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Address of

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Bigness and the Antitrust Laws

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I am pleased to have this opportunity to speak to you about "Bigness and the Antitrust Laws." This is a subject which has been receiving increasing attention and from which there has sprung phoenix-like, a belief that our present antitrust enforcement program is a threat to mere corporate size.

Some periodicals and publications dealing with the antitrust laws assert that the Antitrust Division is attacking bigness. Recently, during a televised debate on the A&P case, I heard it said that I fear bigness in industry and believe there is something sinister about size. Not long ago I received an invitation to take the affirmative in a radio debate on whether bigness should be attacked under the existing antitrust laws."

What is the reason for all these articles and statements? If there were any basis for the belief that bigness is under attack, the professed concern about our present enforcement program and the need for repeated commentaries on it would be understandable. But there is no case that we have filed; no position that we have taken; no statement that I have made, which provides any foundation for that belief.

We have never brought a case attacking bigness. I have never said that our antitrust enforcement program was directed at bigness. On the contrary, on numerous occasions as Head of the Antitrust Division I have publicly stated that bigness is not an antitrust crime and that I will not bring a case predicated on bigness alone. My feelings on this question are such that I offered to participate

in that radio debate only if I could take the position that bigness should not be attacked under the present antitrust laws.

From the days of Teddy Roosevelt vigorous enforcement of the antitrust laws has always produced a standardized reaction. All pledge their faith to competition and to the laws which assure competition. But inevitably, a vociferous group decries the manner in which those laws are being perverted. So today the cry is that the antitrust laws are being warped into weapons to attack and smash "bigness" in industry and that this so-called "new" interpretation of the Sherman Antitrust Act will lower our standard of living, decrease our efficiency and impair our ability to defend ourselves. It is regrettable that some respected publications have repeated this absurdity without analysis of the cases which they claim to be the basis for it.

If any of our cases have given birth to this new straw man -- that we are attacking bigness -- they are probably some of the more publicized antitrust cases instituted under the Sherman Act. That Act, which is the basic antitrust statute, prohibits unreasonable restraints of trade, monopoly power, and attempts to achieve that power.

Our current antitrust enforcement program accords with the emphasis of the statute and is entirely within its scope and tradition. Most of our cases are directed to illegal restraints of trade such as price-fixing, patent abuses, exclusive dealing arrangements, boycotts, and divisions of territory. These restraints have

judicially been described as "steps toward that entire control which monopoly confers; they are really partial monopolies." The primary focus of our enforcement program, however, is on monopoly power which, though found in fewer instances, presents the greater threat to our economy. That power includes the ability to impose unreasonable restraints on competition; to determine prices without substantial regard to those pressures which normally affect price in a competitive market; artificially to allocate and limit production; to divide markets and fields of production; and to exclude competitors.

"The material consideration in determining whether a monopoly exists," according to the Supreme Court, "is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so."

Historically monopoly power was found in one huge corporation dominating an entire industry. Today monopoly power may more frequently be found in industries controlled by a few companies following policies and practices which avoid any real competition among themselves and which at the same time enable them to maintain their dominant positions.

The current misconception about our enforcement program may rest upon several grounds. It may be due to a confusion between the meaning of monopoly power and "bigness." Monopoly power and bigness are not synonymous. An industrial giant actively competing

with other industrial giants may satisfy all the standards of bigness without possessing monopoly power. On the other hand, a small company may enjoy a monopoly power in an industry where the demand is not great. Monopoly power, therefore, is to be determined by the ability to restrain competition and not by corporate size.

Moreover, the Sherman Act proscribes local as well as national monopolies. Consequently, monopoly power may be and has been found in the hands of regional as well as national companies. For example, as the Supreme Court said in the Yellow Cab case: It is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint or a conspiracy. The complaint in this case deals with interstate purchases of replacements of some 5,000 licensed taxicabs in four cities. That is an appreciable amount of commerce under any standard.

Perhaps the misconception to which I referred is due to the fact that many of our cases are against big companies. The reason for this may be that the economic consequences of their antitrust violations are of greater magnitude. Then, too, big companies appear to be more frequent violators than the little fellow. Many small companies never get the opportunity to acquire monopoly power and actually some of them may exist only by sufferance of the dominant companies. Of course, it does not follow that we are attacking size merely because many of our cases are against big companies.

It is amusing to note that when we file a case against a little company it generally says, "We are so small, why bother with us" and

it points to the big fellow as the real antitrust violator. When we attack the big fellow he claims we are attacking him merely because he is big.

Perhaps the misconception that we are attacking size arises from the fact that some of our cases ask the court to grant divestiture or dissolution. Any request for this type of relief in an antitrust suit against a large company provokes the denunciation that we are merely attacking bigness. This conclusion may be the result of a confusion of the two steps in an antitrust case. The first step is to establish that the defendant, whether large or small, possesses monopoly power or has otherwise violated the antitrust laws. The second is to demonstrate to the court the relief it should order to correct the unlawful situation and to bring about a condition in harmony with the antitrust laws. Whether dissolution or divestiture should be ordered does not turn upon the question of size.

In this connection the Supreme Court has stated that these remedies serve several functions. "(1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the Act."

The charge that the Antitrust Division is waging a campaign against bigness has been made most frequently in connection with the Meat Packers case, the Western Electric-AT&T case, the Du Pont-General Motors case, and the A&P case.

This charge first appeared when we filed the suit in which we asked the court to dissolve each of the four major meat packing companies into several independent and competing firms. Although each of these defendants is large, their size cannot breathe life into this straw man.

Suppression of competition in the purchase of livestock and in the sale of meat and meat products, and the exclusion of other competitors from the meat industry by various means, including the abuse of monopoly power, are the bases of our complaint in the Meat Packers case. Among the charged methods of suppressing competition are controlling the amount of livestock each purchases so that the supply of meat which each company has for sale is automatically regulated; and selling this regulated supply at substantially identical prices and terms.

