ADVANCE RELEASE FOR
MORNING PAPERS OF
THURSDAY, JUNE 21, 1956

ADDRESS

By

HONORABLE HERBERT BROWNELL, JR.

ATTORNEY GENERAL OF THE UNITED STATES

Prepared for Delivery

before the

1956 EXECUTIVE CONFERENCE ON ADMINISTRATIVE POLICIES AND PROBLEMS

sponsored by the

University of Pennsylvania

Philadelphia, Pennsylvania

WEDNESDAY, June 20, 1956

This month marks more than three years since the Eisenhower Administration's antitrust program has been in operation. With this in mind, I am happy to talk over with this group of business executives and market statisticians the path we in the Department of Justice have travelled and some of our aims for the future.

Antitrust, you all realize, covers the entire range of American life. Thus, this Administration has brought suits against lead producers, 1/ shipping companies and airlines 2/ shrimp dealers, 3/ trailer operators, 4/ and linen service suppliers. 5/ Treating even more directly those human frailties to which all of us may be subject, antitrust has moved against restraints on the manufacture of eyeglasses, 6/ false teeth, 7/ and vitamin pills. 8/ Just to ensure continued need for such pills, we have attacked restrictions on the sale of alcoholic beverages in the states that range from Maryland to Tennessee. And riding even higher on the wave of the future, we have more recently struck at limitations on production of sex hormones.

1/ U. S. v. American Smelting and Refining Co., et al. Civ. 88-249 filed Oct. 9, 1953.

2/ U. S. v. Pan American World Airways, Inc., et al. Civ. 90-259, filed Jan. 11, 1954.

3/ U. S. v. Gulf Coast Shrimpers and Oystermans Association, et al. Cr. 7192, filed April 1, 1953.

4/ U. S. v. Nationwide Trailer Rental System, Inc., et al. Civ. W-655, filed Aug. 28, 1953.

5/ U. S. v. National Linen Service Corp., et al. Cr. 20559, Civ. 5171, both cases filed April 25, 1955.

6/ U. S. v. Bausch & Lomb Optical Company, Civ. 46-C-1332, filed July 23, 1946.

7/ U. S. v. Luxene, Inc., Civ. 66124, filed April 27, 1951.

8/ U. S. v. Merck & Co., Inc., Civ. 3159, filed October 28, 1943.

Antitrust, I might add, is concerned not only with the material things of life. It covers the theatre and arts as well. Thus, we have proceeded against restraints by the New York City Theatre Scenery Haulers 9/ as well as the International Boxing Club. 10/ And blending theatre with sport, as well as with a sense of humor, we now investigate our Nation's commercial wrestling.

As you can readily see, antitrust is no esoteric endeavor conducted by bureaucrats in far-off Washington and eternally removed from the main stream of American living.

Another way to bring home to each of us the pervasiveness of antitrust in American industrial and commercial life may be to sketch briefly nine examples of the types of business conduct that do, or may, transgress the antitrust laws. At the outset agreements

(1) to fix prices

(2) to boycott, or

(3) to divide territories

are traditional per se violations of Sherman Act Section 1. Section 1, however, as the Court announced in the 1911 Standard Oil 11/ decision is "an all-embracing enumeration to make sure that no form of transaction or combination by which undue restraint" is achieved may stand. As a

---

9/ U. S. v. Walton Hauling & Warehouse Corp., et al., Civ. 86-286, filed July 15, 1953; Cr. 141-349, filed June 23, 1953.

10/ U. S. v. International Boxing Guild, et al., Cr. 21823, filed Jan. 10, 1956.

11/ Standard Oil Company of New Jersey v. United States, 221 U. S. 1, 59 (1911)

result,

(4) permanent combination by merger or vertical integration

may raise problems under Section 1, but as a practical matter, such issues arise largely under Clayton Act Section 7. Similarly, though

(5) a "tying" arrangement conditioning the sale or lease of one product on use of another, or

(6) an exclusive dealing plan

may run afoul of Section 1, their legality is more generally tested under the more rigorous standard of Clayton Act Section 3.

