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THE ANTITRUST DIVISION AS A REGULATORY AGENCY: AN ENFORCEMENT POLICY IN TRANSITION

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INTRODUCTION

The controversy over corporate control of capital markets has reached a high point the last six years. The corporate landscape is submerged beneath a tidal wave of mergers, acquisitions, takeovers and leveraged buyouts. Continuous corporate expansion through mergers has produced one banner year after another. Megamergers, valued in the billions of dollars, have increased.¹ A number of factors explains this merger trend. Few people doubt that eased antitrust standards and the Reagan administration's review procedures, employed the last six years, are major factors.

Several theories have been advanced to explain why mergers are popular and beneficial. The principal justification is that competition in the market for corporate control has beneficial effects on society and the economy. First, mergers permit the movement of assets from lower-

1. Mergers first increased substantially in the 1960's and 1970's. The period from 1968 to 1973 was a period of particularly intense merger activity. In 1969 alone, 6,107 acquisitions took place. In comparison, while the number of mergers in 1985 was but half that of 1969, the 1985 number of 3,001 was 30-25% more than the number of transactions in the ten year period from 1975-84. But the number of transactions is not the whole picture. Important also is the dollar value of the acquisition. For instance, while the number of 1969 mergers was double those of 1985, their total value was only about one-seventh of that of 1985. The value of the annual transactions has increased fourfold since 1980. The size of individual transactions has grown substantially; there were no billion dollar transactions in the banner year of 1969. The first appeared in 1970, followed by five between 1970 and 1978. Thereafter billion dollar transactions increased substantially: 18 in 1984, 36 in 1985, and 27 in 1986, the largest of which was \$13.2 billion. Even Attorney General Meese and Assistant Attorney General Ginsburg have conceded that the annual dollar volume of mergers and acquisitions now has exceeded the peak reached in 1968 by 40%. This may well explain why the market for corporate control and the attendant mergers are receiving increased attention. *See Appendix. See generally* Statement of Douglas Ginsburg, Assistant Attorney General, Antitrust Division, before the Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, U.S. House of Representatives, March 5, 1986; Statement of Edwin Meese III, Attorney General, before the Committee on the Judiciary, U.S. Senate, April 9, 1986; Statement of Charles F. Rule, Deputy Assistant Attorney General, before the Cookware Manufacturers Association, May 1, 1984; *N.Y. Times*, March 13, 1986, at 36, col. 2; 52 *ANTITRUST & TRADE REG. REP. (BNA)* 269-70 (Feb. 12, 1987).

One author has stated that the first billion dollar merger occurred in 1901 when United States Steel was formed. K. DAVIDSON, *MEGAMERGERS* xiii (1985).

higher-valued uses through increased efficiencies and redeployment of assets. The restructuring necessitated by changing technologies often prompts mergers. Second, mergers serve as a means to replace or discipline ineffective and entrenched corporate management. Third, mergers can produce efficiencies through joint operating agreements, economies of scale, financial economies and economies of scope. Fourth, mergers can provide resource and service access for both the acquiring and acquired firms.²

Other theorists argue that the current merger movement is counter-productive. Common criticisms of the effects of corporate mergers include: 1) forcing management into operating only on short-term goals and protecting against hostile takeovers, thereby diverting management attention; 2) damaging management and personnel morale, causing dislocations in human organization; 3) misallocating financial resources of lending institutions, "crowding out" more productive investments; 4) increasing concentration and market power; 5) frequent breakup or divestiture of merged firms; and 6) leveraging to finance the acquisition, which increases the debt-equity ratio to unacceptable levels.³

2. K. DAVIDSON, *supra* note 1. See also IV P. AREEDA & D. TURNER, *ANTITRUST LAW* 273-88 (1980); G. BENSTON, *CONGLOMERATE MERGERS: CAUSES, CONSEQUENCES, REMEDIES* (1980); H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 293-300 (1985); E.T. SULLIVAN & H. HOVENKAMP, *ANTITRUST LAW, POLICY & PROCEDURE* 561-66 (1984); Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 *TEX. L. REV.* 661 (1982); Carlton, Landes & Posner, *Benefits & Costs of Airline Mergers: A Case Study*, 11 *BELL. J. ECON.* 65 (1980); Easterbrook, *Is There a Ratchet in Antitrust Laws?* 60 *TEX. L. REV.* 705 (1982); Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?* 125 *U. PA. L. REV.* 1191 (1977); Fisher & Lande, *Efficiency Considerations in Merger Enforcement*, 71 *CALIF. L. REV.* 1580 (1983); Ginsburg and Robinson, *The Case Against Federal Intervention in the Market for Corporate Control*, *BROOKINGS REV.* 9 Winter 1986; Jarrell & Bradley, *The Economic Effects of Federal & State Regulations of Cash Tender Offers*, 23 *J.L. ECON.* 371 (1980); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *HASTINGS L.J.* 65 (1982); Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 *CASE W. RES. L. REV.* 381 (1980); Williamson, *The Modern Corporation: Origins, Evolutions, Attributes*, 19 *J. ECON. LITERATURE* 1537 (1981); Williamson, *Economies as an Antitrust Defense: Revisited*, 125 *U. PA. L. REV.* 699 (1977); Williamson, *Allocative Efficiency and The Limits of Antitrust*, 59 *AM. ECON. REV.* 105 (1969); Williamson, *Economies as an Antitrust Defense: Reply*, 59 *AM. ECON. REV.* 954 (1969); Williamson, *Economies as an Antitrust Defense: The Welfare TradeOffs*, 58 *AM. ECON. REV.* 18 (1968); Williamson, *Economies As An Antitrust Defense: Correction and Reply*, 58 *AM. ECON. REV.* 1372 (1968); Discussion, *Capitalism and Monopolistic Competition: I. The Theory of Oligopoly*, 40-2 *AM. ECON. REV.* 63, 64. (1950) (remarks of Joe S. Bain).

3. See generally R. RUMELT, *STRATEGY, STRUCTURE AND ECONOMIC PERFORMANCE* (1974); Drucker, *Corporate Takeovers—What Is To Be Done?*, 82 *PUBLIC INTEREST* 3, 12-13 (1986); Firth, *The Profitability of Takeovers and Mergers*, 89 *ECON. J.* 316 (1979); Scherer, *Takeovers: Present and Future Dangers*, *BROOKINGS REV.* 15 Winter 1986; Weston & Smith, *Further Evaluations of*

The Antitrust Division of the Department of Justice is charged with the responsibility of challenging mergers which have a reasonable probability of substantially lessening competition or tending to create a monopoly.⁴ Merger enforcement has not always been consistent, however, varying with administration agendas and economic theories. For example, from the inception of the Clayton Act in 1914 until major revision of the statute in 1950, the Department of Justice brought only sixteen merger cases.⁵ Over the next decade only twenty-seven mergers were challenged by the government. In 1968, the highpoint of its enforcement activity, the Department filed twenty-four cases.⁶ In the first five years of the Reagan Administration, the Antitrust Division challenged only twenty-six mergers out of over 10,000 merger applications.⁷ Thirteen of those challenged cases resulted in resolution through the entry of consent decrees.⁸

Serious concern has been expressed in several quarters, including the Federal Reserve Board,⁹ about the present relaxed standards governing antitrust enforcement. The Antitrust Division continues to advance a merger policy which, it asserts, "distinguishes more clearly between procompetitive, efficiency-enhancing mergers on the one hand, and mergers that create a significant probability of increasing prices to consumers, on the other."¹⁰ But whatever economic policy the Department of Justice selects as its benchmark for the interpretation of the legal merger standards, one of the most interesting and controversial issues of merger law today is the public ordering or means of resolving merger conflicts.

This Article focuses on the Antitrust Division's actual enforcement techniques for resolving merger disputes, rather than the underlying economic policy which favors or disfavors large mergers. Although the eco-

Conglomerate Performance, J. BUS. RES. 5 (1977); Statement of Charles F. Rule, *supra* note 1, at 5-10.

4. 15 U.S.C. § 18 (1982).

5. Statement of Charles F. Rule, *supra* note 1, at 3 n.1.

6. *Id.*

7. Solomon, *Administration Hopes to Extend the Reagan Revolution to Antitrust Laws*, NAT'L J. Jan. 18, 1986, at 144; Memorandum to Cabinet Councils on Changes In Antitrust Laws dated Nov. 8, 1985, 49 Antitrust & Trade Reg. Rep. (BNA) 946, 947 (1985); 50 Antitrust & Trade Reg. Rep. (BNA) 483 (1986).

8. 49 Antitrust & Trade Reg. Rep. (BNA) 946 (1985). The 26 suits break down as follows: 5 in 1981, 7 in 1982, 2 in 1983, 4 in 1984, and 8 in 1985. On five other occasions the threat of a suit was sufficient to terminate proposed acquisitions.

9. N.Y. Times, Dec. 29, 1985, § 3, Col. 2, at 1.

10. Statement of Edwin Meese III, *supra* note 1, at 1.

conomic policy employed to interdict corporate takeovers and its distributional effects are obviously important public policy inquiries, equally important, and no less controversial, is the process or procedure by which the Antitrust Division interprets and enforces its statutory mandate.¹¹

The thesis of this Article is that the Antitrust Division has changed from a traditional, litigation-oriented enforcement agency to a regulatory agency. The Antitrust Division, as an economic regulator, has adopted a negotiational rather than an adversarial posture. The result is an avoidance of lengthy and costly adversarial litigation in exchange for a more efficient resolution of merger issues. The change is not merely procedural. It has important implications for enforcement policy, compliance incentives, and substantive law. For example, the present administration uses the review process to favor market deregulation. Another administration in Washington may decide that the review process also permits a pervasive industrial policy. The review process analyzed here could serve either ideology. For that reason, a careful analysis of the present process is in order.

Although the new policy may result in more cost-efficient enforcement, a regulatory role for the Antitrust Division is antithetical to the original intention of the Sherman and Clayton Acts. Nevertheless, the transition has occurred, and at times Congress has sanctioned or ratified, at least implicitly or through inaction,¹² this enforcement transition.

11. The process by which the Antitrust Division resolves acquisition conflicts may be outcome-determinative of the issues; thus selection of conflict resolution process may preordain the result. But the regulatory process is broad enough to facilitate either deregulation or a pervasive industrial policy. Ideology could dictate either result.

The fact that the present administration favors deregulation and self-correcting markets does not undercut the conclusion that the merger review process at the Antitrust Division is a form of regulation. That a regulator exercises regulatory authority benignly does not mean that one is not a regulator. The character or structure of the process dictates the classification. Few would doubt that the Interstate Commerce Commission, the Federal Communications Commission, or the Federal Trade Commission are regulatory agencies, even though they now operate under a deregulation philosophy. *See infra* text accompanying notes 224.

12. On the use of congressional inaction or the exercise of congressional oversight as an implied congressional ratification, *cf.* *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 533-35 (1982); *Haig v. Agee*, 453 U.S. 280, 290-306 (1981); *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981); *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974); *Power Reactor Dev. Co. v. International Union of Elec., R. & M.W.*, 367 U.S. 396 (1960); *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535 (1954); *United States ex rel. Chapman v. Federal Power Comm'n*, 345 U.S. 153 (1953); *Costanzo v. Tillinghast*, 287 U.S. 341 (1932); *United States v. Jackson*, 280 U.S. 183 (1930); *Clayton v. Utah Territory*, 132 U.S. 632 (1890).

The constitutional question whether the Antitrust Division is engaged in a lawful delegation of

Now that the transition from a traditional, enforcement-oriented agency to an economic regulator has occurred, and can be clearly demonstrated in the context of the current corporate-takeover wave, it is time for Congress to evaluate this enforcement transition.

This Article attempts to explicate the tensions created by the Antitrust Division's regulatory posture. Section I of this Article reviews the original intention of the drafters of the Sherman and Clayton Acts. Section II identifies classical models of regulation. Section III describes and analyzes specific procedures and rules followed by the Division. That section demonstrates how the Division has changed its enforcement posture to that of a *de facto* regulator, consistent with recognized models of regulation and more recent legislative action. Finally, section IV concludes with an analysis of how the Division's present review procedures enhance efficiency and clarity in the law and how they are consistent with and supported by the emerging trend of alternative dispute resolution.

I. LEGISLATIVE HISTORY

A. *The Sherman Act*

Congress considered the first antitrust bills in 1888.¹³ Senator Sherman, sponsor of the principal bill, argued that Congress could regulate trusts only through its taxing power; later he broadened his argument, claiming that Congress had authority to regulate under the commerce clause.¹⁴ After two years of debate, Congress adopted the Sherman Antitrust Act in 1890. The original text contained eight sections, including civil and criminal enforcement provisions.

Congress intended that courts should interpret the Sherman Act on a case-by-case basis within the context of the common-law principles and

executive powers envisioned by Congress is beyond the scope of this article. This issue may go even beyond the recent Supreme Court delegation cases. *See, e.g.,* *Bowsher v. Synar*, 54 U.S.L.W. 5064 (U.S. July 7, 1986); *INS v. Chadha*, 462 U.S. 919 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926).

13. A committee of the House of Representatives conducted early investigations of monopolies in 1888. *See Report of Investigations of Trusts*, H.R. REP. vol. IX, No. 3112, 50th Cong., 1st Sess. 9 (1887-88). *See also* 21 CONG. REC. 2456 (1890); 19 CONG. REC. 7512 (1888); 19 CONG. REC. 6041 (1888).

14. E.T. SULLIVAN & H. HOVENKAMP, *ANTITRUST LAW, POLICY & PROCEDURE* 25 (1984); W. LETWIN, *LAW & ECONOMIC POLICY IN AMERICA* 87-90 (1965). *See also* 21 CONG. REC. 2599 (1890); A. NEALE & D. GRAYER, *THE ANTITRUST LAWS OF THE U.S.A.* (3d ed. 1980); H. THORELLI, *THE FEDERAL ANTITRUST POLICY* (1954).

precedents. The statute contained only very general, substantive principles and created public offenses and private causes of action against restraints of trade and monopolizations. Importantly, the new legislation gave the federal courts subject matter jurisdiction. At common law, if restraints were found unreasonable, courts considered the restraints void and unenforceable. Under the Sherman Act, however, a private suit for treble damages could be maintained, and the federal government could bring criminal actions for fines and imprisonment or civil actions for injunctive relief.

Originally, jurisdiction to institute proceedings on behalf of the government rested with the Attorney General's office.¹⁵ From 1903 until 1933, an Assistant Attorney General within the Department of Justice had authority to enforce the antitrust law. The Antitrust Division was not established until 1933.¹⁶

A review of the legislative debates preceding the passage of the Sherman Act indicates that there was very little, if any, discussion about the role of the Department of Justice.¹⁷ Debate centered largely around the constitutionality of the proposed legislation and the dislike for trusts, combinations and monopolies.¹⁸ The Senate Judiciary Committee drafted the final bill, largely through the work of Senators Edmunds, George, Hoar and Evarts.¹⁹ The final bill, similar to Senator Sherman's earlier proposal, contained more severe penalties²⁰ and gave the Attorney General responsibility over the public enforcement provisions. The drafters expressed no doubts that the Attorney General had authority to enforce the law.²¹ As one congressman noted during the floor debate:

[The Sherman Act] invokes the equity side, the greatest restraining power

15. 21 CONG. REC. 2570 (1890); White, *Introduction, Commemorating the Tenth Anniversary of the Economic Policy Office of the Antitrust Division*, 29 ANTITRUST BULL. 1-2 (1985).

16. *Id.* The Economic Policy Office of the Antitrust Division was formally established in 1973.

17. 21 CONG. REC. 2456, 3148 (1890). At least two commentators have argued that "the bill which was arduously debated was never passed, and that the bill which was passed was never really discussed." W. HAMILTON & I. TILL, *ANTITRUST IN ACTION* 11 (1940). *See also* A. WALKER, *HISTORY OF THE SHERMAN LAW* 1-62 (1910).

18. *Id.* *See also* W. LETWIN, *supra* note 14, at 91-95.

19. W. LETWIN, *supra* note 14, at 94. *See also* W. HAMILTON & I. TILL, *supra* note 17, at 8-10 (1940).

20. W. LETWIN, *supra* note 14, at 94. *Compare* W. HAMILTON & I. TILL, *supra* note 17, at 9-10 with A. WALKER, *supra* note 17, at 27.

21. *See* W. LETWIN, *supra* note 14, at 100 (citing N.Y. Times, Nov. 25, 1892, at 4, col. 2: "Let the officers charged with the enforcement of the law do their full duty and Trusts and combinations will go to pieces as quickly as they sprang into existence" (quoting Senator Edmunds)). *See also* 21 CONG. REC. 2569 (1890).

of the court, and it makes it the duty of United States district attorneys under the direction of the Attorney General, to go upon the equity side of the court and invoke the strong hand of the chancellor, backed by the whole power of the United States . . .²²

But the Sherman Act Congress gave little attention to the question of how discretion to enforce the law, either public or private, should be exercised.²³ One retrospective report to the Congress in 1940 observed:

Nor was there an attempt to devise new machinery of enforcement. In the thought of the nineties the law should be as nearly self-enforcing as possible. The main reliance seems to have been placed upon the private suit. A man knew when he was hurt better than an agency or government above could tell him. Make it worth their while—as the triple-damage clause was intended to do—and injured members could be depended upon to police an industry. If more were needed, the resort was to the usual course of Federal justice. Another duty was added to the overlarge obligations of the Attorney General and of the several district attorneys scattered throughout the land.²⁴

As presidential administrations changed over the years, enforcement of the antitrust laws also changed. In the early years after the adoption of the Sherman Act, public enforcement of the act took the form of litigation, not regulation.²⁵ This early policy interpretation is consistent with the scant legislative history on point, which suggests that Congress did

22. A. WALKER, *supra* note 14, at 39, 59-60 (citing 21 CONG. REC. 4099 (1890)).

23. W. HAMILTON & I. TILL, *supra* note 17, at 10.

24. *Id.*

Section [sic] 4 and 5 of the Sherman law confer jurisdiction in equity upon the several Circuit Courts of the United States to prevent and restrain violation of the Sherman law in pursuance of petitions presented by the district attorneys of the United States under the direction of the attorney general of the United States on behalf of the United States. Those two sections contain a few special directions for guidance of such proceedings. . . .

