between ostensibly distinguishable products.[108]

There is no assurance that large companies would respond as theorized. Firms might upset the grand design by shifting emphasis to foreign growth areas. And, of course, there is always the possibility — or probability, depending upon one's view — that in terms of overall economic development this method of attacking the problem would prove disastrous.[109] It is, for example, impossible to anticipate the reaction of the investment market. Finally, there is an odor of unfairness in creating an environment in which some firms are shielded from takeover while others are by statute relegated to a state of perpetual vulnerability to acquisition. Such a grouping would obviously have great impact on managerial initiative, recruitment, policy and planning, and on the general competitive climate of the market itself. There is the ironical possibility that the government would have in effect subsidized a "quiet life" for many large and perhaps moribund corporations.

At this point, it is inappropriate to engage in in-depth amplifitory analysis on the issues briefly described in the preceding paragraphs. It would be necessary to depend upon precise assumptions

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107 *See* F. MACKLUP, THE POLITICAL ECONOMY OF MONOPOLY 475-87 (1967).

108 *E.g.*, United States v. Continental Can Co., 378 U.S. 441 (1964) ("Meaningful competition" between glass and metal containers created by advertising). *See* Austin, *Antitrust Proscription and the Mass Media*, 1968 DUKE L.J. 1021.

109 Professor Bork, a member of Task Force on Antitrust Policy (Neal Committee), argued that since the choice of a target company is dictated by estimates of efficiency potential the acquisition engineering recommended by the Neal Report "will either shift the acquisition to a less preferred firm, causing a decrease in the efficiencies realized, or cause the abandonment of any plan to acquire a unit in that industry, causing a complete loss of expected efficiencies." The net result is a loss of efficiencies, a loss ultimately borne by the consumer. *Separate Statement of Robert H. Bork*, NEAL REPORT, *supra* note 19, at 5658.

that defy reasonable prediction. Moreover, such an exercise would only peripheralize the real significance of merger determinism. To permanentize a priori assumptions on aggregate concentration would clearly constitute a sharp break with present antitrust policy. It would mean a repudiation of the premise that the marketplace can (and should) by self-direction efficiently allocate its resources and thereby transfer savings to the public. Participation by the government would no longer descend in response to specific problems. It would also mean repudiation of the notion that economic theory, contoured into a legal framework, can serve as an anticipatory seismograph of competitive disturbances. The most important implication of acquisition engineering is that it represents a significant extension of governmental regulation into a sector of the economy that has been relatively free from close surveillance and control. Indeed, the line of demarcation between the public utility sector and the "free" sector would be fragile.

V. CONCLUSION

The obstinacy of reality indicates that of the three areas of impact — the judiciary, the executive branch, the legislature — conglomerate pressures are likely to cause the most serious transformations in the first two fields. Materialization of new legislation appears unlikely. Inherent congressional anathema of abrupt change of policy is reinforced by the present administration's obvious inclination to rely on an assumed elasticity of present laws to deal with the problem.[110] Undoubtedly, the recent trend of decisions has encouraged confidence in this attitude.[111] As for the other two areas, reality points to the conclusion that the pattern of effects projected above will continue inexorably uninterrupted. The fact that the antitrust laws, even with their proven scope, simply do not touch conglomeration assures the persistency of this projection. Although the precise perimeter of the metamorphosis of court attitudes and the scope of responses by the administrative agencies may reside in the future, it is safe to conclude that socio-economic

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[110] Both Attorney General Mitchell and Antitrust Division Chief McLaren have expressed firm conviction that existing legislation is capable of dealing with conglomeration. Address by Attorney General John N. Mitchell, Georgia Bar Ass'n, June 6, 1969, in 115 CONG. REC. 6480 (daily ed. June 16, 1969).

[111] It should be noted, however, that in two recent cases the government received setbacks. United States v. International Tel. & Tel. Corp., 5 TRADE REG. REP. (1969 Trade Cas.) ¶ 72,943 (D. Conn. Oct. 21, 1969); United States v. Northwest Indus., Inc., 301 F. Supp. 1066 (N.D. Ill. 1969).

views on human resource allocation, a congery of expressions on acquisition engineering, and notions on permissible aggregate size will form the nucleus of the jurisprudence of conglomeration.

Firm judicial resistance constitutes the only real line of defense against the demise of an antitrust policy oriented around a competitive effect standard. This line is bending generally and on occasion has broken. It is, therefore, only a question of time until the administrative agencies move in to take full responsibility for charting corporate growth. When this move is finalized it will mean that conglomeration will have caused a reorientation in antitrust controls and an enlargement of governmental power greater in range than would be likely under new legislation. Whereas legislation covering conglomeration could be expected to eschew broad powers of delegation in favor of specificity and predictability, executive control would in true bureaucratic fashion shift enforcement emphasis with the changing styles of influence. For those who subscribe to the traditional antitrust approach, this is not an attractive picture. Indeed, given a choice, statutorily decreed acquisition determinism is preferable.