The same specific acts controlling price and restricting competitive opportunities prohibited by Section 1 may constitute essential ingredients of large offenses proscribed by Section 2. But apart from the elements which Section 2 has in common with Section 1, it establishes three separate offenses:

(7) to monopolize,

(8) to attempt to monopolize, and

(9) to combine and conspire with others to monopolize any part of the trade or commerce among the several states or with foreign nations.

I shall not attempt to enumerate antitrust problems handled primarily by the Federal Trade Commission.

This Administration's antitrust policy parts company with its immediate predecessors on three basic scores. At the outset, cases brought have aimed not at proving doctrinaire economic or social theories, but at making real and prompt and practical strides toward either

cracking restraint on entry by new persons into an industry, or control over price. Thus, our goal has been a vigorous cracking-down on hard core antitrust violations. Second, because businessmen know this difference in policy will spell greater court success, pre-trial settlements have jumped sharply. Thus, we secured more results per each enforcement dollar and helped relieve congestion of Federal Court calendars. Finally, to clarify those foggy unsettled regions of law and policy, we organized a study group representing a fair cross section of all antitrust views, and now for the first time since the Sherman Act's passage we have a survey of the major decisions under the Sherman and Clayton Antitrust Acts. So we seek to help our Nation mold a coherent antitrust policy.

During 1954, the first full year this Administration ran the Antitrust Division, 35 cases were brought; and during calendar year 1955, 54 new cases. This record represents a considerable increase in the number of cases filed over the average of preceding years.

Not only have more cases been filed, but we have focused on keeping our calendar up to date. During 1954 and 1955, some 108 cases were closed. This represents about a 25 percent increase over the average of preceding years in cleaning up pending cases.

Once decrees are entered, moreover, we see to it they are lived up to. Thus, in the 62 years since the Sherman Act's passage, 26 contempt proceedings were brought for violation of outstanding decrees. Of this 26, one-third or nine, were brought in the past three and one-half years.

These enforcement results, let me emphasize, we press for against all groups alike if they are covered by the antitrust statutes. Congress has

exempted some activities, such as certain activities of organized labor from antitrust. Nonetheless, this Administration has moved vigorously to strike down those union restraints on commercial competition which Congress has not shielded. From January 1953 to date, we have brought 10 cases in which a labor union was a defendant and one case in which a union was a co-conspirator.

Statistics alone tell only a small part of the story. For cases are filed with an eye to practical enforcement results. In the Panagra suit, for instance, the relief sought by the Government--divestiture by Grace Lines and Pan Am of their Panagra stock--will spur a competing transport route to crucial South American markets. Similarly, in the recent RCA proceeding, striking down RCA's limitations on patent licensing may do much to encourage research in that area of electronic endeavor so vital to our national welfare and defense. Beyond these examples, this firm interest in practical enforcement results, rather than doctrinaire rules, inspired our turn-down of the proposed Youngstown-Bethlehem merger while at almost the same time we approved certain mergers by small auto makers.

The purpose and extent of economic analysis differs from case to case. As the Attorney General's Report put it: 12/

> In antitrust cases, courts may be called upon to measure the actual or probable effect of business conduct upon competition. Where agreements to control market prices or output are charged, the only issue is whether the alleged practice did in fact occur, since the effect on competition is known to be so adverse that the practice is unreasonable per se. Practices which are not unreasonable per se are those from which a fixed set of effects do

---

12/ Report of the Attorney General's National Committee to Study the Antitrust Laws, p. 315.

> not necessarily follow. They are subject to more extensive market inquiry under the standards of the antitrust laws. This means that their actual or probable market consequences must be determined as part of the test of their legality. Such determination, in turn, involves resort to economic analysis.