A. WALKER, *supra* note 17, at 59.

As one commentator opined 20 years after the statute's enactment:

It therefore follows that whenever it becomes the duty of a particular district attorney of the United States to institute proceedings in equity for the purpose of stopping a particular combination from continuing past violation of Section 1 of the Sherman law, it also becomes the duty of the same district attorney to institute and prosecute proceedings to accomplish the seizure, condemnation and forfeiture of whatever property was the subject of the combination . . . Moreover, such forfeiture proceedings, under Section 6 of the Sherman law, should always follow or accompany any indictment under Section 1 of that statute.

A. WALKER, *supra* note 17, at 60-61.

25. W. LETWIN, *supra* note 14, at 103-42. The Sherman Act could control the trusts, Senator Edmunds said, "if the officers of the Government having charge of the enforcement of law understand their duty and are willing to do it, being, of course, supplied with sufficient means to put it into force." *Id.* at 142 (citing Letter from Edmunds to Sleicher, Jan. 2, 1903 in 36 CONG. REC. 1901

not intend to establish a regulatory agency to enforce the legislative scheme.²⁶ That the Department did not enforce the statute regularly or consistently throughout its early life does not undercut the statute's litigation focus. Irregular enforcement was not due to a lack of authorization or statutory clarity, but rather to discretion and budget constraints.²⁷ In subsequent years enforcement mechanisms were

(1903)). See also W. HAMILTON & I. TILL, *supra* note 17, at 34, 121-43; A. WALKER, *supra* note 17, at 63-162, 167.

26. See IX A. BICKEL, *THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-21*, 130 (1984) ("The Sherman Act, . . . was a method of regulation by lawsuit."); Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189, 1216 (1986) ("In 1890 Congress passed the Sherman Act. In doing so, however, Congress chose not to establish an administrative agency as a means of implementing its regulatory scheme.").

27. W. LETWIN, *supra* note 14, at 103-42; W. HAMILTON & I. TILL, *supra* note 17, at 27-35. See also 47 *CONG. REC.* 4183, 4185 (1908); D. DEWEY, *MONOPOLY IN ECONOMICS AND LAW* 143-49, 156 (1959); H.B. THORELLI, *FEDERAL ANTITRUST POLICY* 181, 215, 565 (1955).

Prior to the administration of Theodore Roosevelt in 1901, only 18 federal antitrust suits were filed during the administrations of Harrison, Cleveland and McKinley. 47 *CONG. REC.* 4183, 4186 (1908). W. HAMILTON & I. TILL, *supra* note 17, at 135; A. WALKER, *supra* note 17, at 164. During this same time only 22 private actions were litigated under the Sherman Act. A. WALKER, *supra* note 17, at 81, 113, 122, 161. Harrison Administration: 6 government suits, 3 private suits; Cleveland Administration: 8 government suits, 8 private suits; McKinley Administration: 4 government suits, 11 private suits. The United States government was successful in 10 of the 18 cases it brought during this period. A. WALKER, *supra* note 17, at 164-65. Six years after the Sherman Act became law, the House of Representatives requested, in resolution form, the Attorney General to report what steps the Department of Justice had taken in enforcing the Sherman law. The request implied that enforcement of the statute was being neglected. *Id.* at 167.

Under the federal system, a prosecutor has discretion to decide what charges to institute, when to file suit and where suits should be brought. See *United States v. Batchelder*, 442 U.S. 114, 123-25 (1979) (government free to prosecute under any statute defendant violates, without regard to penalty, provided prosecution not discriminatory); *United States v. Mayo*, 705 F.2d 62, 77 (2d Cir. 1983); *United States v. Hamm*, 659 F.2d 624, 628 n.13 (5th Cir. 1981) (en banc) (executive has discretion to decide which charge to bring) (quoting *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967)). See generally A. GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* (1981); M. HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* (1978); F. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* (1970); D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* (1966). See also *United States v. Bagnell*, 679 F.2d 826, 830-33 (11th Cir. 1982) *cert. denied*, 460 U.S. 1047 (1983) (prosecutor has discretion to determine in which district to bring charges); *United States v. Lavasco*, 431 U.S. 783, 796 (1977); *cf. United States v. Kendrick*, 692 F.2d 1262, 1267 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983). See generally *United States v. Batchelder*, 442 U.S. 114, 124 (1979) (decision whether to prosecute generally within prosecutor's discretion); *United States v. Hamm*, 659 F.2d 624, 628-29 (5th Cir. 1981) (en banc) (executive is absolute judge of whether prosecution should be initiated); *United States v. Sade*, 652 F.2d 1126, 1135 (1st Cir. 1981) (executive exercises broad discretion in deciding whether to prosecute); *United States v. Girst*, 645 F.2d 1014, 1015-16 (D.C. Cir. 1979) (*per curiam*).

Discretion exists by virtue of the prosecutor's role as a member of the Executive Branch of the

strengthened.

B. Legislative Activity Prior to the Passage of the Clayton Act

As noted above, from the passage of the Sherman Act in 1890 until the start of Roosevelt administration at the turn of the twentieth century, the Attorney General brought relatively few federal enforcement actions. As early as 1882 Roosevelt considered antitrust an important issue, but when he took office in 1901 he had not formulated an antitrust policy. Only later did he take the lead in advocating strong enforcement.²⁸

The Department of Justice filed its first case under the Roosevelt administration, *United States v. Northern Securities*, in 1902.²⁹ Shortly thereafter, Roosevelt proposed a national regulatory statute: "In the interest of the whole people, the nation should, without interfering with the power of the States in the matter itself, also assume power of supervision and regulation over all corporations doing an interstate business."³⁰ While he was increasing the prosecutions substantially,³¹ he also became the first to advocate a regulatory agency for antitrust. However, Roosevelt's proposal clearly indicated that he did not envision the Department of Justice in the role of economic regulator.

The first regulatory effort was the creation of the Bureau of Corporations in 1903.³² Roosevelt wanted the Bureau to investigate corporations and report its findings to the administration. The Bureau's first effort

government which is charged, under the Constitution, with ensuring that the laws of the United States are "faithfully executed." U.S. CONST., art. II, § 3. See *Noler v. Saxbe*, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974). In interpreting this discretion, courts frequently draw distinctions between the decision to file a lawsuit or the decision to dismiss the case. *Id.* (citing *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973)). See also *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). When the distinction is recognized, prosecutors generally are required to obtain judicial approval before the prosecutions can be terminated. The United States Department of Justice has summarized appropriate consideration to be weighed and desirable practices to be followed in discharging prosecutorial responsibilities. U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION (July 1980), reprinted in 27 Crim. L. Rep. (BNA) 3277 (1980).

It is this article's thesis that the current role played by the Antitrust Division goes beyond traditional prosecutorial discretion.

28. H.B. THORELLI, *supra* note 14, at 412-15. W. LETWIN, *supra* note 14, at 196, 200.

29. 193 U.S. 197 (1904). See also *United States v. Swift & Co.*, 195 U.S. 375 (1905) (filed in 1902).

30. W. LETWIN, *supra* note 14, at 205, 239. See also H. THORELLI, *supra* note 14, at 420.

31. W. LETWIN, *supra* note 14, at 240; see also W. HAMILTON AND I. TILL, *supra* note 17, at 135-36.

32. Act of Feb. 14, 1903, 32 U.S. Stat. 827, 57th Cong., 2d Sess.

centered on investigating the "Beef Trust."³³ It had investigative authority to act as an adjunct to the Department and to publicize business conduct. Relations between the Bureau and the Department were not always smooth; nor was dual cooperation consistent.³⁴

Since Roosevelt continued to perceive the Department's primary duty as litigation, he pressed for expanded regulatory authority for the Bureau. "To attempt to control these corporations by lawsuits means to impose upon both the Department of Justice and the courts an impossible burden."³⁵ Roosevelt, therefore, called for a strengthened regulatory framework within the Bureau of Corporations³⁶ urging that an expert commission with supervisory power over firms engaged in interstate commerce was needed. He called for regulation "by an executive body, and not merely by means of lawsuits."³⁷ Although a bill to accomplish Roosevelt's objectives was introduced in Congress in 1908, it lost support after long debate.³⁸

The presidential campaign of 1908 saw the Democrats propose, among other changes to the Sherman Act, a federal licensing system. This licensing system would have required an interstate corporation "to take out a Federal license before it [was] permitted to control as much as twenty-five percent of the product in which it deals." "[T]he license [was designed] to protect the public from watered stock and to prohibit the control by such corporation of more than fifty percent of the total amount of any product consumed in the United States."³⁹ President Taft, Roosevelt's successor, proposed a similar form of antitrust regulation.

Instead of proposing amendment of the Sherman Act, Taft urged the establishment of compulsory federal incorporation of interstate business.⁴⁰ Under his proposal, the Department of Commerce would have had authority to regulate stock purchases, to prohibit companies from

33. *United States v. Swift & Co.*, 196 U.S. 375 (1905).

34. W. LETWIN, *supra* note 14, at 240-44.

35. *Id.* at 245. See also H.B. THORELLI, *supra* note 14, at 431.

36. W. LETWIN, *supra* note 14, at 246. *But cf.* H.B. THORELLI, *supra* note 14, at 430.

37. W. LETWIN, *supra* note 14, at 246. See also 42 CONG. REC. 3853-54 (1908); H.B. THORELLI, *supra* note 14, at 551-54.

38. W. LETWIN, *supra* note 14 at 247-50.

39. *Id.* at 251.

40. *Id.* at 252. See also IX A. BICKEL, *supra* note 26, at 95, 128. The federal incorporation statute would provide: "a means, without great financial disturbance, of changing the character, organization, and extent of . . . business into one within the lines of the law under Federal control and supervision, securing compliance with the antitrust statute." *Id.*

holding stock in other corporations except upon prior approval, and to require certain disclosures.⁴¹ Later, after the Supreme Court decided *Standard Oil Co. v. United States*,⁴² Taft amended his federal incorporation proposal to provide for supervision by "an executive tribunal of the dignity and power of the Comptroller of the Currency or the Interstate Commerce Commission."⁴³ Taft's Attorney General, who had negotiated final decrees in major antitrust cases, supported this idea. Attorney General Wickersham said:

It is not right that the Attorney General should be subjected to the responsibility of deciding . . . whether or not a proposed plan of disintegration of an individual combination would restore lawful combination. The questions involved are economic; they depend upon information which we can not have in this department; and it was a mere chance that the Bureau of Corporations had investigated, and, therefore, was possessed of facts which enabled it to come to the assistance of the Department of Justice in this particular instance.⁴⁴

The *Standard Oil* decision had a major impact on subsequent legislation, which substantially broadened the Department's enforcement responsibility. Before *Standard Oil*, Taft, as a federal judge deciding *United States v. Addyston Pipe & Steel Co.*,⁴⁵ had held that the "rule of reason" analysis only applied to ancillary restraints, not to direct restraints such as price fixing, which he characterized as "naked restraints." For Taft, direct restraints were per se illegal regardless of their reasonableness.

In *Standard Oil*, the Supreme Court rejected Taft's interpretation of the coverage of the Sherman Act. Chief Justice White's opinion for the Supreme Court in *Standard Oil*, adopted a rule of reason analysis significantly broader than Judge Taft's standard. White's majority opinion applied a rule of reason analysis to direct, as well as ancillary, restraints in determining the "reasonableness" of the restraint. Only "unreasonable" or "undue" restraints of trade were illegal under the *Standard Oil* view. Applying the newly articulated standard, White found the defendants in *Standard Oil* guilty of engaging in unreasonable restraints of trade. Accordingly, the Court ordered dissolution of Standard Oil.

Immediately after the decision in *Standard Oil*, critics attacked the

41. IX A. BICKEL, *supra* note 26, at 128.

42. 221 U.S. 1 (1911).

43. IX A. BICKEL, *supra* note 26, at 128.

44. *Id.*

45. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

Court, charging that White's broader analysis might weaken the statute and broaden the discretion of the judiciary. The critics denounced the new standard as vague. They feared that the Sherman Act's effectiveness in controlling trusts, combinations and monopolies would be diluted.⁴⁶ As a result, numerous congressional proposals urged the creation of a business court or expert commission that would license the whole range of business decisions from "capitalization to . . . business practices."⁴⁷ Congress viewed the Sherman Act, with its newly announced standard, as merely a "method of regulation by lawsuit,"⁴⁸ too uncertain to be regarded seriously. No congressional consensus emerged on the proposals, however, until after the presidential elections of 1912. The statutory amendments that followed radically changed the nature of the Department of Justice's authority.

C. *The Adoption of the Clayton Act and Direct Control Over Mergers*

The debate in Congress in 1911-12 and the political speeches surrounding the campaign of 1912 demonstrated that few people, if any, in positions of authority believed that the Department of Justice's antitrust enforcement mandate extended beyond filing lawsuits and litigating cases.⁴⁹ After the *Standard Oil* decision, which broadened judicial discretion, the call became even stronger for supplemental antitrust legislation, the creation of a regulatory agency, and the rejection of the idea of federal incorporation. After President Wilson took office in 1912, these proposals became reality.

The legislative debates leading to changes in the antitrust laws began in 1913. Senator Cummins presented three proposals.⁵⁰ The first two provided for a Bureau of Corporations as a separate administrative

46. E.T. SULLIVAN & H. HOVENKAMP, *supra* note 14, at 36-37.

47. IX A. BICKEL, *supra* note 26, at 130.

48. *Id.* (emphasis added).

49. IX A. BICKEL, *supra* note 26, at 129; W. LETWIN, *supra* note 14, at 267-73; D. Dewey, *supra* note 27, at 150-51. Attorney General Harmon, in his report submitted to Congress, strongly supported the use of court litigation as the means of antitrust enforcement, but felt that the detection of possible violations and evidence accumulation should be placed within another bureau. 47 CONG. REC. 4183, 4186. Harmon stressed the need for liberal appropriations and effective organization of prosecutions for Department enforcement of the Sherman Act. *Id.*

50. 49 CONG. REC. 4126 (1913). The Committee on Interstate Commerce said:

First . . . the [Sherman Act] should stand as the fundamental law upon the subject and . . . any supplemental legislation . . . should be in harmony with the purpose of the existing statute. Second . . . it is neither necessary nor desirable at this time to provide for the organization under act of Congress of industrial corporations. . . . Third . . . it is desirable to impose upon corporation [sic] now or hereafter organized under State law, and engaged

agency. The third proposal would have permitted a preclearance approval or disapproval of proposed mergers. The purpose was to facilitate "administrative" ease and efficiency in the enforcement of the antitrust laws.⁵¹ Senator Cummins offered the proposals in the hope that they would regulate competition,⁵² and aid the Department of Justice in its enforcement task.⁵³ The Committee to which these matters were referred was unable, however, to recommend specific legislation.⁵⁴

Throughout the election campaign and in his first year in office, President Wilson urged the adoption of supplemental legislation. In general, Wilson shared Senator Cummins' agenda. He proposed a more explicit statute that would prohibit specific types of conduct and urged the creation of a new regulatory trade commission. Wilson favored a regulatory commission to serve as an expert fact finder to help shape dissolution and divestiture decrees.⁵⁵ Importantly, however, Wilson disapproved of Cummins' proposal to permit a premerger approval or disapproval procedure.⁵⁶

The President believed that the premerger approval process was flawed. Specifically, he feared that a premerger, advisory opinion (which had been used twice in the Roosevelt administration) would bind the

or proposing to engage in such commerce, further conditions or regulations affecting both their organization and the conduct of their business. . . .

Id.

51. *Id.* See also S. REP. No. 1326, 62nd Cong., 3d Sess. 11 (1913).

52. W. LETWIN, *supra* note 14, at 269.

53. 49 CONG. REC. 4127 (1913).

The Department of Justice will ignore a great many unlawful transactions because there will be doubt as to whether the interference . . . is direct or indirect. . . . The committee . . . contents itself now with a statement of its conclusion that there should be further legislation specifically prohibiting certain forms of associations, combinations, or monopoly which admittedly restrain trade and commerce . . . but which may be held by the courts to be indirect or remote interferences.

Id.

54. 49 CONG. REC. 4126 (1913); W. LETWIN, *supra* note 14, at 270.

55. W. LETWIN, *supra* note 14 at 270-73; IX A. BICKEL, *supra* note 26, at 143.

56. 51 CONG. REC. 1962-63 (1914).

What we are proposing to do, therefore, is, happily, not to hamper or interfere with business as enlightened business men prefer to do it, or in any sense to put it under the ban. The antagonism between business and government is over. We are now about to give expression to the best business judgment of America, to what we know to be the business conscience and honor of the land. The Government and business men are ready to meet each other halfway in a common effort to square business methods with both public opinion and the law.

Id. at 1963. "[[T]he opinion of the country] would not wish to see [a commission] empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible." W. LETWIN, *supra* note 14, at 270-73.

government and give the impression that the government was working "with" firms to effect business mergers.⁵⁷ Wilson rejected the notion of a government and business "partnership". He expressed, however, his desire to provide the Department of Justice with "guidance and information" from an administrative body acting as a "clearing house for information."⁵⁸ In fact, the regulatory commission finally approved by the Congress had broader powers than Wilson, or his advisor Brandeis, had ever advocated.

Out of compromise in 1914 came two legislative enactments: the Clayton Act and the Federal Trade Commission Act. Each spoke, either explicitly or implicitly, of the role played by the Department of Justice in the merger area. First, the Clayton Act,⁵⁹ in a marked departure from the Sherman Act, explicitly prohibited certain practices, including certain mergers. Section seven of the Clayton Act prohibited stock acquisitions or mergers that might "substantially lessen competition or tend to create a monopoly in any line of commerce."⁶⁰ Although this vague standard of legality afforded judges little guidance, the legislative history clearly indicated a congressional desire "to arrest the creation of trusts . . . in their incipiency and before consummation."⁶¹ Otherwise, the open-endedness of the standard defied specificity and clarity. Even though the House and Senate were aware of textual ambiguities, the spirit of compromise enjoined the membership from being more specific.⁶² Congress made no provision for preclearance of mergers by the Department of Justice or the newly created regulatory agency, the Fed-

57. W. LETWIN, *supra* note 14, at 270-73. Cummins, recognizing that such a new agency would hold "quasi-judicial" functions and perform a policy role, believed that it could be more efficient than the courts. As discussed *infra* at § III, this was the forerunner to the Department of Justice's premerger notification program in place today.

58. 51 CONG. REC. 1963 (1914). "It demands such a commission only . . . as a clearinghouse for the facts by which both the public mind and the managers of great business undertakings should be guided. . . ." *Id.* This was similar to the proposal made by Attorney General Harmon in 1896. See *supra* note 49.