These companies which we charge have operated in combination for more than a quarter of a century possess monopoly power, the systematic use of which is so deeply imbedded in their whole method of doing business that nothing less than the removal of that power can provide an opportunity for any real or effective competition in the meat packing business.

That this combination has existed for decades despite repeated attempts to eliminate it by injunctive provisions alone is an added reason for the dissipation of this monopoly power by dissolution.

Volume was added to the cry that we are attacking bigness when we filed the Western Electric-AT&T antitrust case. The central theme

of this case is that Western Electric illegally obtained a monopoly of the manufacture and sale of telephone equipment. This monopolistic position was the end product of a series of unlawful acts, such as exclusionary arrangements between Western Electric and AT&T covering manufacturing, patent licensing, and the furnishing of supplies. These arrangements and activities enabled Western Electric to eliminate competition, in some instances by direct acquisition of competitors but in most by depriving competitors of access to the market place which Western Electric so thoroughly preempted.

Western Electric is indeed a large company. It has to be large to supply the vast market which it has unlawfully expropriated. But our case is not predicated upon the fact that Western Electric is big. Western Electric is a defendant because it acquired monopoly power by illegally excluding substantially all of its competitors from the industry and preventing the entry of new competitors.

Western Electric, selling in a controlled market, is able to dictate both the price and type of telephone equipment which the Bell operating companies must use. To correct this condition and to restore competition for the benefit of purchasers and users of telephone equipment, we have requested the court to cut the ties between AT&T and Western Electric and to dissolve Western Electric into three independent and competing integrated companies, each of which, judged by any standard, will be big. Competition among the new companies and other suppliers will mean a lower rate base with consequent lower charges throughout the United States for telephone

service.

In the Du Pont-General Motors case which followed some months later it has been publicly stated that we are attacking size and efficiency. This case is wholly unrelated to size or efficiency. It involves the abuse by Du Pont of its controlling stock ownership in General Motors and United States Rubber.

The complaint alleges, among other things, that through this control Du Pont requires both General Motors and United States Rubber to purchase substantially all their requirements from it and from each other. It also alleges that Du Pont has granted systematic secret rebates on certain products sold by it to General Motors and has required United States Rubber to sell tires and tubes to General Motors at preferential prices. We further charge that these three companies have eliminated competition among themselves by dividing fields of manufacture. No one of them invades the manufacturing fields allotted to the other two.

In this case we do not seek in any way to cut down the size of any of the defendants. What we do seek is a termination of the unlawful commercial relationship which Du Pont by virtue of its stock ownership has imposed upon the other defendants and which has been used to effectuate illegal restraints of trade.

Obviously, Du Pont, General Motors and their co-defendant, United States Rubber are all big corporations. Obviously, when we bring an antitrust case against them we are attacking them. Equally obviously, because they are big and because we are attacking them, it does not

follow that we are attacking them because of their size.

More recently there has been the civil case against A&P. This case is based upon the same conduct involved in an earlier criminal case in which A&P was found guilty and paid maximum fines of $175,000. A&P injected into the criminal case, as it now does in its advertisements regarding the civil case, the contention that we were attacking bigness and claimed that it is big because the American people have made it big. On the contrary, the court found that A&P's bigness was not due to efficiency and enterprise but to the "predatory application of its mass purchasing power" and the abuse of that power through boycotts, blacklisting, preferential rebates, price wars and below-cost retailing in selected areas in order to eliminate local competition.

In the present civil action we ask the court, once and for all, to put an end to A&P's long continued predatory practices. Because the public record of A&P's business conduct over the past twenty years has demonstrated a total disregard for legislative and judicial antitrust mandates amounting almost to disdain, the Government has requested that A&P be shorn of its power to make its suppliers and its competitors "walk the economic plant."

No discussion of bigness can be complete without some reference to the subject of efficiency with which this straw man so consistently seeks to enshroud himself.

The Sherman Act has no quarrel with efficiency just as it has none with bigness. On the contrary, it is the philosophy of the Act that

the stimulus of competition will increase efficiency and promote the natural growth of the most efficient. Of course, we cannot assume that the biggest are the most efficient. For example, a corporation may be so vast, so scattered and so diversified that it may become entangled in administrative red tape. Alfred P. Sloan, Jr., of General Motors, as far back as 1925, stated this problem as follows:

> "In practically all our activities we seem to suffer from the inertia resulting from our great size. * * * *
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> "I can't help but feel that General Motors has missed a lot by reason of this inertia. You have no idea how many things come up for consideration in the technical committee and elsewhere that are discussed and agreed upon as to principle well in advance, but too frequently we fail to put the ideas into effect until competition forces us to do so. Sometimes I am almost forced to the conclusion that General Motors is so large and its inertia so great that it is impossible for us to really be leaders."

Between the huge corporation and the business that is too small to realize the economies of mass production and modern technology there may be a size of optimum efficiency. Efficiency and tremendous size, however, do not necessarily go hand-in-hand.

I have discussed only four of the 68 antitrust cases which have been filed since I became Assistant Attorney General. An analysis of the remaining cases, some of which also request dissolution or divestiture, will furnish cumulative evidence that the charge that

we are attacking bigness or efficiency is in fact a straw man.

It is my position that bigness is not an antitrust crime. If corporate size gives rise to economic problems the solution lies with Congress and not with the antitrust laws as presently constituted. I think I should point out, however, that bigness is not a defense to an antitrust violation. The fact that a company has sufficient size to lend plausibility to its cry that it is being attacked merely because it is big will not obtain for it any immunity from prosecution under the antitrust laws.