Beyond these generalizations, the Supreme Court's recent 4-3 decision in the du Pont Cellophane case highlights the sort of economic data that may be relevant to proof of monopolization under Section 2. The Supreme Court there upheld the District Court's findings that "the 'great sensitivity of customers in the flexible packaging markets to price or quality changes' prevented du Pont from possessing monopoly control over price." 13/ Accordingly, the Court concluded "that cellophane's interchangeability with other materials suffices to make it a part of this flexible packaging material market." 14/

The majority's beginning point was: "Illegal power must be appraised in terms of the competitive market for the product." 15/ The Government's "charge," in the language of the Court, was "monopolization of cellophane. The defense that cellophane was merely a part of the relevant market for flexible packaging materials." Deciding "what is the relevant market for determining the control of price and competition," the Court reasoned, "no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of

---

13/ Slip Sheet Opinion, p. 23.

14/ Ibid., p. 23.

15/ Ibid., p. 16.

the trade or commerce,' monopolization of which may be illegal." 16/ Applying that test to the facts at bar, the Court deemed most relevant "the use or uses to which the product is put." 17/ Though the Court conceded that cellophane "differs from other flexible packaging materials," 18/ it noted that "it has to meet competition from other materials in every one of its uses." 19/ "Moreover," the Court emphasized, " a very considerable degree of functional interchangeability exists between these products." 20/ Accordingly, ruling against the Government, the Court held that, for Section 2 purposes, the relevant:

> * * * market is composed of products that have reasonable interchangeability for the purposes for which they are produced--price, use and qualities considered. While the application of the tests remains uncertain, it seems to us that du Pont should not be found to monopolize cellophane when that product has the competition and interchangeability with other wrappings that this record shows. 21/

With that conclusion, the dissent disagreed. As Chief Justice Warren put it: "We cannot agree that cellophane * * * is 'the self-same product' as glassine, grease proof and vegetable parchment papers, waxed papers * * * and other films." 22/ If "the conduct of buyers indicated * * * /these other wrappings/ were actually the 'self-same products'

16/ Ibid., p. 18.

17/ Ibid., p. 19.

18/ Ibid., p. 20.

19/ Ibid., p. 22.

20/ Ibid., p. 22.

21/ Ibid., p. 27-28.

22/ Dissent, p. 1.

as cellophane," the Chief Justice reasoned "the qualitative differences * * * would not be conclusive. But the record provides convincing proof that businessmen did not so regard the products"; we "cannot believe", the Dissent went on, "that buyers, practical businessmen, would, have bought cellophane in increasing amounts * * * if close substitutes were available at from one-seventh to one-half cellophane's price." 23/ Accordingly, the Dissent concluded:

> * * * the record shows conclusively that cellophane is the relevant market. Since du Pont has the lion's share of that market, it must have monopoly power * * * This being so, we think it clear that in the circumstances of this case du Pont is guilty of monopolization. 24/

Against this background of enforcement experience thus far, what recommendations for improvements in the effectiveness of the antitrust laws have we offered. The Economic Report of the President, sent to the Congress a short while ago 25/ set forth a number, of which I will select three major ones:

> . . . the following revisions of antitrust legislation are recommended. First, all firms of significant size that are engaged in interstate commerce and plan to merge should be required to give advance notice of the proposed merger to the antitrust agencies and to supply the information needed to assess its probable impact on competition. Second, Federal regulation should be extended to all mergers of banking institutions. Combined with the requirement for advance notice, this extension of the law would give the Government an opportunity to prevent mergers that are likely to result in undue restraint on banking competition.

23/ Ibid., p. 3.

24/ Ibid., pp. 11-12.

25/ Economic Report of the President submitted to Congress January 24, 1956, pp. 78-79.

> * * * When civil rather than criminal proceedings are contemplated, the Attorney General should be empowered to issue a civil investigative demand, compelling the production of documents before the filing of a complaint, and without having to invoke grand jury proceedings.

First, pre-merger notification. At the present time some 16 lawyers are assigned to the section of the Antitrust Division with primary responsibility for antitrust merger activity. Beyond these 16 lawyers, three more lawyers and some five economists devote part of their time to merger work. Before mergers can be appraised with an eye to clearance or suit, they must, of course, be discovered. And our experience has been that a good part of the time and efforts of this staff is occupied with discovering mergers before they occur.