59. 15 U.S.C. §§ 12-27, 44 (1982).

60. 15 U.S.C. § 18 (1982).

61. H.R. 15657, 63rd Cong. 2d Sess. 1 (1914).

62. H.R. 1142, 63rd Cong. 2d Sess. 18-29 (1914). The Conference Committee Report amplified why Congress was unable to add specificity: "It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. . . . If Congress were to adopt the method of definition, it would undertake an endless task." See also 51 CONG. REC. 10376 (1914) (statement of Senator Newlands discussing the roles of the Department of Justice and the newly emerging regulatory agency); A. BICKEL, *supra* note 26, at 143.

eral Trade Commission. Wilson, and not Cummins, had prevailed on this major issue.

The legislative history underlying the creation of the Federal Trade Commission illustrates how Congress viewed the Department of Justice at the time. The debates made clear that a new regulatory commission would introduce new investigative tools and an administrative "body of law" necessary to make antitrust enforcement more effective.⁶³ The Senate Committee observed that many of the present antitrust problems could have been avoided if a regulatory commission, not the Department of Justice, initially had been entrusted with the enforcement of the Sherman Act. The Committee noted that changes in administrations had caused inherent problems in the Attorney General's office.⁶⁴ The Committee favored a separate administrative agency in part because it believed that the public was not ready for a sharp swing in enforcement as carried out by the Department of Justice. Thus, while maintaining the Department's law enforcement role under the Sherman Act, Congress created the Federal Trade Commission (FTC) for the purpose of establishing a framework for the regulation of corporations engaged in interstate commerce.⁶⁵

Congress gave the FTC investigative and fact finding authority, as well as the power to issue cease and desist orders against "unfair methods of competition." The Commission would define those terms as it enforced the new act⁶⁶ because Congress had declined to offer helpful guidance. Congress expected the Department and the Commission to assess different penalties: criminal penalties by the Department in its traditional role as prosecutor and regulatory penalties by the Commission for controlling or adjusting markets.

63. 51 CONG. REC. 10376 (1914).

64. *Id.* at 10376, 14520-26.

65. *Id.* at 11083. Senator Newlands, who reported for the Committee on Interstate Commerce, said that the purpose of the regulatory commission was to aid the courts and the Attorney General "in framing and enforcing decrees dissolving corporations," to aid in "the enforcement of the Sherman Act" and to be free from "changing incumbency" of the Attorney General's office. He opined that powers of the new trade commission "are not greatly in excess of those now possessed and for years exercised by the Bureau of Corporations." 51 CONG. REC. 10376 (1914).

66. H.R. 1142, 63rd Cong., 2d Sess. 18-29 (1914). The Conference Committee reported: "It is now generally recognized that the only effective means of establishing and maintaining monopoly . . . is the use of unfair competition. The more certain way to stop monopoly at the threshold is to prevent unfair competition." *See also supra* note 49.

D. Subsequent Amendments of the Antitrust Laws Affecting the Department of Justice Enforcement

In 1950 Congress amended section seven of the Clayton Act to cover asset, as well as stock, acquisitions. The difficult burden of proof established in *United States v. Columbia Steel Co.*⁶⁷ for challenging mergers under the Sherman Act motivated Congress to amend section seven.⁶⁸ A review of the Celler-Kefauver debates indicates that the enforcement responsibilities of the Antitrust Division were not debated, although Senator Kefauver inserted in the *Congressional Record* a reference that recognized the Department's role in "policing business and industry."⁶⁹

In 1955 a special committee set up by the Attorney General published an in-depth study of the antitrust laws.⁷⁰ The committee wanted to provide "a thoughtful and comprehensive study" of the antitrust laws because sixty-four years had elapsed since passage of the Sherman Act. Its charge was to recommend to "enforcement agencies, Congress and the courts" a "future guide" for decisions. Among other recommendations, the committee suggested that section seven of the Clayton Act authorize the Department of Justice to utilize procedures for prior clearance of proposed mergers. Objections from the minority members focused on a strict interpretation of the Department's role as a prosecutorial body with no premerger clearance authority.⁷¹ The committee's recommendations included the possible use of investigatory tools, such as Civil Inves-

67. 334 U.S. 495 (1948).

68. Compare *Columbia Steel*, 334 U.S. 495 (1948), with *United States v. E.I. DuPont de Nemours & Co.*, 353 U.S. 586, 592-97 (1957). In *DuPont*, the Court held:

that any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of the section whenever the *reasonable likelihood* appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce. . . . The Clayton Act was intended to supplement the Sherman Act. Its aim was primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case. . . .

Id. at 592-97 (emphasis added).

69. 96 CONG. REC. 16454 (1950) (quoting from the St. Petersburg Times, Feb. 24, 1947: "But whether the current Congress enacts few or many regulator measures, the problem of policing business and industry steadily grows bigger, even under existing laws. Much of this responsibility falls on the Antitrust Division of the Department of Justice. . .).

70. ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY ANTITRUST LAWS OF THE DEPARTMENT OF JUSTICE iv, (1955). The Committee believed that antitrust policy represented the "distinctive American means for assuring the competitive economy on which our political and social freedom under representative government in part depend[s]." *Id.* at 2.

71. *Id.* at 3. In 1914, Senator Cummins had proposed a similar pre-merger clearance or screening process which failed to reach floor debate. See *supra* notes 50-52 and accompanying text.

tigative Demands (CID's), which the Department had requested to aid in the production of evidence for litigation.⁷² The committee distinguished the CID investigatory tool, which it recommended for the Department, from the investigatory subpoena power granted to the FTC. The committee wanted the Department to be able to obtain the information necessary to perform its enforcement function and to determine whether to file suit, but it did not wish to give the Department extra-judicial enforcement authority. Moreover, the committee refused to create the full panoply of procedural mechanisms necessary when subpoenas are authorized to *regulatory* agencies in the performance of their functions. The 1962 Antitrust Civil Process Act eventually embodied these views.⁷³

The hearings on the Antitrust Improvements Act of 1975 concerning pre-merger notification and expanded CID use illustrate continued concerns about the role of the Department.⁷⁴ Lewis Engman, then FTC Chairman, expressed the view that the proposed pre-merger notification might get the Antitrust Division (and the Commission) into the business of "controlling" mergers rather than "maintaining their proper role to enforce the antitrust laws."⁷⁵ The FTC Chairman felt the standards established under the FTC pre-merger program would be sufficient if Congress also mandated a sixty-day waiting period before the merger proceeded.⁷⁶

72. ATTORNEY GENERAL'S NATIONAL COMMITTEE, *supra* note 70, at 348.

73. Antitrust Civil Process Act, Pub. L. No. 87-664, 76 Stat. 548 (1962); 15 U.S.C. § 1311-1314 (1982). The Department received authority in 1962 to issue CID's under the following guidelines: (1) only non-natural persons under investigation for civil violations of antitrust laws could be served; (2) only documents could be demanded—no one could be compelled to give oral testimony. *See also* 15 U.S.C. § 49 (1982).

74. *Antitrust Improvements Act of 1975: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 71 (1975).

75. *Id.* Engman believed that full investigation of all mergers exceeding the \$100 million assets or sales test contained in the bill would be counterproductive. Although he used the terminology "proper role to enforce the antitrust laws," he was using that terminology for both the Department and FTC. He did not appear to question whether the Department and FTC should have the same pre-merger notification requirements. Rather, Engman seemed to believe that the threshold test for which corporations would be required to submit notice might be so low as to (1) create administrative costs for the Department and FTC to fully investigate as required and (2) bring within the Department and FTC scrutiny more business activities that are *not* violative of antitrust laws, with the result that the agencies are in fact "controlling" business rather than enforcing laws.

76. *Id.* at 72. Thus, while Engman clearly supported the view that the Department's role under the antitrust laws is only prosecution, his statements do not indicate that he believed granting increased CID or premerger notice to the Department necessarily altered that role or function. His primary concern, which seemed to apply to the FTC as well, appeared to be whether government should bring so many mergers or acquisitions under review at all.

The Assistant Attorney General of the Antitrust Division, Thomas Kauper, also testified on the proposals.⁷⁷ Commenting on the Department's role before regulatory agencies, where it gives advice on competition issues, Kauper characterized the use of CID's as "clearly . . . advantageous," but added that the Department's primary duty remained law enforcement. He distinguished the Department's role as an enforcer and prosecutor from the role of the FTC as a regulator and "policy maker."⁷⁸ However, he pointed out that in recent years the Antitrust Division, subject to delegated authority from the Attorney General, had become "one of the prime advocates of competition policy before the federal regulatory agencies." He added that "[t]his activity is increasing and becoming ever more important."⁷⁹

Thus, Congress became aware of the Antitrust Division's increasing involvement, through its competition advocacy program, in the regulatory affairs of other agencies and of the possibility that preclearance merger procedures would further involve the Department in the business of economic regulation.

Congressional debate on the Antitrust Improvements Act carried over into 1976. Again, the Judiciary Committee advanced strong statements about the boundaries of the Antitrust Division's authority.⁸⁰ The minor-

77. *Id.* at 70. Kauper endorsed the 1962 Civil Process Act, and the considerations supporting its enactment, but he testified that the Department's experience since that time had shown that "the limited scope of the Act substantially impairs our investigative effectiveness." *Id.* at 91. Among the bill's provisions, Kauper favored, *inter alia*, expansion of the Department's pre-complaint civil investigatory powers, increased *parens patriae* authority to state attorneys general, pre-merger notification procedures and an automatic injunction (with limitations) against consummation of mergers or acquisitions challenged by federal enforcement agencies.

78. *Id.* This statement was the basis of one of the primary criticisms of the Act offered by the Chamber of Commerce of the United States by J.W. Riehm and J. Randolph Wilson. The Chamber believed that existing investigatory powers of the Department were adequate and that a grant of broader powers would unwisely cause "many of the staff of the Antitrust Division . . . [to] become bogged down in investigations of antitrust trivia." *Id.* at 177. The Chamber of Commerce chastised the FTC for becoming bogged down with its own broad investigative powers rather than concentrating on "its primary role of a broad antitrust policymaker." *Id.*

79. *Id.* at 92. See also 122 CONG. REC. 15487, 16925-26 (1976) ("[The Justice Department has in recent years begun to intervene in and appeal from various agency proceedings which do not in its view pay enough attention to competition. . . . The Department of Justice is, after all, an enforcement agency. It should remain one.") (Statements of Senators Fannin and Hansen). See also 122 CONG. REC. 16927 (1976) ("We have vested the Antitrust Division . . . with the full authority to look out after competitive forces in our economy. . . . Here, and by statute, we permit them to intervene in various regulatory agency cases.") (Statement of Senator Kennedy).

80. S. REP. NO. 94-803, Part II, 94th Cong., 2nd Sess. 167-274 (1976) (minority views of the Committee on the Judiciary of the Senate on S. 1284). The Hart-Scott-Rodino Act, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified at 15 U.S.C. §§ 18a and 1311-1314 (1982), was the culmination of

ity Committee members opposed the use of CID's for proposed merger violations because they did not perceive the Department as a regulatory agency subject to the safeguards of the Administrative Procedure Act.⁸¹ The minority stated:

The Department of Justice is not a regulatory agency subject to direct congressional oversight, but is the prosecuting arm of the U.S. Government. There is a vast difference between a prosecutor and a regulator. Conferring the investigatory powers of a regulatory commission on a prosecutor is alien to our legal traditions and contrary to the premise of the fifth amendment, which contemplates that a prosecutor can investigate crime only through the grand jury process.⁸²

Allowing CID's, the minority argued, would give the Department "regulatory" powers directly opposite to the original mandate for prosecution of the antitrust laws.⁸³ The minority characterized FTC as an investigator and factfinder with no authority to determine civil or criminal liability and noted that the "rigorous protections relevant to criminal prosecutions" would, therefore, be unnecessary.⁸⁴ The minority also identified the FTC's inability to intervene before all other government agencies as a justification for allowing it broad investigatory powers, and denied similar powers to the Department because it can file "comments" with other regulatory bodies.⁸⁵ The minority supported its position with the findings of the 1955 Attorney General's Committee Report. Summarizing that committee's view, the minority noted that that committee had refused to give unlimited administrative power to the Department be-

the legislative efforts to improve antitrust enforcement begun in 1975 with hearings conducted by the Subcommittee on Antitrust Monopoly.

81. S. REP. NO. 94-803, *supra* note 80, at 196-200. *But see* 122 CONG. REC. 15973 (1976):

The Judiciary Committee has carefully considered the issue of whether or not safeguards . . . are sufficient to protect the legitimate interests of the public against unreasonable Government intrusion. . . . We are confident that the provisions . . . strike a balance between the rights of the persons under investigation and thirdparties against unreasonable Government intrusion. . . .

Id. (Statement by Senator Hart). *See also* safeguards listed at *infra*, note 91.

82. S. REP. NO. 94-803, *supra* note 80, at 196; 122 CONG. REC. 15317, 15834, 16485 (1976). *But see* 122 CONG. REC. 16485 (1976):

The minority report tries to claim that there is a difference between regulatory agencies and the Justice Department, because the latter is a prosecutor rather than a regulator. In fact, a number of non-regulatory agencies also possess such authority including the Department of Agriculture, Labor. . . . The critics of this title clearly stand on thin ice. . . .

Id. (Statement by Senator Hathaway).

83. S. REP. NO. 94-803, *supra* note 80, at 198; *see also* 122 CONG. REC. 17563-64 (1976).

84. S. REP. NO. 94-803, *supra* note 80, at 198.

85. *Id.*

cause it was an enforcement agency.⁸⁶

The minority members of the committee attacked the pre-merger notification provision because it assumed that mergers are bad per se and that notification was necessary to correct faulty mergers.⁸⁷ The minority felt the Department and the FTC had sufficient present powers to stop anticompetitive mergers. In their view, pre-merger stay provisions would "indirectly vest in the Department . . . an unjustifiable and destructive regulatory authority."⁸⁸

Despite the continued, strong warnings concerning the expansive regulatory nature of CID's and pre-merger notification, Congress passed, without conference resolution, the Hart-Scott-Rodino Act of 1976.⁸⁹ In doing so, it increased CID authority and provided for premerger notification to the Antitrust Division.⁹⁰

In answer to the minority's criticisms, the Act contained many procedural safeguards designed to guard against prosecutorial abuse under the expanded CID authority.⁹¹ The pre-merger notification provision itself

86. *Id.* at 197. The minority seemed particularly troubled by giving one who might *institute* a prosecution (instead of referring the information to someone else) broad investigatory powers without adequately protecting the right of the individual. *Id.* However, it should be noted that the minority appeared to base its objections primarily on perceived possible abuse of the fourth amendment protections against unwarranted search and seizure, primarily in criminal contexts.

87. *Id.* at 205; 122 CONG. REC. 16915, 16928 (1976).

88. S. REP. NO. 94-803, *supra* note 80, at 213. See also 122 CONG. REC. 16916 (1976) (referring to a proposed automatic stay provision, Senator McClure stated: "Title V would vest in the Justice Department and the FTC an unjustifiable and destructive regulatory authority and veto over the process of capital allocation.")

89. Hart-Scott-Rodino Act, Pub. Law No. 94-435, 90 Stat. 1383 (1976) (codified at 15 U.S.C. §§ 18a and 1311-1314 (1982)).

90. *Id.* (The Hart-Scott-Rodino Act of 1976 expanded the existing CID authority to include investigating a proposed but un consummated merger or acquisition, servicing demands on natural persons, issuing demands to persons not themselves targets of antitrust investigations and issuing demands for written interrogatories and oral testimony).

91. *Id.* at § 1311-1314. Safeguards against potential CID abuse include the following: (1) specification in the CID of the nature of the conduct constituting the alleged violation; (2) confidentiality of materials contained in the CID, (3) representation by counsel of any person required to give oral testimony and reservation of legal rights to object to questions, (4) the Department's inability to compel oral testimony without resort to federal court, (5) the Department's inability to impose penalties for noncompliance with the CID without resort to court, and (6) various grounds of objections to compliance. In addition, the House Committee on the Judiciary rejected the minority's concerns that the increased CID power was inappropriate for a prosecutorial body and converted the Department into a regulatory body. H.R. REP. NO. 94-1343, 15 (July 15, 1976) (To accompany H.R. 13489). The Committee clearly believed that most of the Division's efforts involve civil litigation and that many federal and state antitrust or other law *enforcement* agencies and officials possess similar investigatory powers. *Id.* at 4, 5, 16, 25.

also afforded protection by permitting both speedy resolution of the transaction and adequate review to ensure compliance with the law and opportunity for effective relief.⁹²

Congress did not explicitly disagree with the roles that the minority assigned to the FTC and the Department. However, it is not entirely clear whether Congress simply rejected the proposition that the legislation actually altered the roles or whether it was merely satisfied that procedural safeguards within the legislation adequately protected against possible harms. Arguably, Congress was on notice that this legislation would alter the historic enforcement role of the Antitrust Division. The direction was towards that of an economic regulator, especially if one compares the almost identical pre-merger clearance process approved for and exercised by both the FTC and the Antitrust Division.⁹³

II. MODELS OF REGULATION

More than a century has passed since government regulation of industry and private property began in the United States. The Supreme Court first sanctioned regulatory schemes in *Munn v. Illinois*,⁹⁴ and Congress first sanctioned such schemes with the formation of the Interstate Commerce Commission.⁹⁵ *Munn* set the legal standard for national regulatory intervention in the market:

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When,

92. 15 U.S.C. § 18a. The pre-merger notification provisions contain the following "protections" against unwarranted government intrusion into legitimate business transactions: (1) certain types of transfers and acquisitions are exempt, (2) jurisdictional requirements regarding size of the parties and amount of voting securities or acquired assets involved exclude nonsignificant or trivial transactions, (3) confidentiality of the information is provided, (4) only one extension of the waiting period is permitted to the Department and FTC without a court order, (5) special rules for tender offers speed consideration of such transactions without needlessly delaying consummation of the offer, and (6) expedited court consideration must be provided when the government seeks injunctive relief.

93. *Id.* at § 18a(a)-18a(g).