Pre-merger notification would substantially ease this investigative burden. No longer would enforcement staffs be required to scan the variety of financial periodicals as they now do. More important, many mergers not presently publicized in advance of consummation would be brought to our attention. Since 1953, the Department has preliminarily examined over 2,000 mergers, and set up special merger files in 120 instances which merited detailed inquiry. In five we filed suit, but in some 20 cases, some phase of the acquisition was consummated before it came to the attention of this Department. In another 20, the fact of merger was not known to this Department sufficiently in advance to enable intelligent decision as to whether to sue before the merger was consummated.

In one-third of our detailed examinations, then, pre-merger notification would have afforded a chance to take action before assets of merging companies had been commingled. We wish to avoid problems stemming from the quite understandable judicial reluctance to attempt the task of separating companies that already have been joined.

Not only will the enforcement burden be eased, but pre-merger notification may well benefit the business community. Lawyers representing merging companies have at times stated that disruption of business plans is lessened by Department action before merger consummation. Even in cases where merging companies do not choose to utilize our clearance program, some nonetheless urge that if the Department is to proceed at all, we sue before consummation. Pre-merger notification, it seems clear, should systematize the process by which mergers are sifted and thus enable more prompt action if it is merited.

Further, we believe evenhanded enforcement requires notification. With that requirement, no longer would the company that tries to obey the law and seeks advance approval watch its close-mouthed rival consummate a merger, and thereafter rely on the natural indisposition of an enforcement agency or a court to attempt to unscramble the omelet. Thus minimized is the element of chance discovery in any decision to sue.

Next, our proposal to amend Clayton Act Section 7 to cover bank asset as well as stock acquisitions. We seek to plug that loophole left by present Section 7's failure to cover asset acquisition by banks. On the one hand, that provision's stock acquisition bar applies to all corporations "engaged in commerce." Section 7's asset acquisition portion, in sharp contrast, covers only corporations "subject to the jurisdiction of the Federal Trade Commission." Section 11 of the Clayton Act exempts banks from Federal Trade Commission jurisdiction by specifying that "authority to enforce compliance" with Section 7 "is hereby vested . . . in the Federal Reserve Board where applicable to banks, banking associations, and trust companies." On the basis of these provisions,

this Department concluded that asset acquisition by banks is not covered by Section 7 as amended in 1950. 26/

As a result, Section 7 is for practical purposes useless to cope with what the Comptroller of the Currency has described as "this recent trend of /bank/ mergers, consolidations, and sales." 27/ Corroborating the rise in bank mergers, the Chairman of the Board of Governors of the Federal Reserve Board concluded that bank mergers "have gone up steadily." 28/ In 1952, his testimony reveals, there were 100 bank mergers. This number jumped to 116 in 1953 and more than doubled to 207 in 1954. 29/ Most important, the Federal Reserve Board Chairman concluded, this number is "still rising." 30/

26/ Reaching the same conclusion, a House Judiciary subcommittee staff report explained that, because of revisions in amendments to Sec. 7,

> . . . it became impracticable to include within the scope of the act, corporations other than those subject to regulation by the Federal Trade Commission. Banks, which are placed squarely within the authority of the Federal Reserve Board by Sec. 11 of the Clayton Act, are therefore circumscribed insofar as mergers are concerned only by the old provisions of Sec. 7 . . .

(Staff report to Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 82d Cong., 2d sess. (September 1952)).

27/ Hearings on Current Antitrust Problems, before House Antitrust Subcommittee, 84th Cong., 1st sess., May 17, 1955, p. 453.

28/ Hearings on A Study of the Antitrust Laws, before Senate Antitrust Subcommittee, 83d Cong., 1st sess., June 24, 1955, p. 680.

29/ Hearings on Current Antitrust Problems, before House Antitrust Subcommittee, 84th Cong., 1st sess., June 13, 1955, p. 2159.

30/ Hearings on A Study of the Antitrust Laws, before Senate Antitrust Subcommittee, 84th Cong., 1st sess., June 24, 1955, p. 680.

Even though we still have a right to move against this tide of bank mergers under the more difficult Sherman Act Section 1, our antimerger efforts are cramped by Clayton Act Section 7's failure to cover bank asset acquisitions. Mergers may meet Sherman Act standards, yet fall before the Clayton Act's more stringent bans. Congress's clear object by its 1950 amendment of Section 7 was to strike some mergers beyond the reach of the Sherman Act. Thus the Senate report explains that the

> bill is not intended to revert to the Sherman Act test. The intent here . . . is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding. 31/

The report further states that the Act's intent is to have

> broad application to acquisitions that are economically significant. . . . /The/ various additions and deletions, some strengthening and others weakening the bill, are not conflicting in purpose or effect. They are merely different steps toward the same objective, namely, that of framing a bill which although dropping portions of the so-called Clayton Act test that have no economic significance, reaches far beyond the Sherman Act. 32/

To apply this Clayton Act standard to bank asset acquisitions, as it now does to bank stock mergers, is our aim. And this general, broad aim, apart from disagreements over means, is endorsed by the President of the United States, the Department of Justice, the Federal Trade Commission, and appropriate banking agencies.

Finally, the civil investigative demand. This proposal would enable the Department of Justice to compel production of documents by corporations,

---

31/ S. Rept. 1775, 81st Cong., 2d sess., pp. 4-5 (1950).

32/ Ibid.

partnerships, and associations--but not individuals--during the investigative or pre-complaint stage of civil proceedings. A bill embodying this proposal was introduced in the closing days of the last session.

The need for its prompt enactment seems clear. Under present law, the Department has no such power. Where criminal proceedings are contemplated, of course, grand jury process adequately enables production of both documentary and oral evidence. Where the Department proceeds with an eye to civil proceedings, however, experience shows that the Antitrust Division is severely handicapped. Some potential defendants may voluntarily grant access to their records. In other instances, however, a grand jury investigation must be initiated, and the court's power of subpoena used in order to obtain documents even though only civil proceedings may be the likely outcome. One result of resort to grand jury is extensive delay and expense. Finally, the Government may resort to filing a complaint and then make use of discovery processes of the Federal Rules to gather evidence. Effective enforcement, however, requires comprehensive investigation before--rather than after--formal proceedings have been filed.

In sum, then, two of our three main proposals, pre-merger notification and civil investigative demand, aim to secure, more rapidly, accurate and complete market data. Only thus can intelligent decisions be made in individual cases. Underscoring the importance of these new means for securing market evidence is that, as the Federal Trade Commission Merger Report explained, "Examination of the antitrust cases in which market share information has played a conspicuous role will show that such cases have been brought in fields where the pertinent

industries or markets were under regulation and tax or license data permitted full coverage of the market," 33/ for example, American Tobacco, 34/ Yellow Cab, 35/ and Standard Stations, 36/ or "where standard published statistics and definitive lists of companies have been available," for example Appalachian Coals 37/ Alcoa, 38/ and Paramount, 39/ This defect our proposed legislation may well remedy.

Beyond securing existing market information to enable intelligent decision in individual cases, Congress has imposed on this Department new obligations to make broad economic surveys. The 1955 amendments to the Defense Production Act, for example, require the Attorney General to undertake surveys and report to the President and Congress, every three months "for the purpose of determining any factors which may tend to eliminate competition, create or strengthen monopolies, injure small business, or otherwise permit undue concentration of economic power in the course of the administration of this Act." In like fashion, the Small Business Act now requires the Attorney General to make similar surveys and reports, relative to small business administration, "at such

---

33/ Federal Trade Commission Report on Corporate Mergers and Acquisitions, May 1955, pp. 179-180.

34/ American Tobacco Co., et al. v. United States, 328 U. S. 781 (1946).

35/ United States v. Yellow Cab Co., 332 U. S. 318 (1947).

36/ United States v. Standard Oil Co. of California, 337 U. S. 293 (1949).

37/ Appalachian Coals, Inc. v. United States, 288 U. S. 357 (1933).

38/ United States v. Aluminum Co. of America, et al., 148 F. 2d 416 (1945).