94. 94 U.S. 113 (1877). For other cases decided with *Munn* regulating railroad rates see *Stone v. Wisconsin*, 94 U.S. 181 (1877); *Winona & St. Peter R.R. v. Blake*, 94 U.S. 180 (1877); *Chicago, M. & S.P.R.R. v. Ackley*, 94 U.S. 179 (1877); *Peik v. Chicago & N.W. Ry.*, 94 U.S. 164 (1877); *Chicago, B. & Q.R.R. v. Iowa*, 94 U.S. 155 (1877). See also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

95. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.). *But see Wabash, St. Louis & P. Ry. v. Illinois*, 118 U.S. 557 (1886) (state could not regulate shipping in interstate commerce).

therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in the use, and must submit to be controlled by the public for the common good.⁹⁶

The "affected with public interest" standard announced in *Munn* stands today as the central principle for government control of economic activity. It portended broad regulation over business and the establishment of federal regulatory agencies.⁹⁷ Although regulation has taken many forms since the late nineteenth century, several models of regulation can be identified and the purposes underlying the regulations explored. These regulatory models and their purposes can inform any discussion of contemporary regulatory practices at the Antitrust Division.

Economic regulation is evident in either its motivation or effect.⁹⁸ Changing economic conditions or theories often foster a change in regulatory form or response.⁹⁹ Pervasive government regulation reached a high point during the New Deal and Great Society programs. Deregulation, which began in the late 1970's,¹⁰⁰ now has reached its crescendo. In certain industries, re-regulation is even now on the rise. From these changes in regulatory climate, we can describe the forms and purposes of regulation that have evolved. Some commentators have broadly defined "regulation" to mean government intervention in the market as a means of assuring good or more competitive performance.¹⁰¹ Since the 1877 *Munn* decision, one regulatory purpose has been to ensure the more efficient functioning of markets.¹⁰² Government has intervened in the market when self-correction appeared unlikely as a result of high fixed costs,

96. 94 U.S. at 126 (citing *De Portibus Maris*, 1 Harg. Law Tracts 78 (Lord Chief Justice Hale's treatise)).

97. The creation of the Interstate Commerce Commission and the enactment of the Sherman Act are early examples. For an excellent discussion of this early era of regulation, see Rabin, *supra* note 26. See also *supra* § I; J. WILSON, *THE POLITICS OF REGULATION* 8 (1970).

98. 1 A. KAHN, *THE ECONOMICS OF REGULATION* 8 (1970).

99. Rabin, *supra* note 26, at 1189-90.

100. See, e.g., Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified at 12 U.S.C. § 226 (1982)); Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified at 49 U.S.C. § 1301 (1982)); Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified at 49 U.S.C. § 10101 (1982)); Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified at 49 U.S.C. § 10101 (1982)).

101. 1 A. KAHN, *supra* note 98, at 20.

102. See generally Rabin, *supra* note 26, at 1252. It is beyond the scope of this article to access the costs on industry and benefits to the public of the government largess. See generally O. WILLIAMSON, *MARKETS AND HIERARCHIES* (1975); Coase, *The Problem of Social Costs*, 3 J. LAW ECON. 1 (1960); Landes & Posner, *Adjudication As A Private Good*, 8 J. LEG. STUD. 235 (1979).

economics of scales, externalities, structural shortcomings, bargaining inequality, market disincentives, monopoly power, windfall profits, inadequate information, scarcity in supply, paternalism, income transfers, or allocative waste.¹⁰³

Frequently, the purpose of intervention has been to achieve distributional consequences, requiring income or wealth transfers from one group in society to another, or for economic rehabilitation or prosperity. But the purpose or effect of regulation has not always been clear. For example, the "public interest" notion of regulation promotes public interest over private gain as justification for market intervention.¹⁰⁴ Substantial challenges to such regulatory purposes began in the 1960's, although the counter theories have much earlier origins. Political motives for regulation were studied and found, in certain industries and certain eras, to dominate over public interest concerns. Regulation was viewed as purely political when designed to protect and serve the interest of those being regulated—i.e. special interest legislation designed to obtain more from government and consumers to the benefit of those regulated. Purely political regulation is seen by many as a means through which producers or sellers "capture" the industry for private advantage. While political motives focus on net gains from the system to those being regulated, the "capture theory" is concerned with the economic consequences of regulation: as producers promote government regulation and market intervention, increased costs (deadweight loss) are shifted to consumers, competition is discouraged and, in general, a redistribution of wealth is effected. Under this theory, regulation is considered anticompetitive.¹⁰⁵

103. ABA COMMISSION ON LAW & ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 26-31 (1979). See also S. BREYER, REGULATION AND ITS REFORM 15-35 (1982); Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

104. 1 A. KAHN, *supra* note 98, at 3-7: "One view, which convinced the Court majority in *Munn v. Illinois*, in 1877, was that regulation might properly be introduced to protect customers from exploitation of private monopolists." But, others, including Justice Brandeis, have recognized and argued that other unregulated business activity may be harmful to the public and may require regulation. Kahn illustrates this point with Brandeis' view that "unregulated competition could be excessively strong" and injure both business and the public. *Id.* at 7.

105. Rabin, *supra* note 26, at 1252-53, 1295, 1316. See generally A. FELDMAN, WELFARE ECONOMICS AND SOCIAL CHOICE THEORY, 161-220 (1980); G. KOLKO, RAILROADS AND REGULATIONS: 1877-1916 (1965); P. MACAVOY, THE ECONOMIC EFFECTS OF REGULATION (1965); T. McCRAW, PROPHETS OF REGULATION 302-303 (1984); S. SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, 125-50 (1982); Wilson, *The Politics of Regulation* in THE POLITICS OF REGULATION 357, 140-41, 446 (J. Wilson ed. 1980); D'Irenzo, *The Origins of Antitrust: An Interest-Group Perspective* 5 INT'L REV.

Classical models of regulation include: 1) cost-of-service ratemaking, 2) reallocation in accordance with the "public interest," 3) standard-setting, 4) historically-based price-setting, and 5) historically based-allocation.¹⁰⁶ Another type, de facto regulation, uses other regulatory controls to preserve competitive markets by imposing 1) taxes as an incentive or deterrent to conduct, 2) a bargaining process through which the regulatory agency bargains with the regulated industry or firm to achieve consensus, 3) disclosure requirements used for economic purposes, and 4) preclearance (screening) approval procedures.¹⁰⁷ Several of these regulatory paradigms form the basis of the present regulatory posture of the Antitrust Division over mergers and acquisitions.¹⁰⁸

One of the most commonly applied classical models of regulation in-

L. ECON. 73 (1985); Harbeson, *Railroads and Regulation, 1877-1916: Conspiracy or Public Interest?*, 27 J. ECON. HIST. 230 (1967); Purcell, *Ideas and Interests: Businessmen and the ICC*, 54 J. AM. HIST. 568 (1967); Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 723-28 (1986).

106. ABA COMMISSION ON LAW & ECONOMY, *supra* note 103, at 31; S. Breyer, *supra* note 103, at 37-130. See also Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

107. ABA COMMISSION ON LAW & ECONOMY, *supra* note 103, at 31, 42-49; S. BREYER, *supra* note 103, at 156-84. See also G. CALABRESI, *THE COST OF ACCIDENTS* (1970); T. MCCRAW, *supra* note 105, at 301; Coase, *The Problem of Social Costs*, *supra* note 102; Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEG. STUD. 13 (1972).

108. Several of the classical models of regulation are not relevant to the Antitrust Division's oversight responsibilities on mergers. At least two focus explicitly on price control. For example, cost of service ratemaking generally applies when an agency regulates prices and profits of firms. It has occurred for natural monopolies (public utilities) as well as competitive markets (airlines). The regulator determines the costs and then sets the price or rate structure in order for the firm or industry to receive a "reasonable rate of return."

Historically based price regulation is an alternative regulatory device used when regulated firms have disparate costs. The regulator implements price controls that allow each firm to charge the price it charged on a particular historical date plus an additional percentage per year. Industry-wide price controls (such as in the oil industry) have been implemented by use of historically based price regulation.

Allocation in the public interest applies when there are scarce resources. The regulatory agency chooses a standard under which the scarce resources (television licenses, airline certifications) will be allocated. The agency decides what and how much will be given away, the threshold objective criteria used to judge those qualified, and the duration of the license.

A regulator can also allocate scarce resources on a historic data basis. Historically based allocation has been used when there are short term scarcities; the oil crisis of 1973 is an example. Allocations are based on past quantities consumed rather than past prices. As an adjunct to historically based allocations, price controls or resale restrictions are added in order to prevent those with historical rights in a commodity from earning windfall profits.

Alternative methods to classical regulation, in which the Antitrust Division would not normally be involved, include assessing taxes. In addition to raising revenue, taxes can stimulate or discourage economic behavior and redistribute income (using cost-of-service ratemaking to eliminate windfall profits). Because taxes do not fix prices, they permit the market to allocate the output through

volves the setting of standards. The regulator, often an administrative agency, first determines what adverse effects exist in the market and whether they should be eliminated or minimized. After determining the problem, and the costs and benefits of eliminating or minimizing it, the agency then gathers relevant information necessary to draft a standard. Standards, of course, must be enforced once promulgated. And, any agency regulation that imposes rights and obligations must comply with the notice and comment provisions of the Administrative Procedure Act (APA). The APA requires agencies to provide a "concise general statement" of the standard's "basis and purpose."¹⁰⁹

Another form of regulation is disclosure. Disclosure requirements can be designed to inform or used to achieve economic regulatory purposes. In either case, the agency must designate the conditions that trigger disclosure obligations and provide for enforcement mechanisms. Although similar to standard setting in many respects, disclosure regulation has a narrower impact. It does not prohibit or prescribe certain products or conduct; it only mandates the disclosure of certain information. When used as a means of economic regulation, disclosure informs regulators of the industry and specific firm data that are relevant to competitive market factors. Disclosure requirements are considered less costly and less restrictive than standards set to regulate production, output or product prices.¹¹⁰

A preclearance screening process, analogous to standard setting, is another form of regulatory control. Under this model agencies have au-

normal price system, thereby avoiding allocation through regulation. *See generally* ABA COMMISSION ON LAW & ECONOMY, *supra* note 103, at 37-40; S. BREYER, *supra* note 103, at 96-119.

109. 5 U.S.C. § 553 (1982). Although the Merger Guidelines, discussed hereafter, were issued by the Department of Justice and published in the Federal Register, standing alone they are not regulations per se. Distinctions are drawn between promulgated regulations and general statements of policy. Statements of policy are those "issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL 30 n.3 (1947), *cited in* Brock v. Cathedral Bluffs Shale Oil Co., No. 84-1492 (D.C. Cir. July 29, 1986). As the District of Columbia Circuit said in *Brock*:

[a]n agency pronouncement is not deemed a binding regulation merely because it may have "some substantive impact," as long as it "leave[s] the administrator free to exercise his informed discretion". . . . Federal Register is an indication that the statement in question was not meant to be a regulation. . . [but] [t]he real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations.

Id. The Merger Guidelines were not published in the Code of Federal Regulation.

110. ABA COMMISSION ON LAW & ECONOMY, *supra* note 103, at 44; S. BREYER, *supra* note 103, at 161-64.

thority to screen applicants based upon pre-formulated standards that satisfy regulatory objectives. After applicants petition for approval, the standards are applied on an ad hoc basis. Applications that do not meet the preclearance standards are denied or challenged. Preclearance screening operates much like licensing which allocates resources based on public interest standards.¹¹¹

Finally, bargaining is an alternative, or de facto, model of regulation. Its objectives are the development of a consensus between parties who share similar interests. The process is one of trade offs—each party must determine its priorities within certain limits, weigh the costs and benefits of each, and determine the higher values. Bargaining produces greater likelihood for voluntary compliance¹¹² and imposes fewer costs on the parties than do other regulatory methods. Successful bargaining minimizes enforcement costs as well, because voluntarily compliance is more likely when standards are defined by consensus. A number of shortcomings are inherent, however, in the bargaining process. First, bargaining does not work unless consensus can be achieved. Second, the process is not useful unless the parties have roughly equivalent bargaining power. Third, a final agreement may affect parties not represented in the bargaining process.¹¹³

The Antitrust Division's merger approval process employs all the regulatory methods described above, standard setting, disclosure, preclearance screening and bargaining. Through this regulatory process, the Department of Justice regulates economic behavior and allocates scarce resources by applying standards and structuring the merged entity to avoid competition problems. The application of these regulatory devices is not typical behavior for a law enforcement agency.

As an example, the Department has issued Merger Guidelines, which set forth a "public interest" standard of competition focusing on market power and collusive practices.¹¹⁴ Before the review of any proposed merger, the Antitrust Division requires, under the Hart-Scott-Rodino Act of 1976,¹¹⁵ disclosure of certain economic and financial data of both

111. S. BREYER, *supra* note 103, at 131-55. See also S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND THE REGULATORY POLICY* (1979).

112. S. BREYER, *supra* note 103, at 178.

113. *Id.* at 180-81.

114. Baxter, *Responding to the Reaction: The Draftsman's View*, 71 CALIF. L. REV. 618, 622 (1983).

115. Hart-Scott-Rodino Act, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified at 15 U.S.C. 18a and 1311-1314 (1982)).

the acquiring and acquired firms. Pursuant to this disclosure, the Division can issue a business review letter¹¹⁶ setting forth present enforcement intentions regarding the "proposed business conduct." This premerger review is essentially a preclearance screening process that permits the Division to screen out mergers with reasonable probabilities¹¹⁷ of anticompetitive consequence. If the proposed merger is not objectionable, the business review letter can issue stating that the Department "has no present intention of instituting enforcement proceedings to challenge" the proposed merger. If the proposed merger raises antitrust concerns, the Division identifies the areas of anticompetitive effect and bargains or negotiates with the merging parties to restructure the merger. If the parties fail to reach a consensus on the restructured merger, the parties can abandon the merger or the Department can file suit to enjoin the proposed merger. The present administration has used the latter remedy only infrequently.

In summary, the Antitrust Division engages in regulatory-type conduct by: 1) setting standards through its announced Guidelines, 2) reviewing data through the required disclosure provisions, 3) screening out potentially anticompetitive mergers through the preclearance screening process, 4) negotiating a restructured merger if necessary, and finally, 5) if the bargaining process is successful, issuing an approval, similar to a "license," through a business review letter.

III. THE ANTITRUST DIVISION AS ECONOMIC REGULATOR

As briefly outlined in the prior section, the present merger approval process clearly demonstrates that the Antitrust Division has become an economic regulator of mergers. This transformation, from a litigating division to a de facto regulatory agency, began in the 1960's. The Division's increased focus on economic analysis of mergers and the Division's adoption of the 1968 Merger Guidelines signaled the first break with the past.

116. 28 C.F.R. § 50.6 (1985).

117. 15 U.S.C. § 18 (1982):

No person shall acquire, directly or indirectly, the whole or any part of the stock [or assets] or other share capital . . . where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly.

A. Merger Guidelines

The 1968 Merger Guidelines set forth the standards, enforcement interpretation and policy by which the Antitrust Division would determine whether to challenge mergers and acquisitions.¹¹⁸ The Guidelines were not to be considered as a substitute for the Division's business review process.¹¹⁹ The Division preferred to use the business review process when determining the legality of a particular proposed merger.¹²⁰

Stating that the primary role of section seven of the Clayton Act was to "preserve and promote market structures conducive to competition," the Guidelines attempt to identify those mergers or acquisitions that were likely to alter the structure of the market in a way that was not conducive to competitive conduct.¹²¹

Market structure is the focus of the Department's merger policy chiefly because the conduct of the individual firms in a market tends to be controlled by the structure of that market, *i.e.*, by those market conditions which are fairly permanent or subject only to slow change (such as, principally, the number of substantial firms selling in the market, the relative sizes of their respective market shares, and the substantiality of barriers to entry of new firms into the market).¹²²

Recognizing that not all proposed mergers might be susceptible to a structure-conduct analysis, especially where the market was in transition, the Guidelines pointed out that in exceptional circumstances the Division could be guided by "a more complex and inclusive evaluation."¹²³ But in the main, the Guidelines centered on identifying acceptable market shares in horizontal mergers,¹²⁴ the foreclosure of competition in ver-

118. U.S. DEP'T OF JUSTICE, MERGER GUIDELINES 1968 *reprinted in* 2 Trade Reg. Rep. (CCH) ¶ 4510 (1982).

119. *See infra* at § III.C for a discussion of the business review procedure.

120. *See supra* note 118, at 6882.

121. *Id.* *See generally* J. BAIN, BARRIERS TO NEW COMPETITION (1956); Stigler, *The Case Against Big Business*, 47 FORTUNE 123 (1952).

122. MERGER GUIDELINES 1968, *supra* note 118, at 6882.

123. *Id.*

124. The most prominent feature of the 1968 Guidelines horizontal merger analysis was the use of the four-firm concentration ratio. The four-firm concentration ratio examined the pre-merger market shares of the four largest firms in a market. A concentration ratio of 75% indicated a highly concentrate market; it was subject to a more stringent standard of review. This standard was significant because it resulted in a lowering of the market share combinations that would be challenged in a merger. For instance, in a less highly concentrated market, mergers between firms that had market shares of 5% and 5%, or 10% and 4%, or 15% and 3% were likely to be challenged. In a more highly concentrated market, with a concentration ratio above 75%, mergers between firms with shares of 4% and 4%, or 10% and 2%, or 15% and 1% would be challenged. *See* MERGER GUIDE-

tical mergers, and the elimination of potential competitors, the creation of reciprocal dealing and the entrenchment of a dominant firm in a concentrated market.

Despite an attempt to follow the case law, the courts did not adopt the 1968 Guidelines with regularity.¹²⁵ In the fourteen year period following the issuance of the 1968 standards, the Division's philosophy changed, economic analysis was refocused, and decisional law developed without adherence to the Guidelines.¹²⁶ As a result, a new administration, with an attitude more favorable to larger mergers and the market forces, issued new Guidelines in 1982.

In contrast to the 1968 Guidelines, the 1982 Guidelines reflected a major change in merger standards. The "law enforcement" philosophy that prevailed at the Antitrust Division when the first Guidelines were issued in 1968 had faded by the time the 1982 Guidelines were issued.¹²⁷ Indeed, in announcing the new Guidelines, Attorney General William French Smith stated that the new Guidelines "outline the general principles and specific standards the Department's Antitrust Division uses *in screening* the hundreds of mergers it examines every year."¹²⁸ He did not mention, as had been stated in the 1968 Guidelines, the Department's role as an "enforcement agency."¹²⁹ He only noted that the new standards differed "considerably from the old ones."¹³⁰

First, the 1982 Guidelines centered on preventing mergers that facili-

LINES 1968 *supra* note 118, at 6683-84. Calkins, *The New Merger Guidelines and the Herfindahl-Hirschman Index*, 71 CALIF. L. REV. 402, 406-07 (1983). See also *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) (court used concentration ratio).