39/ United States v. Paramount Pictures, Inc., et al., 334 U. S. 131 (1948).

times . . . as he deems desirable." And one Senate Report in the 84th Congress requests the Department of Justice to report to Congress each year for the first ten years following the sale of Government-owned rubber producing facilities. 40/ Finally, Congress, granting consent to the extension of an interstate compact to conserve oil and gas, provided that the Attorney General shall make an annual report to Congress "for the duration of the Interstate Compact to Conserve Oil and Gas, as to whether or not the activities of the States under the provisions of such compact have been consistent," generally speaking, with established anti-trust principles. 41/

Now, I would like to close with a few thoughts on the role antitrust plays in preserving that national prosperity that is so important to all of us.

In 1776, Adam Smith's "Wealth of Nations," comparing Britain and the United States, noted:

> But though North America is not yet so rich as England, it is much more thriving, and advancing with much greater rapidity to the further acquisition of riches.

Since that day hardly a year has passed without some like exclamation of wonder from students of economics. For example, in 1939, Michael Chevalier, in his "Society, Manners and Politics in the United States," remarked on the difference between his own France and what he sees here:

> An American's business, Chevalier says, is always to be on edge lest his neighbor get there before him. . . Industry has become a veritable battlefield . . . Unlimited competition /has/ become the sole law of labor, everyone being his own master.

40/ Senate Report No. 117, 84th Cong., 1st. sess.

41/ Section 2 of Public Law 185, 84th Cong., 1st sess.

These observations are firmly rooted in the realities of our national income statistics. In 1952 the average income per person in the United States was twice that of the Swiss citizen, three times that of the Englishman or Frenchman, or Belgian, six times that of the Western German. National income of necessity rests upon national production, our productivity.

In America we produce one-third of the total goods in the world and one-half the manufactured goods with one-fifteenth of the land area of the world, one-fifteenth of the people of the world, and one-fifteenth of the national resources of the world.

Perhaps influenced by this striking comparison, a noted Swiss political economist, William E. Rappard, concluded in his study, "The Secret of American Prosperity" published as recently as May 1955, "that the United States today enjoys a much greater average income than any other nation. The material standard of living is, therefore by far the highest in the world." Seeking the reason for this, Mr. Rappard wrote Mr. John S. Crout, Director of the renowned Battelle Institute. Explaining American growth, Mr. Crout reasoned: Antitrust has

> compelled corporate managements to reconsider their position. They realized that they were required to compete, but had no hope of ever establishing a monopoly.
>
> Under these circumstances, they accepted the concept of true competition and directed their energies and efforts to ways and means of increasing their profits by expansion of their volume of business.
>
> In essence, this meant that each management set out to do a better job of producing, selling and distributing its products than its competitors. 42/

42/ William E. Rappard, The Secret of American Prosperity, (1955), p. 67.

A like conclusion was reached by a British study team that recently visited this country. As a result of the Marshall Plan, international study centers were organized to study the reasons for the superior productivity of American industry. "The Anglo-American Council on Productivity" was set up. It was responsible for organizing British teams of managers, technicians and trade unionists, which went to the United States to see what methods used there could be adapted to the needs of Great Britain. Sixty-six teams had made the trip by late 1952. They presented reports which were practically unanimous.

Lest you think I might be biased in reporting their conclusions, let me read you what an American newspaper reported under a London dateline in late 1954, as a result of the return of one of the latest teams. The New York Times headline read:

> Productivity Team Lays U. S. Output Supremacy Largely to Sherman, Clayton Acts.
>
> Hits Own Country's Law
>
> Parliament Urged to Act on Manufacturer Pacts That End Competition

That newspaper's account went on:

> The praise for the Sherman and Clayton Antitrust Acts was included in the industrial engineers' report because, according to members of the group, "it was the answer we kept getting when we asked Americans what was the source of the competitiveness in their economy." The group's secretary . . . remarked that ". . . the monopolies issue has become a part of the public morality of the United States; it is enforced by public opinion."

And so we see the importance that antitrust enforcement assumes, in the eyes of others. It has withstood the crucible not only of time, but of study. Today it stands as one of the prime supports for our prosperous and free competitive economy. In its preservation you--indeed, all Americans--have a vital stake.