125. Compare *Fruehauf Corp. v. FTC*, 603 F.2d 345, 353-54 (2d Cir. 1979); *United States Steel Corp. v. FTC*, 426 F.2d 592, 606 (6th Cir. 1970) with *Stanley Works v. FTC*, 469 F.2d 498, 504 n.13 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973); *Marathon Oil Co. v. Mobil Corp.*, 530 F. Supp. 315, 325 (N.D. Ohio), *aff'd*, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982). See also *F & M Schaefer Corp. v. C. Schmidt & Sons*, 597 F.2d 814, 817 & n.5 (2d Cir. 1979); *Allis-Chalmers Mfg. Co. v. WhiteConsol. Indus., Inc.*, 414 F.2d 506, 524-25 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970).

126. Bauer, *Government Enforcement Policy of Section 7 of the Clayton Act: Carte Blanche for Conglomerate Mergers*, 71 CALIF. L. REV. 348 (1983); Kauper, *The 1982 Horizontal Merger Guidelines: Of Collusion, Efficiency and Failure*, 71 CALIF. L. REV. 497 (1983) [hereinafter cited as *Kauper, The 1982 Guidelines*].

127. Kauper, *supra* note 126, at 498; Harris & Jorde, *Market Definition in the Merger Guidelines: Implications for Antitrust Enforcement*, 71 CALIF. L. REV. 464, 486 (1983).

128. U.S. DEP'T OF JUSTICE, MERGER GUIDELINES 1982, *reprinted in* 2 Trade Reg. Rep. (CCH) ¶ 4500 (1984) (emphasis added).

129. MERGER GUIDELINES 1968, *supra* note 118.

130. MERGER GUIDELINES 1982, *supra* note 128. In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the Supreme Court established a multifaceted balancing analysis for measuring a

tated: 1) the exercise of market power—the ability to raise prices above competitive levels without a drop in quantity demanded, 2) monopolization, and 3) cartelization.¹³¹ The emphasis on market power suggested that the Department's concern was not solely with the increased concentration that results from a new merger. Instead, the concern was with the potential collusive effects in the industry.¹³² Clearly, the new standards permitted many mergers that would have been challenged under the 1968 Guidelines. The 1982 Guidelines demonstrated this favorable attitude toward mergers by employing a test that concentrated on the horizontal effect of the merger. The Division was given more discretion not to challenge a proposed merger because, under the 1982 Guidelines, the Division would insist on "economic evidence of harm or potential harm to competition before a merger [would] be challenged."¹³³ The Division's exercise of judgment seemed broader, given the range of economic factors to consider. Its discretion to not intervene in capital markets seemed apparent.

Although they sometimes harm competition, mergers generally play an important role in a free enterprise economy. They can penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets. While challenging competitively harmful mergers, the Department seeks to avoid unnecessary interference with that larger universe of mergers that are either competitively beneficial or neutral.¹³⁴

The 1982 Guidelines largely incorporated this philosophy¹³⁵ through the introduction of a broader market definition. The new definition reduced the likelihood that a particular merger would raise antitrust concerns.¹³⁶ By changing from a four-firm concentration ratio to that of the

merger's legality. The Court failed, however, to establish weights for each factor in the balancing process.

131. MERGER GUIDELINES 1982, *supra* note 129, at 6881.

132. *United States v. Aluminum Co. of Am.*, 377 U.S. 271 (1964); Baker and Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CALIF. L. REV. 311, 316 (1983).

133. MERGER GUIDELINES 1982, *supra* note 128, at 6681-2. *See also* Kauper, *supra* note 126, at 508-09.

134. MERGER GUIDELINES 1982, *supra* note 128, ¶ 4501, at 6881-7. *See also* Statement by Charles F. Rule, *supra* note 1 (characterizing the enforcement policy of the 1960's and 1970's as interventionist).

135. *See* Harris & Jorde, *supra* note 127.

136. In departing from the four-firm concentration ratio of the 1968 Guidelines, the 1982 Guidelines employed the use of the Herfindahl-Hirschman Index (HHI). The HHI is calculated by squaring the market share of all the firms in the market and then summing the squares. The standard then examines the post-merger HHI number and the change or increase in the HHI caused by the merger.

Herfindahl-Hirschman Index (HHI), the Department selected a standard unchartered in merger law and unapproved by the courts. Many, however, did not believe that a change in definition would lead to different results.¹³⁷

In addition, the 1982 Guidelines explicitly deemphasized the antitrust importance of vertical and conglomerate mergers.¹³⁸ The new Guidelines debunk previous economic theories that feared 1) foreclosure of competition in vertical mergers, 2) the creation of reciprocal dealing, or 3) the entrenchment of a dominant firm in a concentrated market. Non-horizontal mergers are a concern under the 1982 standards only if they fall into one of four categories: 1) vertical or conglomerate mergers that eliminate potential competition, 2) vertical mergers that increase barriers to entry by necessitating simultaneous two-level entry, 3) vertical mergers that facilitate collusion, and 4) vertical or conglomerate mergers that facilitate the evasion of rate regulation by a regulated firm.¹³⁹ These changes are again recognition that the Department is willing to go beyond the established case law and, through its expanded discretion, regulate mergers by reinterpreting and rearticulating the competition standards of section seven.

In sum, the 1982 Guidelines expressed a more specifically directed economic policy. The standards were more quantitative in approach and more mathematically precise. They reduced uncertainty and increased predictability of enforcement intentions.¹⁴⁰ As several commentators

See 1982 MERGER GUIDELINES, *supra* note 128, at ¶ 4503 at 6881-11-12. Unconcentrated markets are defined by an HHI below 1,000, moderately concentrated markets are defined by an HHI between 1,000 and 1,800, and highly concentrated markets are defined by an HHI above 1,800. If the post-merger HHI is below 1,000, the Department is unlikely to challenge the merger. If the post-merger HHI is between 1,000 and 1,800, the Department is likely to challenge only if the change or increase is more than 100 points. And if the post-merger HHI is above 1,800, the merger is likely to be challenged if the increase is less than 50 points. See generally Calkins, *supra* note 124, at 404-05.

137. Baker & Blumenthal, *supra* note 132, at 312-13, 324, 327; Calkins, *supra* note 124, at 428-29. But see Bauer, *supra* note 126, at 351. See also Fox, *The New Merger Guidelines: Blueprint for Microeconomic Analysis*, 27 ANTITRUST BULL. 519 (1982). Clearly, the merger in *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), would not be challenged today even though the government won its challenge to the merger. In *Von's Grocery*, the pre-merger HHI was 300 and the post-merger HHI was about 40 points higher.

138. 1982 MERGER GUIDELINES, *supra* note 128, at ¶ 4504, at 6881-15.

139. A merger challenge even in these categories is unlikely unless the HHI of the target market is more than 1,800. If effective collusion is particularly likely, a challenge may be made with an HHI less than 1,800.

140. To be sure, in 1983 fewer than two percent of the mergers required to file Hart-Scott-Rodino disclosures were challenged. See Sims & Lande, *DOJ Adds Revisionist Dollop to '82 Merger Guidelines*, *Legal Times*, June 25, 1984, at 15, col. 1. But see *United States v. Philadelphia Nat'l*

with prior Antitrust Division experience have observed: "the guidelines [have] in fact become the general working standard in the field."¹⁴¹ With the Antitrust Division interpreting its own standards, it can focus less on law enforcement and more on regulation. The 1982 Guidelines constituted a regulatory standard more pervasive than previous standards, and more open to broad discretion.¹⁴² This emerging regulatory philosophy is significant in light of the nature and difficulty of private merger litigation.¹⁴³ Negotiated settlements that restructure the merger are henceforth implicitly sanctioned. Consequently, if the Department does not challenge a proposed merger, it is likely that it will go unchallenged. Therefore, the Department through enforcement of its Guidelines, maintains stronger regulatory control than before.

Finally, in 1984 the Department issued another set of revised Merger Guidelines.¹⁴⁴ Although only two years had elapsed, the Department believed that clarification and refinement were necessary. Paradoxically, the revisions have interjected greater uncertainty and decreased predictability into the process. At the same time, the revisions have increased the interpretative discretion and regulatory nature of the Division.

In four areas, the 1984 standards modify the 1982 Guidelines: 1) market definitions, 2) treatment of efficiencies as a defense, 3) the inclusion of foreign competition into market definitions, and 4) consideration of failing divisions of healthy firms.¹⁴⁵ To better understand the Division's broader regulatory control, this Article examines three of these modifications.

The 1984 Guidelines broaden the test for product and geographic markets. The Division is no longer restricted to the five percent, price-elasticity test,¹⁴⁶ but now "may at times postulate a price increase that is much

Bank, 374 U.S. 321 (1963) (court did not focus on detailed economic evidence as the standard analysis for determining a merger's legality). In *Philadelphia Nat'l Bank*, the court announced a presumptive test of illegality based on market shares.

141. Sims & Lande, *supra* note 140.

142. See also Kauper, *supra* note 125, at 508-09.

143. See *infra*, § IV, note 266.

144. U.S. DEPT OF JUSTICE, MERGER GUIDELINES 1984, reprinted in 2 TRADE REG. REP. (CCH) ¶ 4490, at 6879-2 (Dec. 12, 1984).

145. *Id.* at 6879-2.

146. Courts had ruled that product markets should be defined according to a product "interchangeability" standard or the "cross-elasticity of demand" test. See, e.g., *United States v. E.I. DuPont De Nemours & Co.*, 351 U.S. 377 (1956). The 1982 Guidelines refined this standard by adopting a precise, quantitative test: a market would be recognized for a product and geographic area where a five percent price increase would not cause buyers of that product to substitute or

larger or smaller than five percent,"¹⁴⁷ over a one year period, to determine what products should be included in the product market definition. Instead of five percent the standard becomes a "small but significant and non-transitory"¹⁴⁸ price increase. This more ambiguous, subjective test is a return to a broader standard reminiscent of the early case law.¹⁴⁹

The 1984 standards also include foreign competition (and its market share) in the geographic market definition if a foreign firm is a significant competitor in the United States domestic market.¹⁵⁰ Given the uncertainty in interpreting the data on currency exchange rates, quotas and tariffs, the Division exercises broad discretion, on a case-by-case basis, when deciding whether to include foreign company data in the market definition. This, in turn, increases the number of negotiable issues between the Division and the merging parties.

In contrast to the 1968 and 1982 Guidelines and prior case law,¹⁵¹ which rejected efficiency defenses except in extraordinary cases, the 1984 standards include efficiency considerations among the factors the Division examines before challenging a merger. However, the merging parties must support by "clear and convincing" evidence any claim that

would not cause new competitors to enter the product market to compete with the firm that raised the price. If the data demonstrated that, in response to a five percent price increase of a product, a new competitor would enter the market, then the product of the outside firm would be included in the market. MERGER GUIDELINES 1984, *supra* note 144 ¶ 4502, at 6881-8.

147. MERGER GUIDELINES 1984, *supra* note 144, ¶ 4490, at 6879-2.

148. *Id.*

149. *See* United States v. E.I. DuPont De Nemours & Co., 351 U.S. 377 (1956) (first articulation of the broader standard).

Every manufacturer is the sole producer of the particular commodity it makes but its control . . . of the relevant market depends upon the availability of alternative commodities for buyers: i.e., whether there is a cross-elasticity of demand. . . . This interchangeability is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and adaptability of the competing commodities. . . . An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other. If a slight decrease in the price of cellophane causes a considerable number of customers of [the] other . . . to switch . . . , it would be an indication that a high cross-elasticity of demand exists between them; that the products compared in the same market.

Id. at 380-81, 400.

150. MERGER GUIDELINES 1984, *supra* note 144, ¶ 4490, at 6879-4.

151. *See, e.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[A] merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress. . . . It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.

Id. at 371.

efficiencies will result. The Division then determines whether this “clear and convincing” test has been met. This significant change is consistent with the new standards’ overall textual tone and general philosophy that mergers have the potential to enhance efficiency. The type of efficiency data subject to analysis is also broader than that suggested under the 1982 Guidelines.

In short, the less precise 1984 Guidelines invite a more open-ended balancing analysis¹⁵² and leave more room for the exercise of discretion by the Division. The Guidelines permit the Division greater flexibility and, thus, control over the screening process. Through the standard-setting process the Guidelines repose the decisionmaking power over merger approval in the discretion of the Antitrust Division.

B. Premerger Disclosure Requirements

In 1976, Congress passed the Hart-Scott-Rodino Act, which prescribes certain premerger disclosures.¹⁵³ The purpose of the Act is to delay or prevent the consummation of mergers until the Department or the Federal Trade Commission has an appropriate opportunity to analyze the proposed merger. The Act does not change the substantive antitrust law governing the legality of mergers, but it does require advance notification and does set forth specific waiting periods before the consummation of the transaction. Congress designed the waiting period to give the reviewing agency sufficient time to approve the merger or to proceed expeditiously to seek injunctive relief.¹⁵⁴ The latter procedure automatically delays or prevents the consummation of the transaction.

The Act imposes disclosure requirements on parties to “very large mergers and acquisitions” in which a) either party is engaged in commerce, b) the net sales or total assets of one of the parties is \$10 million or more and the net sales or total assets of the other is \$100 million or

152. See *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). See also Miller, *Notes on the 1984 Merger Guidelines: Clarification of the Policy on a Repeal of the Celler-Kefauver Act?* 23 ANTI-TRUST BULL. 653, 658 (1984).

In addition, there is recognition that the formulas used within the Guidelines, such as the HHI standard, are not brightline tests, and that the Department will consider all relevant factors in analyzing the merger. For example, the Department will not solely consider the HHI when evaluating horizontal mergers, but will look to other factors as well, such as whether current market shares are misleadingly over or understated due to changing market conditions. MERGER GUIDELINES 1984, *supra* note 144, ¶ 4492, at 6879-12. See *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

153. 15 U.S.C. § 18a (1982) (Section 7A of the Clayton Act).

154. 15 U.S.C. § 18(f) (1982).

more, and c) the acquiring firm, as a result of the acquisition, holds fifteen percent or \$15 million of the voting securities or assets of the acquired firm.¹⁵⁵ The pervasive disclosure requirements do not depend on the form of the transaction.¹⁵⁶ For example, ordinary acquisitions of securities or assets,¹⁵⁷ statutory mergers or consolidations¹⁵⁸ and tender offers¹⁵⁹ as well as conversions of convertible securities,¹⁶⁰ formations of joint ventures¹⁶¹ and secondary acquisitions¹⁶² must be reported.

If premerger disclosure is required, the parties must file detailed notification and report forms. The required data include type of transaction, structure of the merging firms, holdings of the acquiring party in the acquired firm, horizontal overlaps, vertical relationships and any acquisitions made within the previous ten years.¹⁶³

The Act empowers the FTC, with the concurrence of the Assistant Attorney General, to issue rules for the implementation of the Act. Similarly, the regulatory authorities have discretion, as delegated by Congress, to exempt certain classes of persons and transactions from compliance with the Act or with any aspect of the notification requirements.¹⁶⁴ The Antitrust Division independently determines the form of notification, receives the filings under the Act and extends or terminates the waiting period.¹⁶⁵ In addition, the Division may request submission of any additional information or documents;¹⁶⁶ such a request extends the waiting period. Finally, the Division may give the parties to a pro-

155. 15 U.S.C. § 18(a)(1)-(a)(3) (1982). There is a \$10,000 per day penalty for noncompliance. 15 U.S.C. § 18a(g)(1) (1982).

156. ABA, *ANTITRUST LAW DEVELOPMENTS (SECOND)* 216 (1984).

157. 15 U.S.C. § 18a(a)(2)-(a)(3).

158. 16 C.F.R. § 801.2(d) (1986).

159. *Id.* at § 801.1(g)(1).

160. *Id.* at § 801.32.

161. *Id.* at § 801.40.

162. *Id.* at § 801.4. The Act and the Rules promulgated under this Act exempt several classes of transactions and parties from compliance. 15 U.S.C. § 18a(c). For example, acquisitions in certain regulated industries, or acquisitions by institutional investors, underwriters, creditors and insurers, certain acquisitions of foreign assets or securities, acquisitions made in the ordinary course of business or solely for investment by a person who already holds a 50% ownership position are exempt. 16 C.F.R. § 802. In addition, acquisitions valued at less than \$15 million in a corporation with less than \$25 million in sales, requisitions representing an amended or renewed tender offer, and acquisitions not meeting or exceeding a greater notification threshold are also exempt. *Id.* 16 C.F.R. § 802.20, .21, .23 (1986).

163. *Id.* 16 C.F.R. at § 803.1 (1986).

164. 15 U.S.C. § 18a(d)(2)(B) (1976).

165. 15 U.S.C. § 18a(b)(2) (1976).

166. 15 U.S.C. § 18a(e)(1) (1976); 16 C.F.R. § 803.20(b)(1) (1986).

posed acquisition a business review letter,¹⁶⁷ reflecting the Department's opinion regarding the legality of the proposed merger. If it finds that the proposed merger implicates anticompetitive concerns, and the merging parties do not agree to a restructured merger, the Division can file an action for injunctive relief in a federal district court.

C. *Business Review Letter*

For several decades, the Antitrust Division has been willing, in certain circumstances, to review proposed business conduct and state its enforcement intentions. This practice originated with the "railroad release" procedure. Under that procedure, the Division would review the proposed business conduct and state whether it would initiate criminal proceedings, if the proposed conduct was carried out. The Division subsequently expanded this procedure to include the "merger clearance" procedure practiced today. Under the merger clearance procedure the Division states its present enforcement intention and issues a written statement entitled "Business Review Letter."¹⁶⁸ The procedure gives the Division pre-transaction clearance authority to approve or disapprove business conduct that implicates antitrust concerns.¹⁶⁹ Premerger clearance also avoids the adversarial process and is frequently associated with negotiational posturing.

A party contemplating a merger initiates the business review process by filing a written request with the Assistant Attorney General.¹⁷⁰ The requesting party must provide the Division with all relevant information and documents that the Division may need to review the matter.¹⁷¹ The Division, in its discretion, may refuse to consider the request.¹⁷² After examining the business review request, the Division will state its present enforcement intentions, and then either decline to pass on the request or take such other position as it considers appropriate. The requesting

167. 16 C.F.R. § 803.30 (1986); 28 C.F.R. § 50.6 (1985).

168. 28 C.F.R. § 50.6 (1985). The regulations were issued on February 1, 1968, 33 Fed. Reg. 2,422 and have been revised twice, 38 Fed. Reg. 34,804 (December 19, 1973) and 42 Fed. Reg. 11,831 (March 1, 1977). Advisory opinions were first used, twice, during the T. Roosevelt Administration. See *supra* section IC.

169. The concept is not new; the "idea of regulation itself has hinged on the workability of one or another forms [sic] of advance regulation." T. MCCRAW, *PROPHETS OF REGULATION* 128-30 (1984).

170. 28 C.F.R. § 50.6(1) (1986).

171. 28 C.F.R. § 50.6(5) (1986).

172. 28 C.F.R. § 50.6(2), (7)(a) (1986).

party will be notified accordingly.¹⁷³

At the same time that the Division notifies the requesting party of the Division's action on the business review request, a press release describing the action is issued along with a copy of the Division's letter of response.¹⁷⁴ Business review letters state only the enforcement intentions of the Division as of the date of the letter. The Division remains free to initiate any action or proceeding it finds consistent with the public interest.¹⁷⁵

D. Negotiation As a Means To Restructure Mergers

The Antitrust Division initiates further investigation, after reviewing the Hart-Scott-Rodino disclosures, in only a small number of proposed mergers.¹⁷⁶ The Division does not undertake further investigation when it believes that a merger will not result in a substantial lessening of competition.¹⁷⁷ If the proposed merger raises competitive concerns, the Division has a policy known as "fix it first." This policy rests on a nonadversarial approach to dispute resolution and employs negotiation as a means to resolve merger conflicts.

Under the "fix it first" policy, the Division notifies the merging parties that certain anticompetitive problems are present in the proposed merger and informs them how these problems might be eliminated. Frequently, the parties and the Division meet to discuss restructuring the merger to eliminate the antitrust objection. The Division policy requires that the problems be removed ("fixed") before the consummation of the merger. If the problem is eliminated before consummation, the Division will not file an injunction to prevent the acquisition. However, if time does not permit restructuring before consummation, the Division may approve

173. 28 C.F.R. § 50.6(8) (1986).

174. 28 C.F.R. § 50.6(9)(d) (1986).

175. 28 C.F.R. § 50.6(9) (1986).

176. For example, the Division conducted expanded investigations as follows:

1978	40
1979	102
1980	56
1981	66
1982	56
1983	62

See Statement by Charles F. Rule, *supra* note 1.

177. 15 U.S.C. § 18 (1976).

the merger, subject to the entry of a consent decree. The consent decree will require the resulting company to restructure, according to the terms of the negotiation, agreement and settlement, within a set period of time.¹⁷⁸ As a result of the Division's efforts to negotiate a settlement and to restructure mergers, few public enforcement actions are filed today.¹⁷⁹

The Antitrust Division frequently proposes several types of restructured mergers. First, and most often, the Division will suggest that the acquirer divest a unit or units of either firm, which, if retained, would cause a lessening of competition. Second, the Division may require the acquiring firm to terminate existing relationships. Third, the Division may require the two parties to enter into a completely different relationship or to exercise different roles than those originally negotiated by the parties in their merger agreement. Several recent restructured mergers are illustrative.

1. *Divestiture*

In the first category, where the Division requires that assets be sold off, the Division recently required IBM to divest the mil-spec computer division of Rolm as a precondition to approval of the merger between IBM and Rolm Corp.¹⁸⁰ A curative consent order contained the parties' agreement to the Division's suggestions.¹⁸¹

Similarly, when General Electric announced its proposed merger of RCA Corporation, the Division first required General Electric to sell its vidicon tube business. The Division determined, upon review of the Hart-Scott-Rodino filings, that the merging firms accounted for nearly ninety-nine percent of all silicon target vidicon tube sales for military applications in 1985 and ninety percent of all antimony trisulfide target vidicon tube sales.¹⁸² General Electric was a leading producer of silicon and antimony trisulfide target vidicon tubes for military applications, and

178. Statement by Charles F. Rule, *supra* note 1, at 12. In many cases, the divestiture can be accomplished before the acquisition. See, e.g., *United States v. ARA Services, Inc.*, 1982-3 Trade Cas. (CCH) ¶ 65,209 (S.D. Ohio 1982).

179. Department of Justice Press Release, dated Feb. 15, 1983, regarding the failed acquisition of National Amusements, Inc. from General Cinema Corp.

180. 48 Antitrust & Trade Reg. Rep. (BNA) 433 (Mar. 7, 1985).

181. *United States v. International Business Mach. Corp.*, 48 Antitrust & Trade Reg. Rep. (BNA) 433 (D.D.C. March 7, 1985).

182. TRADE REG. REP. (CCH) ¶ 45,086 at 53,768 (June 16, 1986) (consent decree for *United v. General Electric Co.*). "Vidicon tubes are image tubes that convert an optical image into an electrical signal." *Id.* These tubes are used in camera systems.

RCA was the second largest.¹⁸³ Because the "sell off" agreement could not be achieved in time, the Division filed a complaint and simultaneously filed a consent order setting forth the divestiture agreement of the parties and the Division.

In another merger, involving Allied Corporation and Signal Companies, the Division required Allied to divest its air turbine starter by the end of 1985. Both Allied and Signal were large manufacturers of air turbine starters. Signal controlled over fifty percent of the market and Allied controlled a sufficient share to put it in second place. Through the merger, Allied-Signal would control more than seventy percent of the (noncommunist) world market in air turbines.¹⁸⁴ Without divestiture, this merger would have increased the Herfindahl-Hirschman Index by 1,975 points, clearly resulting in antitrust problems.

In its settlement with the Division, Allied agreed to sell its air turbine starter business to a buyer acceptable to the Antitrust Division.¹⁸⁵ In the event that the sale could not be accomplished by the end of 1985, the Division would require Allied to sell its entire Bendix Fluid Power division, of which the air turbine starter unit was but a part, by March 31, 1986. The Division structured the settlement in this way because it believed that a forced divestiture of the entire Bendix Fluid Power division would provide a powerful incentive for Allied to locate an acceptable buyer.¹⁸⁶ If the sale of the Bendix Fluid Power division became necessary, the Division planned to request a court appointed trustee to oversee and execute the sale. The Allied-Signal merger demonstrates the creative but persuasive regulatory oversight exercised by the Division.

One of the most interesting examples of the Antitrust Division's regulatory involvement focused on an entire industry—the beer industry. It was the first time under the Reagan Administration that a proposed merger was challenged.¹⁸⁷ The Justice Department originally became involved in mergers in the beer industry in 1981 when Heileman brewing attempted to buy Schlitz. As a result of the Justice Department's challenge, the deal fell through.¹⁸⁸ Six months later, Stroh's made a deal to

183. *Id.* Annual sales were approximately \$7 million.

184. 49 Antitrust & Trade Reg. Rep. (BNA) 321 (1985) (consent decree for United States v. Allied Corp.).

185. *Id.*

186. *Id.*

187. At the time Heileman was the sixth largest brewer with a 7.5% market share, while Schlitz was fourth with an 8.5% share. Antitrust & Trade Reg. Rep. (BNA) 1036:A-1 (1982).

188. 42 Antitrust & Trade Reg. Rep. (BNA) 769 (1982).

purchase Schlitz.¹⁸⁹ The Department announced that it would not ask for additional information, but would continue to investigate. The Department's primary concern was the effect of the merger in the southeastern United States where the merger would have increased the HHI by 150 points.¹⁹⁰

Rather than deciding whether to challenge or approve the merger, the Department began negotiating with the parties to produce a solution that would allow the transaction to go through while avoiding any section seven problems. A week following its first announcement, the Department announced a proposed consent decree that approved the merger on the condition that Stroh's would divest a Schlitz plant in the Southeast.¹⁹¹ The plant in question could be sold to anyone but Anheuser-Busch or Miller,¹⁹² the two largest brewers in the country. Eight months later, the consent decree was modified to allow Stroh's to trade its Schlitz brewery in Tampa for a Pabst brewery in Minnesota.¹⁹³ Therefore, the restructured entity avoided anticompetitive problems in the Southeast where Schlitz and Stroh's both had significant market shares. The Division's involvement in shaping these mergers provides a clear example of its willingness to go beyond mere enforcement to facilitate the successful completion of mergers.

A further example also comes from the brewing industry. In 1982 Heileman entered an agreement to purchase Pabst.¹⁹⁴ The Division announced its intention to challenge the merger because it would result in an HHI increase of 112 points.¹⁹⁵ Six weeks later, the Division challenged an attempt by Heileman to have a third party, nonbrewer, purchaser Pabst and then sell Pabst to Heileman.¹⁹⁶ Following this

189. *Id.*

190. *Id.* In the Southeast, Schlitz had a market share of 13.4%, and Stroh's had a market share of 6.9%. See also MERGER GUIDELINES 1982, *supra* note 128, at ¶ 4503, at 6881-12 (§ III.A general standards (b) Justice Department will challenge merger if HHI increased by 100 or more.).

191. 42 Antitrust & Trade Reg. Rep. (BNA) 810 (1982) (consent decree for United States v. Stroh Brewery Co.).

192. *Id.*

193. 42 Antitrust & Trade Reg. Rep. (BNA) 1224 (1982).

194. 42 Antitrust & Trade Reg. Rep. (BNA) 1264 (1982). Heileman previously had tried to purchase Schlitz and the Justice Department had not allowed them to intervene in the suit involving Stroh's and Schlitz.

195. *Id.* Heileman was the nation's fourth largest brewer with 7.6% market share and Pabst was the fifth largest with a 7.4% market share. Due to the concentration in the brewing industry, any merger that increased the HHI by more than 100 was likely to be challenged.

196. 43 Antitrust & Trade Reg. Rep. (BNA) 271 (1982).

challenge, Heileman began negotiating with the Division to arrive at an acceptable merger agreement. This negotiation resulted, four months later, in the Division securing a proposed consent decree. The decree allowed Heileman to purchase Pabst under the condition that Heileman would sell eighty-five percent of Pabst's assets.¹⁹⁷

Finally, in a controversial merger between LTV and Republic Steel Corporation, the Antitrust Division required LTV to divest, within six months, two of Republic's mills. The Division had determined that the merger implicated competitive concerns in three product markets: hot-rolled carbon and alloy sheet and strip; cold-rolled carbon and alloy sheet and strip; and cold-rolled stainless sheet and strip.¹⁹⁸ The Division required the divestiture of the Gradsden mill, resulting in a reduction by one-third of increased concentration in the carbon and alloy sheet market. The required divestiture of the Massillon mill eliminated the projected concentration in the stainless steel and strip market.¹⁹⁹ In addition, the Division prohibited LTV from exchanging any data on the output or efficiency of any of its mills with any other competitor or the industry trade association. This precondition seemed unique to the LTV merger. Further, the Division enjoined LTV and Republic from acquiring assets or securities from any "substantial competitor for ten years."²⁰⁰

197. *Id.* at 9.

198. 46 Antitrust & Trade Reg. Rep. (BNA) 577-78 (1984).

199. *Id.* If the original merger were consummated, LTV and Republic "would have had almost 50 percent of the [domestic] sheet steel market even if you include imports from every single country of the world, including Japan and the [European Community]." *Id.*

On July 17, 1986, LTV filed for bankruptcy. It was reported to be the largest bankruptcy filed in history. LTV was more than \$4.2 billion in debt and had more than 20,000 creditors. N.Y. Times, July 18, 1986, at 21, col. 3.

200. 46 Antitrust & Trade Reg. Rep. (BNA) 578 (1984).

The preclearance oversight, as dictated by the Hart-Scott-Rodino Act and exercised by the Antitrust Division, is substantially similar to, if not indistinguishable from, that of the Federal Trade Commission, which is a de jure regulating agency. Yet no one doubts that the Federal Trade Commission is a regulator. An example illustrates the point.

When Standard Oil of California announced its \$13.2 billion acquisition of Gulf Corp., the Federal Trade Commission required as a precondition that certain Gulf properties be divested. The divested assets included: 1) the Gulf brand name and trademark in six states, consisting of 4,000 gasoline stations and 30 wholesale terminals; 2) the Colonial pipeline; and 3) several refineries. 46 Antitrust & Trade Reg. Rep. (BNA) 871-72 (1984) (consent decree for *In re Standard Oil Co.*).

In addition, the Federal Trade Commission exercised control over the acquisition. The FTC: 1) issued "hold separate orders" so that Gulf's property could not be controlled until the divestitures were complete; 2) retained full authority over all divestitures, including authority to order additional divestitures; and 3) ordered Standard Oil to supply buyers with supplies in order to facilitate refinery and market efficiencies. *Id.* at 872.

2. *Relationship Termination*

In the second category of cases, the Division has required merging entities to terminate relationships if they would create problems for competition. Thus, when Signal acquired Wheelabrator-Frye, it had to terminate its relationship with foreign firms for which both Signal and Wheelabrator-Frye were United States representatives. In addition, the Antitrust Division required Wheelabrator-Frye to sell its right to two crude oil processing patents and know-how.²⁰¹ The Division did not incorporate this termination requirement in a consent decree but, exercising its preclearance discretion, negotiated the termination as part of its "fix it first" policy. In addition, the Division, insisted that Wheelabrator-Frye engage in a bidding process for the sale of crude oil processing patents to ensure that the firm who ultimately acquired the patents was "the most vigorous and aggressive in the field."²⁰² The Division's oversight approval of this merger displayed an exercise of sweeping regulatory direction and control.

3. *Regulatory "Matchmaker"*

In a third type of restructuring, the Division has required the formation of certain corporate relationships not previously contemplated by the merging parties. When Alcan Aluminum Limited of Canada sought to acquire most of the aluminum producing assets of Atlantic Richfield Company (ARCO), ARCO wanted to exit the industry. Yet, the Department, in a consent order,²⁰³ required ARCO to enter into a production joint venture with Alcan in which ARCO would hold sixty percent of the shares and Alcan would hold forty percent. The Department fashioned a meticulously detailed agreement between the two companies, which required that the joint venture last for ten years, during which no major aluminum producer could acquire the ARCO interest. The Department, in effect, prevented ARCO from leaving the industry and forced it to enter into a corporate marriage.

After the Division conducted its investigation, it announced that it would oppose the merger. The parties then requested Division officials

201. 44 Antitrust & Trade Reg. Rep. (BNA) 492 (March 3, 1983); U.S. Dep't of Justice, Press Release (March 1, 1983).

202. 44 Antitrust & Trade Reg. Rep. (BNA) 492 (1983).

203. TRADE REG. REP. (CCH) No. 671 at 5 (Oct. 8, 1984). The four largest firms in the market account for 87.9% of sales. The merger created a HHI rating of 2,300, thus indicating a "highly concentrated" market. See U.S. Dep't of Justice, Press Release (Oct. 5, 1984).

to "discuss proposals for restructuring the merger."²⁰⁴ The Department proudly proclaimed that ". . . the use of a production joint venture as a means of settling a §7 case is . . . an innovation,"²⁰⁵ but cautioned that this innovative production joint venture should not be considered a precedent for future cases, "particularly where the challenged acquisition is of an existing rather than prospective competitor."²⁰⁶

E. Consent Decrees

The Antitrust Procedure and Penalties Act of 1974 ("Tunney

204. U.S. Dep't of Justice, Press Release, *supra* note 201, at 3.

205. TRADE REG. REP. (CCH) No. 671 at 5 (Oct. 8, 1984).

The Spectra-Physics and Leserplane merger involved similar creative measures. In June 1981, the Division announced, pursuant to a consent decree, that the newly-formed company was required to grant nonexclusive, royalty-free licenses for any patent the merging companies had a right to license as of January 1, 1980. The Division explained that the traditional divestiture option would not be effective because this industry was more technology-intensive than capital-intensive. Antitrust Trade Reg. Rep. (BNA) 1018 at A-21 (1981).

206. 671 TRADE REG. REP. (CCH) 6 (Oct. 8, 1984).

The Antitrust Division's regulatory influence also is evident in the application of the "failing company" doctrine to mergers, *see generally* Citizen Publishing Co. v. United States, 394 U.S. 131 (1969). In *Citizen Publishing*, the Supreme Court approved a defense to a charge of illegal merger based upon evidence that the acquired firm was failing, or almost certain to go into bankruptcy with no chance of successful reorganization, and that a no less anticompetitive merger was possible. The 1984 Merger Guidelines incorporated the "failing company" defense and expanded it to include a "failing division defense." Both defenses permit the acquisition of an unprofitable division of another firm provided the division is on the verge of liquidation.

A recent example of the failing division defense occurred when Westinghouse proposed the sale of its failing light bulb division to North American Phillips. 44 Antitrust & Trade Reg. Rep. (BNA) 498 (1983). At the time of the proposed acquisition, Westinghouse had the third highest market share, 16% of the industry. The two largest firms in the industry had a combined market share of 59%. Even in this highly concentrated market, the Division did not challenge the merger because Westinghouse could not find a less anticompetitive buyer. *Id.*

Another example of the application of the "failing company" defense was the recent acquisition by John Deere & Co. of Versatile Corporation's agricultural equipment operations. The Antitrust Division notified the companies that it would not block the acquisition if a "comprehensive search for a less anticompetitive purchase than Deere" was undertaken, U.S. Dep't of Justice, Press Release, 1-3, (June 20, 1986). At the time of the acquisition, Versatile ranked number one in the four-wheel-drive tractor manufacturer market with 33% of tractor sales and John Deere ranked number two with a market share of 26%. *Id.*

A final example includes the acquisition of Frontier Airlines by United Airlines. The Justice Department informed the Department of Transportation that the proposed \$146 million transaction should be allowed to proceed because Frontier was a "failing airline" and a "less anti-competitive purchaser" was not available. In its communication to the Department of Transportation, the Antitrust Division said that if United were prevented from acquiring Frontier, its owner, People Express, would "begin to immediately liquidate Frontier." U.S. Dep't of Justice, Press Release (July 28, 1986); Wall St. J., July 29, 1986, at 7, col. 2.

Act”),²⁰⁷ gives the Antitrust Division authority to negotiate and enter into consent decrees, making available effective relief from civil antitrust violations without a trial. The Antitrust Division must submit any consent judgment proposal in a civil proceeding to the district court where the proceeding is pending and must be published in the *Federal Register* at least sixty days prior to the effective date of the judgment. Generally, defendants initiate the settlement negotiations for a consent decree. Frequently, the Division files a proposed consent decree at the same time it files a complaint.²⁰⁸ This procedure permits the consent decree to incorporate prior negotiations between the Division and the parties. In addition, the procedure is consistent with the “fix it first” policy under which the Division advises the merging parties of methods to avoid the antitrust concerns raised by the proposed acquisition. Frequently, the negotiations concerning the restructuring of the transaction result in an agreement to file a consent decree, which settles the antitrust issues and permits the merger to proceed with modifications in the near future. The entered consent decree can be enforced through subsequent contempt proceedings.

If the Division and the parties can reach a settlement on the language of the consent decree, it will be filed with the district court. In addition to the settlement agreement, the Division must file a competitive impact statement reciting: 1) the nature and purpose of the proceeding, 2) the events giving rise to the alleged violation of the antitrust law, 3) an explanation of the proposal for a consent judgment, 4) the remedies available to the potential private plaintiffs damaged by the alleged violation, 5) a description of the procedures available for modification of such proposal, and 6) a description and evaluation of alternatives to such proposal actually considered by the Antitrust Division.²⁰⁹ Before entering any

207. 15 U.S.C. § 16 (1982). During the debate on the Act, Congress was concerned with the almost exclusive control that the Antitrust Division exercises over the consent decree process. See H.R. REP. No. 1463, 93rd Cong., 2d Sess. 6, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6535; 119 CONG. REC. 3455 (1973).

208. Section 4 of the Sherman Act, 15 U.S.C. § 4 (1982), and Section 15 of the Clayton Act, 15 U.S.C. § 25 (1982), give federal district courts subject matter jurisdiction to enter injunctions “to prevent and restrain violations.”

209. 15 U.S.C. § 16(b)(1)-(b)(6) (1982). A summary of the proposed consent judgment must be published 60 days prior to the effective date of the judgment in newspapers within the district in which the case is filed. The proposed judgment and competitive impact statement must be published in the *Federal Register* at least 60 days prior to the effective date of the judgment. Public comments and the Division’s reply to them must be published within the 60 day period. 15 U.S.C. § 16(c), 16(d) (1982).

consent judgment proposed by the Antitrust Division, the court must make a determination that the entry of such judgment is in the "public interest."²¹⁰ In this capacity the court is to exercise "an independent check upon the terms of decrees negotiated"²¹¹ by the Department. This standard of review is based on the interests and purposes underlying the antitrust laws.²¹²

F. Competition Advocacy Program

One of the primary functions of the Antitrust Division is to intervene or participate before administrative agencies that function wholly or partly under regulatory statutes in administrative proceedings.²¹³ The Antitrust Division examines mergers in regulated industries as they would any other industry in order to determine whether the merger is likely to have anticompetitive effects. It considers whether substantial competition between the merging parties will be lessened, and it informs the regulatory agency of its decision.

The Division, through its competition advocacy program, has been extremely active in the airline industry and in transportation regulation. The Division has conducted a number of investigations of airline mergers and at present is investigating three mergers—Northwest/Republic, Texas/Eastern and TWA/Ozark.²¹⁴ In March 1986 the Division urged the Department of Transportation to block Northwest's bid to acquire Republic because competition in the airline industry would be undermined, particularly in the Minneapolis market.²¹⁵ It objected, in addition, to the TWA acquisition of Ozark because of the resulting

210. 15 U.S.C. § 16(d)-(e) (1982). *See generally* United States v. AT&T, 552 F. Supp. 131, 147-153 (D.D.C. 1982); United States v. NBC, 449 F. Supp. 1127 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. 713 (D. Mass. 1975).

211. United States v. AT&T, 552 F. Supp. at 149, *aff'd*, Maryland v. United States, 460 U.S. 1001 (1983).

212. *Id.*

213. 28 C.F.R. § 0.40(b) (1985). Such agencies include the Department of Transportation, Interstate Commerce Commission, Federal Administration's Commission, Federal Maritime Commission, Federal Reserve Board, Federal Energy Regulatory Commission, Federal Trade Commission, Nuclear Regulatory Commission and the Securities and Exchange Commission.

214. U.S. Dep't of Justice, 1986-04 Release, Statement of Charles F. Rule, Deputy Assistant Attorney General, Antitrust Division, before the Subcommittee on Monopolies and Commercial Law Committee on the Judiciary, House of Rep. (May 1, 1986). *See* 50 Antitrust & Trade Reg. Rep. (BNA) 600 (1986).

215. 50 Antitrust & Trade Reg. Rep. (BNA) 600 (1986).

concentrated market in St. Louis.²¹⁶ The Division also recommended that the Department of Transportation reject Texas Air and Eastern's application for quick approval of the merger. The Division suggested instead that "some type of evidence-gathering process" to determine the potential effects in airline competition be conducted.²¹⁷ However, Texas Air Corporation's argument to sell certain slots and gates to Pan American World Airways resolved the Division's concern.²¹⁸ But, the Division urged the Department of Transportation to approve People Express' application to acquire Frontier Airlines because the transaction would have no anticompetitive effect.²¹⁹

Within the rail transportation industry, the Division endorsed a revised plan by Norfolk Southern Corporation after initially expressing reservations. That plan assures rail competition in connection with Norfolk Southern's \$1.2 billion bid to acquire Conrail.²²⁰ Appearing before the Interstate Commerce Commission, the Division urged extension of rail deregulation, and it advised the Interstate Commerce Commission to allow rates to be set by mutual negotiations between railroads and box car owners.²²¹

Although the competitive problems raised in the *regulated* sectors of the economy are diverse and varied, the Division's increased advocacy role remains an adjunct to the primary regulator. Here, too, the Antitrust Division is an active participant in the regulatory process. Whenever possible, the present Division promotes reliance on competition rather than on government regulation.²²²

IV. TOWARD MORE EFFICIENT RESOLUTION OF MERGER CONFLICTS

The preceding sections have demonstrated that the Antitrust Division

216. N.Y. Times, August 8, 1986, col. 6 atD3. A merger of TWA and Ozark would give TWA control over 76% of the air traffic in St. Louis.

217. 50 Antitrust & Trade Reg. Rep. (BNA) 540 (1986).

218. 50 Antitrust & Trade Reg. Rep. (BNA) 867 (1986).

219. 49 Antitrust & Trade Reg. Rep. (BNA) 843 (1985). Subsequently, the Division approved United Airlines' acquisition of Frontier for fear that Frontier was a "failing company" and would be forced to exit the market. U.S. Dep't of Justice, *supra* note 214; Wall St. J., July 29, 1986, at 7, col. 2.

220. 49 Antitrust & Trade Reg. Rep. (BNA) 929 (1985).

221. 50 Antitrust & Trade Reg. Rep. (BNA) 252 (1986).

222. See *Oversight Hearings before the Subcommittee on Monopolies and Commercial Law*, 97th Cong., 1st Sess. 32 (1981) (statement of Assistant Attorney General William F. Baxter).

has become, at least in a de facto sense, an economic regulator of mergers. Not all agree that, as a matter of policy, this enforcement direction is a positive one.²²³ Few have considered in any depth or in a systematic way the competing policies involved. Quite clearly, however, as a descriptive matter, we can agree that a major transition from the traditional, enforcement-oriented agency to that of regulator has occurred. That such a change has reached its high point during the Reagan Administration is not doubted. The administration's outspoken policy is to engage in dispute resolution without litigation.²²⁴ When this trend evolved is hard to discern, although reasons for the policy shift are evident.

The Antitrust Division's role as economic regulator paralleled the development of the Economic Policy Office of the Antitrust Division and the use of economic analysis by the Division. In 1973, then Assistant Attorney General Thomas Kauper established the Economic Policy Office as an outgrowth of the earlier Economic Section of the Antitrust Division.²²⁵ The evidence suggests, however, that the trend towards economic analysis and regulation of mergers began by the mid-1960s, although through the 1960's the Antitrust Division "viewed itself as a litigating agency."²²⁶ Kauper recently conceded that "by the mid-1960's, economic analysis . . . was a primary factor in the formulation of Division policy."²²⁷ Indeed, the Division issued the first Merger Guidelines in 1968.²²⁸ The Guidelines represented the first, formal policy shift in establishing standards through which the Antitrust Division reinterpreted its enforcement prerogatives and regulated mergers. Throughout the 1970's, the Division introduced and considered efficiency defenses to antitrust charges. Congress passed the Hart-Scott-Rodino Act in 1976, which gave the Division greater supervision of mergers through disclo-

223. See, e.g., Bronsteen, *A Review of the Revised Merger Guidelines*, 29 ANTITRUST BULL. 613 (1984); Kauper, *The 1983 Guidelines*, *supra* note 126, at 508; Kauper, *The Role of Economic Analysis In The Antitrust Division Before and After The Establishment of the Economic Policy Office: A Lawyer's View*, 29 ANTITRUST BULL. 111, 132 (1984) [hereinafter cited as Kauper, *Economic Analysis*]; Loevinger, *Antitrust and the Banking Revolution*, REGULATION 19-24 (July 1985).

224. 47 Antitrust & Trade Reg. Rep. (BNA) 986 (1984).

225. White, *Introduction to the Morning Session*, 29 ANTITRUST BULL. 1 (1984); Kauper, *Economic Analysis*, *supra* note 223, at 111.

226. Kauper, *Economic Analysis*, *supra* note 223, at 116.

227. *Id.* at 116-17.

228. MERGER GUIDELINES 1968, *supra* note 118. The Antitrust Division also has issued other guidelines and standards on topics other than mergers; U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE CONCERNING JOINT RESEARCH VENTURES (1980); U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977).

sure requirements. In 1982²²⁹ and 1984,²³⁰ the Division reformulated the Merger Guidelines. This resulted in merger standards that made challenges to proposed mergers more difficult than the Supreme Court cases suggested.²³¹

The operational standards established by the Guidelines were intended first to restate "developments in antitrust law and economics, and second, to reduce the uncertainty surrounding the evaluation of mergers and acquisitions by the Department."²³² In practice, the Guidelines serve, together with the disclosure requirements, as preclearance screening devices. The Division either: 1) gives a quasi-license to the proposed merger through interpretation of the standards and negotiation with the parties, or 2) discourages the merger with the result that the proposal fades away without a contest on the merits. Unquestionably, the Guidelines do contain economic policies of the government. The underlying assumptions and distributional effects of those economic policies are not addressed here, but we do inquire into what justifies this dramatic shift from law enforcement agency to economic planner and regulator.²³³

229. MERGER GUIDELINES 1982, *supra* note 128.

230. MERGER GUIDELINES 1984, *supra* note 144.

231. *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Aluminum Co. of Am. (Rome Cable), 377 U.S. 271 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

232. Baxter, *Responding to the Reaction: The Draftsman's View*, 71 CALIF. L. REV. 618 (1983).

233. Although the validity of the *substantive* content of the Guidelines has been challenged, and their substance undoubtedly affects the outcome of proposed mergers, these issues are beyond the scope of this Article. Only an analysis of the alternative methods or processes for resolving merger disputes are addressed here. On the issue of substantive criticism, see, e.g., Bauer, *Government Enforcement Policy of Section 7 of the Clayton Act: Carte Blanche For Conglomerate Mergers*, 71 CALIF. L. REV. 348 (1983); Cann, *The New Merger Guidelines—Is The Department of Justice Enforcing the Law?* 21 AM. BUS. L.J. 1-48 (1983); Cohen & Sullivan, *The Herfindahl-Hirschman Index and the New Antitrust Merger Guidelines: Concentrating on Concentration*, 62 TEX. L. REV. 453 (1983); Harris & Jorde, *Market Definition in the Merger Guidelines: Implications for Antitrust Enforcement*, 71 CALIF. L. REV. 464 (1983); Johnstone & Schaerr, *Retooling the Merger Guidelines*, 69 A.B.A. J. 584-89 (1983); Joseph & Mountz, *The Justice Department Merger Guidelines: Impact on Horizontal Mergers Between Commercial Banks*, 72 KY. L.J. 505 (1983-84); Roberts, Barringer & Eaker, *The 1982 Merger Guidelines: If "Too Lenient" Why No Old Style Schlitz or Blue Ribbon?* 22 AM. BUS. L.J. 503 (1985); Schwartz, *The New Merger Guidelines: Guide To Governmental Discretion and Private Counseling or Propaganda For Revision of the Antitrust Law?* 71 CALIF. L. REV. 575 (1983); Sullivan, *The New Merger Guidelines: An Afterword*, 71 CALIF. L. REV. 632 (1983); Werden, *Market Delineation and the Justice Department's Merger Guidelines*, 1983 DUKE L.J. 514-79; see generally *A Symposium on the 1984 Department of Justice Merger Guidelines*, 29 ANTITRUST BULL. 613-717 (1984); *Merger Law Update*, 53 ANTITRUST L.J. 319-57 (1984); *The New Merger Guidelines*, 51 ANTITRUST L.J. 283-335 (1982); *Symposium: 1982 Merger Guidelines*, 71 CALIF. L. REV. 280-672 (1983).

This "process" question is addressed next.

As a general matter the enormous cost associated with litigating potentially anticompetitive mergers is a dominant concern of antitrust litigation today. Finding means to reduce the costs of resolving merger disputes serves the public interest.²³⁴ Cost reductions can benefit the public by conserving the limited resources of the courts, the Antitrust Division, and the merging parties. The containment of litigation costs must be a high priority,²³⁵ particularly in times of budget restrictions, when public enforcement agencies must allocate scarce resources efficiently.²³⁶ The Supreme Court has recognized efficiency in antitrust litigation as an important policy goal, and one that will be enforced.²³⁷ Therefore, the central question is whether the present preclearance procedure in resolv-

234. There is a rich literature on the economic concern for finding alternative dispute resolution mechanisms. See generally R. FISHER & W. URY, *GETTING TO YES* (1981); S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* (1985); Abel, *The Contradictions in Informal Justice*, in *THE POLITICS OF INFORMAL JUSTICE* 310 (R. Abel ed. 1982); Brazil, *Civil Discovery: How Bad Are the Problems?* 67 A.B.A. J. 450 (1981); Burger, *Isn't There a Better Way*, 68 A.B.A. J. 274 (1982); Cooter, Marks & Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); Janofsky, *A.B.A. Attacks Delay and the High Cost of Litigation*, 65 A.B.A. J. 1323 (1979); Kastenmeier & Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301 (1979); Landis, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); LEVIN & COLLIERS, *Containing The Cost of Litigation*, 37 RUTGERS L. REV. 219 (1985); Manning, *Hyperlexis: Our National Disease*, 71 N.W.U. L. REV. 767 (1977); Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); Rosenberg, *Civil Justice Research and Civil Justice Reform*, 15 LAW & SOC. REV. 473 (1980-81); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976); Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982); Trubek, Sarat, Felstiner, Kritzer, & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983) [hereinafter cited as *The Costs of Ordinary Litigation*]; Weller, Ruhnka & Martin, *American Experiments for Reducing Civil Trial Costs and Delay*, 1 CIV. JUST. Q. 151 (1982).

235. For example, from 1973 to 1983, the portion of gross national product (GNP) attributable to legal services increased 59%. Levin & Colliers, *supra* note 234, at 222-25. Moreover, federal litigation imposes greater costs than state court litigation. Kritzer, Grossman, McNichol, Trubek & Sarat, *Courts and Litigation Investment: Why Do Lawyers Spend More Time on Federal Cases?* 9 JUST. SYS. J. 7 (1984). In addition, from 1960 to 1980 federal district courts filings, measured on a per capita basis, doubled. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); see also J. LIEBERMAN, *THE LITIGIOUS SOCIETY* (1981).

236. Efficiency in this context means maximizing certain legal and policy objectives, while minimizing costs, subject to certain constraints. A. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 117 (1983).

237. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986); *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); see also *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Hawaii v. Standard Oil*, 405 U.S. 251 (1972); *Celotex Corp. v. Cartrett*, 106 S. Ct.

ing merger issues is more efficient than traditional litigation. If so, continuing the Antitrust Division's present posture towards merger regulation serves the public interest.²³⁸ To answer these concerns, we need to inquire: 1) whether the alternative means of resolving merger disputes used by the Antitrust Division increase or reduce the costs of enforcing section seven of the Clayton Act, and 2) whether these procedures reduce or enhance enforcement effectiveness.²³⁹ In short, we ask whether the benefits of the present regulatory posture exceed the costs of litigation.

It is well known that the costs of litigation create incentives for the parties and the government to avoid litigation.²⁴⁰ The high cost of litigation has increased the importance of alternative means of dispute resolution.²⁴¹ Increasingly, conflicts are resolved through alternative means that achieve settlement before full trial. Antitrust litigation is no exception to this trend.

A recent study on private antitrust litigation showed that the parties reached settlement before trial in eighty-eight percent of the filed antitrust cases surveyed. In many other antitrust cases, the parties settled before ever commencing suit. The parties' knowledge that litigation is not costless and that outcomes are not perfectly predictable spurred a resolution of their conflict.²⁴² For most disputes, the efficient resolution is not the litigated one. Tradeoffs result which require the parties and the government policymaker to seek an optimal level of enforcement—one

2548 (1986), *rev'g.* *Cartrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 187 (D.C. Cir. 1986) (Bork J. dissenting).

238. A discussion of whether the present Mergers Guidelines accurately state the substantive law or take into account questions of distributive justice is beyond the scope of this Article. See *supra* note 233. Rather, the focus here is to explore the alternative methods or processes for merger dispute resolution.

239. See generally Pitofsky, *Beyond Nader: Consumer Protection and Regulation of Advertising*, 90 HARV. L. REV. 661-701 (1977); SULLIVAN & MARKS, *The FTC's Deceptive Advertising Policy: A Legal & Economic Analysis*, 64 OR. L. REV. 593, 614 (1986).

240. Salop & White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001 (1986).

241. See generally J. AUERBACH, *JUSTICE WITHOUT LAW?* (1983); S. MERMIN, *LAW AND THE LEGAL SYSTEM* (1982); H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Perritt, "And the Whole Earth Was of One Language"—*A Broad View of Dispute Resolution*, 29 VILL. L. REV. 1221 (1984); Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982); Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982).

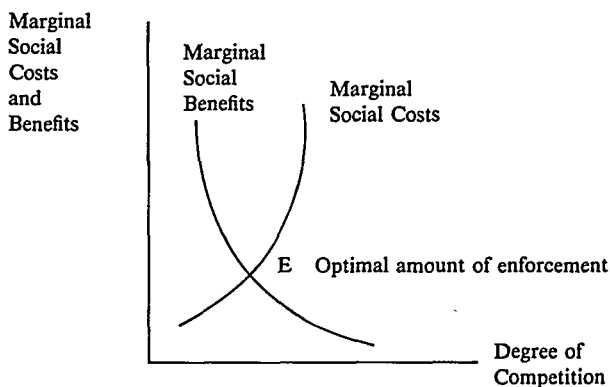
242. Salop & White, *supra* note 240; see also *The Costs of Ordinary Litigation*, *supra* note 234, at 89.

which minimizes costs while maximizing enforcement objectives.²⁴³

Even if one assumes that the government's enforcement budget was fixed in real terms, an increase in litigation costs decreases the number of cases that can be brought for adjudication.²⁴⁴ Consequently, the probability of enforcement decreases and, accordingly, the probability of undetected section seven violations increases. The same holds true if the enforcement budget is decreased.

Recognizing the incentives that litigations costs create, the government policymaker, in search of the optimal level of enforcement, must include the costs and benefits of various alternative means of resolving antitrust disputes. Parties incur costs both in the preparation for adjudication and the adjudication itself. The decision to litigate includes an analysis of: 1) the probability of detention and conviction, 2) risk preference, 3) severity and magnitude of judgment, 4) trial versus settlement costs, 5) availability and productivity of each party's resources, and 6) the uncertainty of outcome.²⁴⁵ Tradeoffs, in most cases, lead parties to

243. K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS*, 10, 13 (1976) ("The appropriate amount of resources devoted to antitrust activities is . . . determined by the intersection of the marginal social benefit and the marginal social cost curves.").



If enforcement is to the left of E, more enforcement resources are needed. If to the right of E, enforcement resources should be reduced.

244. Sullivan and Marks, *supra* note 239, at 626.

245. *Id.* at 627-28 and accompanying footnotes. See generally Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Breit and Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damage*, 17 J.L. & ECON. 329 (1974); Calfee and Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984); Landes, *Optimal Sanctions for Antitrust Violations*, 5 U. CHI. L. REV. 622 (1983); Mennell, *A Note on Private Versus Social Incentives to Sue In a Costly Legal System*, 12 J. LEGAL STUD. 41

utilize some form of alternative dispute resolution such as negotiated settlement.²⁴⁶ When this does not occur, it is because the minimum settlement demand of the government (plaintiff) exceeds the maximum settlement demand of the defendant. Efficient case management and resolution of these factors, however, has led the Antitrust Division as a matter of policy to utilize alternative means for the resolution of merger disputes.²⁴⁷ The fact that the Antitrust Division has avoided the adversarial process is not necessarily bad, especially if viewed in light of the many advantages of its merger resolution process.²⁴⁸

Although alternative dispute resolution procedures (in contrast to court adjudication) are currently fashionable,²⁴⁹ they are not new, having existed as long as civilization.²⁵⁰ Alternative dispute resolution takes many forms but essentially includes the use of extra-judicial processes, such as negotiation, mediation, arbitration and settlement.²⁵¹ In selecting the most effective method of resolution, one needs to consider the general enforcement goals of certainty and clarity of the law, deterrence, resource allocation, case management, justice and legitimacy.²⁵² These goals, of course, are illustrative rather than exhaustive and not of equal importance. Moreover, these goals may not be pursued simultaneously or with equal vigor in each case. Optimally, public officials should pursue those methods of dispute resolution that combine those goals that

(1983); Posner, *A Statistical Study of Antitrust Enforcement* 13 J.L. & ECON. 365 (1970); Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1075 (1980); *The Costs of Ordinary Litigation*, *supra* note 234.

246. Menkel-Meadow, *For & Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 513 (1985).

247. See section III, *supra*. See also Posner, *A Statistical Study of Antitrust Enforcement*, *supra* note 245, at 374-75.

248. The selection of a particular dispute resolution process may be outcome-determinative. Similarly, a determination of the desired outcome may preordain the use of a particular process. Menkel-Meadow, *supra* note 246, at 490.

249. Perritt, *supra* note 241, at 1225.

250. J. AUERBACH, *supra* note 241.

251. Fuller, *supra* note 241; Perritt, *supra* note 241, at 1230.

252. See, e.g., H. HART & A. SACKS, *THE LEGAL PROCESS* 750 (1958); K. ELZINGA & W. BREIT, *supra* note 243, at 11,140-47; Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice*, 1984 WIS. L. REV. 893; Calfee and Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984); Gifford, *Communication of Legal Standards, Policy Development, and Effective Conduct Regulation*, 56 CORNELL L. REV. 409 (1971); Hirsch, *Reducing Law's Uncertainty and Complexity*, 21 UCLA L. REV. 1233 (1974).

yield society the greatest utility.²⁵³

The resolution methods adopted by the Antitrust Division achieve many of these enforcement goals. They also satisfy the underlying policies favoring alternative dispute resolution. Economic efficiency, as it relates to case management and resource allocation, ranks first. The Antitrust Division's procedures for reacting to a proposed merger—standard setting (Guidelines), disclosure requirements, preclearance screening, negotiation, merger restructure and consent orders—display an impressive promptness by government officials. The entire resolution process is substantially shorter, and expends fewer resources, than the alternative—traditional, protracted litigation. The relative speed at which the system operates reduces the process costs of each proposed merger and consequently reduces costs for all proposed mergers.²⁵⁴

253. Bush, *supra* note 252, at 921-62.

Although the evolution of the Antitrust Division from enforcement agency to economic regulator can be described, the motivations that drive and shape the Division's policy and procedure have not been widely studied in the political economy literature, *see, e.g.*, J. WILSON, *THE POLITICS OF REGULATION* 123 (1980). Understanding regulatory behavior and decisionmaking at the Antitrust Division requires an appreciation of the interaction of many constraints.

First, because the Division is part of the executive branch, it is subject to the political agenda and environment set by the administration. Second, statutory and legislative limits and pressures from congressional oversight committees, especially in the budgetary process, constrain the Division's conduct. Third, when the Division files suit, it is subject to judicial checks; although, it exercises broad prosecutorial discretion in deciding whether or not to sue. Fourth, the leadership exercised by the Attorney General and Assistant Attorney General and the strength of opinions held by each, influence the Division's behavior to varying degrees.

Numerous examples of motivating factors are described above, but three seem critical to the present regulatory posture over mergers. Congressional passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 prompted the Division to assume a regulatory role. An executive branch desire to reduce the confrontational and adversarial nature of enforcement motivated the "fix it first" policy. A desire for less government intervention in capital markets is also another frequent theme. These institutional, political, and operating constraints played a significant role in shaping the Division's perception of the "public welfare" and enforcement. Other commentators have noted similar constraints and incentives at work in other agencies. *See generally* K. CLARKSON & W. MURIS, *THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR* (1981); R. Katzman, *REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY* (1980); Weingast, *Regulation, Reregulation and Deregulation: The Political Foundations of Agency Clientele Relationships*, 44 *LAW & CONTEMP. PROBS.* 148 (1981); Weingast & Moran, *Bureaucratic Control: Regulation Policy Making By the Federal Trade Commission*, 91 *J. POL. ECON.* 765 (1983); Weingast, *The Congressional-Bureaucratic System: A Principal-Agent Perspective With Applications to the SEC* (Working Paper No. 86), Center for the Study of American Business, Washington University, St. Louis; Grier, *Congressional Preference and Federal Reserve Policy* (Working paper No. 95), Center for the Study of American Business, Washington University, St. Louis.

254. *See* Barnette, *The Importance of Alternative Dispute Resolution Reducing Litigation Costs as*

Minimizing delay increases public confidence in the process. Court dockets are freed for other important matters, including those few merger cases that can not be settled. As a result, the perceived legitimacy of the system is enhanced with a concomitant increase in deterrence. The relative clarity of substantive merger law as set forth in the Guidelines, in comparison to the ambiguities of the case law, also fosters deterrence.²⁵⁵ To the extent that legal standards are clearly stated, promptly enforced, and backed by adequate deterrence, the efficiency or utility of law is maximized.

Despite the efficiency of the present merger process, not everyone accepts its utility.²⁵⁶ Generally, opponents of alternative dispute resolution strenuously oppose any move away from full adjudication.²⁵⁷ One opponent, Professor Fiss has put forth the most forceful arguments, albeit without empirical support. Fiss criticizes alternative dispute resolution in general and the movement toward settlement, asserting that: 1) a relative imbalance of power between the parties may force unfair resolutions, 2) settlements are often reached without authoritative consent because of imperfect representation, 3) the absence of a judicial record impairs the enforcement of settlements, and 4) peace rather than justice is achieved.²⁵⁸ Although Fiss' arguments were not specifically criticizing merger settlements, each of his general criticisms lacks force when applied to public enforcement of merger regulations.

First, the argument that settlements only achieve justice for the wealthy presupposes disparity in wealth between the disputants.²⁵⁹ Because the Department of Justice is enforcing the merger laws and large corporations are defending the proposed mergers, the relative imbalance

a *Corporate Objective*, 53 ANTITRUST L.J. 277, 278 (1984); see also Bush, *supra* note 252, at 909; Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29, 32-34 (1972).

255. Whether the Guidelines actually alter the substantive case law is a question beyond the scope of this Article. See generally *supra* note 233.

256. See generally *supra* note 233.

257. See, e.g., Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) [hereinafter cited as Fiss, *Against Settlement*]; Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985) [hereinafter cited as Fiss, *Eden*]; Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982). See also Chayes, *The Role of Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). But see McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 16660 (1985).

258. Fiss, *Against Settlement*, *supra* note 257; Fiss, *Eden*, *supra* note 257.

259. Fiss, *Against Settlement*, *supra* note 257, at 1076. See 15 U.S.C. § 18a (1976) (the acquiring person must have total assets or annual net sales of \$100 million and must be acquiring voting securities or assets of a manufacturing person with annual net sales or assets of \$10 million, or a non-manufacturing person with assets of \$10 million).

of power seems insignificant. Merger disputes rarely, if ever, involve indigents, who might be especially vulnerable. Nor does either party have preferred access to resources and information regarding the merger.

Second, authoritative consent of the parties does not seem problematic in the merger context. In addition, Fiss has not advanced any evidence, empirical or otherwise, to support this general argument in the litigation context. Corporations have not charged conflicts of interest between themselves and their representatives in the settlement proceedings. Corporations involved in antitrust merger matters tend to hire competent experts in the field as counsel. Inside corporate counsel work closely with retained counsel to effectuate the corporate client's desires. Sophisticated business executives and lawyers, who are able to respond quickly to the Division's requests and objections, comprise most merger teams. Many actors in today's corporate arena agree that a fundamental corporate objective should be the avoidance of litigation.²⁶⁰ Thus, there is no discernable reason why counsel should not pursue alternative means to resolve merger disputes. The evidence concerning mergers suggests that the parties are doing just that—negotiating and settling, rather than litigating, the conflicts that do arise.²⁶¹

Third, the absence of a judicial record is irrelevant in the preclearance screening process. The parties must submit to the Antitrust Division all relevant financial and economic data required by the Hart-Scott-Rodino disclosure provisions. The Division may set forth its understanding of the conditions and terms of merger in a business review letter. In addition the parties may set forth their agreement and understanding in a consent decree.²⁶² These records provide a factual basis upon which subsequent enforcement actions can be based.

Finally, Fiss asserts that settlements result in peace but not necessarily justice.²⁶³ He opines that the purposes of adjudication are broader than the resolution of the parties' conflict. According to Fiss, adjudication provides a forum for articulating and effectuating through the participation of the judge important values "embodied in the substantive law." Although few public enforcement suits are actually filed in the merger

260. Irving Shapiro, former Chairman of DuPont, is reported to have said: "Anyone with experience in major litigation knows that the cost and wear and tear of litigation are no longer acceptable. Alternative means of resolving problems have to be found." Barnette, *supra* note 254, at 277.

261. See *supra* § III.D.

262. 28 C.F.R. § 50.6 (1986); 16 C.F.R. § 2.31 (1986).

263. Fiss, *Against Settlement*, *supra* note 257, at 1075. *Contra*, Menkel-Meadow, *supra* note 246, at 499.

area,²⁶⁴ the Department of Justice is charged with responsibility of enforcing the law. To date no one has argued or documented that the Antitrust Division has established and enforced the merger Guidelines for the purpose of withdrawing mergers from judicial review or minimizing a perceived "activism" by the judiciary.²⁶⁵ Furthermore, a private cause of action exists for challenging illegal mergers.²⁶⁶ Thus, a judicial forum is available in the event the Department abrogates its responsibilities or in the event the parties cannot reach a settlement. Moreover, a negotiated settlement is not inherently unjust; settlements that satisfy both sides may be more just than uncompromising court mandates.

In short, the Antitrust Division's "regulatory conduct" is unquestionably more prompt, less costly and more efficient than full-blown adjudicatory proceedings. The prescreening clearance process is appropriately suited for review of proposed mergers. It avoids the attendant costs of litigation for the merging parties, the Antitrust Division and the courts. From a policy standpoint, the present review process is in most cases a more effective means of resolving merger issues. In this context, the goals of efficiency, justice, and legitimacy need not compete; each can be pursued simultaneously. Efficiency need not diminish the quantity of the justice or the legitimacy of the process.

V. CONCLUSION

The evolution of the Antitrust Division into an economic regulator is logical. At its roots, the legislative history of the antitrust laws shows a

264. See *supra* § III.

265. See Fiss, *Eden*, *supra* note 257, at 1670.

266. The Supreme Court has established several antitrust doctrines that may bar a competitor from challenging a proposed merger. See *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977) (antitrust injury); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 55 U.S.L.W. 4027 (U.S. Dec. 9, 1986) (standing); *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182 (D.D.C. 1984) (standing). See also Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Hovenkamp, *Merger Actions for Damages*, 35 HASTINGS L.J. 937 (1984); Markovits, *The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook*, 63 TEX. L. REV. 41 (1984). But see *White Consol. Indus., Inc. v. Whirlpool Corp.*, 612 F. Supp. 1009 (N.D. Ohio), *vacated*, 619 F. Supp. 1022 (N.D. Ohio 1985), *aff'd*, 781 F.2d 1224 (6th Cir. 1986); *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 660 F. Supp. 1326 (E.D. Mich.), *aff'd*, 753 F.2d 1354 (6th Cir.), *cert. denied*, 105 S. Ct. 1155 (1985) (cases brought and won by competitors after government clearance of the merger).

In *Cargill*, the Supreme Court held that *Brunswick's* antitrust injury test applies to private plaintiffs seeking injunctive relief under § 16 of the Clayton Act and that loss or injury due to increased competition does not constitute antitrust injury. *Cargill*, 55 U.S.L.W. at 4032.

Of the antitrust suits filed, for which a final disposition is known, 88% were settled without final adjudication. *Salop & White*, *supra* note 240, at 1011.

nonregulatory concept for the Department of Justice, but it also shows, at least in part, a noneconomic view of the antitrust laws.²⁶⁷ Thus, the early focus on individual behavior was quite appropriate; but once the Department took a more global, economic view of antitrust, antitrust enforcement became a process of controlling and adjusting the economic aspects of markets. And, that is what regulatory agencies traditionally do—tinker with the market as a whole. The panoply of merger procedures utilized by the Antitrust Division facilitates this economic regulation.

The Antitrust Division's present merger review procedures are cost efficient. The Division employs several procedures to regulate mergers including: 1) setting merger standards and guidelines, 2) reviewing market data submitted through required disclosure provisions, 3) establishing a preclearance screening process, 4) suggesting and negotiating merger restructures, and 5) joining in curative, or divestment, consent orders.

The dichotomy lies in the fact that, as the Antitrust Division has evolved from a traditional, litigation-oriented enforcement agency to that of a regulatory agency, it has done so without clear congressional approval or directive. It is clear that the original intention of Congress, when adopting the Sherman and Clayton Acts, was not to create in the Department of Justice a regulatory agency over mergers. The present regulatory posture permitting preclearance approval of mergers was specifically proposed by Senator Cummins in 1913 and rejected by President Wilson and the 1914 Congress that passed the Clayton Act. Subsequently Congress has sanctioned or ratified, at least implicitly, this enforcement transition, although Congress may well be unaware of the impact of this change. The change is not merely procedural; it implicates enforcement policy, compliance incentives, and the substantive law of mergers. It also can accommodate various divergent ideologies. From both efficiency and procedural perspectives, the gains are many.

267. See, e.g., Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Lande, *Wealth Transfers As The Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511 (1984); Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076 (1979); Sullivan, *The Economic Jurisprudence of the Burger Court's Antitrust Policy: The First Thirteen Years*, 58 NOTRE DAME L. REV. 1 (1982); Sullivan, *Economics and More Humanistic Disciplines: What Are The Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214 (1977).

APPENDIX

NUMBER AND VALUES OF MERGERS AND ACQUISITIONS
1968-1986

<u>Year</u>	<u>No. of Trans.</u>	<u>Index (1980=100)</u>	<u>Percent change</u>	<u>Reported Value of Trans.*</u>	<u>Index (1980=100)</u>
1968	4,462	236		43,600	98
1969	6,107	323	+37%	23,700	53
1970	5,152	273	-16%	16,400	37
1971	4,608	243	-11%	12,600	28
1972	4,801	254	+4%	16,700	38
1973	4,040	214	-16%	16,700	38
1974	2,861	152	-29%	12,500	28
1975	2,297	122	-20%	11,800	27
1976	2,276	144	-1%	20,030	45
1977	2,224	118	-2%	21,937	49
1978	2,106	111	-5%	34,180	77
1979	2,128	112	+1%	43,535	98
1980	1,889	100	-11%	44,346	100
1981	2,395	127	+27%	82,618	186
1982	2,346	125	-2%	53,755	121
1983	2,533	134	+7%	73,081	165
1984	2,543	135	+1%	122,224	276
1985	3,001	159	+18%	179,600	405
1986	3,356	178	+12%	176,600	398

*Millions of dollars

Source: W.T. GRIMM & CO., MERGERSTAT REVIEW (compiled from data covering 1968-1986).

The values in column 5 include only those values reported by the parties to the acquisition; they represent between 32-50% of all merger transactions. Values to other transactions were not reported. They also include only transactions with a minimum value of \$500,000. The initial reporting threshold under the Hart-Scott-Rodino Act is \$15 million or 15% of the value of the assets or securities of the acquired firm.

