Department of Justice

ANTITRUST POLICY -- POPULIST PHILOSOPHY
OR ECONOMIC NECESSITY?

Remarks by

JOHN H. SHENEFIELD
Assistant Attorney General
Antitrust Division

Before the

LOS ANGELES COUNTY BAR ASSOCIATION

Biltmore Hotel
Los Angeles, California

January 30, 1978

ADVANCE FOR RELEASE

10:00 P.M. E.S.T.

MONDAY, JANUARY 30, 1978

I understand that today's audience includes three different sections of the Los Angeles County Bar Association -- the antitrust litigators, both plaintiff and defense; corporate practice attorneys, including those who give antitrust advice to their clients; and house counsel who in many respects are the client. Let me choose sides for a few minutes, and express some sympathy with and concern for the house counsel amongst you, and for the enterprises you represent day to day. As we all know full well, antitrust litigating and counseling is a growth industry, and every stern word out of Washington about tougher enforcement or new directions by the Antitrust Division generates more business for the private antitrust bar, no matter what "side" it takes in the controversy. Considering my own background in private practice, I am more than a little amused to hear private defense counsel fulminate against the Division and the laws it enforces, since our business is, quite literally, their business as well. All the while, corporate counsel and the corporations for which they work can do little but gnash their teeth and fork over ever-escalating legal fees.

It is no wonder, then, that every week my office receives a basketful of mail to the effect that the Antitrust Division should "get off the back" of American business. One recent writer expressed a devout wish that we devote our resources to tackling the Mafia instead of, say, IBM or AT&T. I was

tempted to reply by pointing out that when IBM or AT&T threaten to bury us in paper, at least they mean it as a figure of speech.

The Mafia, as such, is not on our ordinary list of targets. We could perhaps think about a whole new family of antitrust violations, or seek to push out the frontiers in the area of "full line forcing." Our primary efforts are, of course, aimed at impermissible conduct by what are otherwise legitimate businesses. And since virtually all significant manufacturing and distribution activities in this country are conducted by corporations, it is on them that the brunt of antitrust enforcement quite naturally falls.

From this rather simple fact, that antitrust activities inherently place us at odds in individual cases with some members of the business community, has arisen the mistaken notion that the Antitrust Division is "anti-business," and more precisely, is "anti-efficiency." The apotheosis of this attitude is found in a recent issue of Fortune magazine, in an article wistfully entitled "A Search for Sanity in Antitrust." The unstated premise of that article is that, like the Holy Grail, sanity in antitrust enforcement is often sought but seldom found.

The Fortune article does make some good points, and raises some issues about the directions of our national legal-economic policies that are worth discussing. My premise,

though, unlike that of the magazine editors, is that antitrust policy has not gone astray, and that what appears to Fortune as "an oligopoly of opposites," policies based on inconsistent economic philosophies, is instead a healthy manifestation of national political decisions on how our economy should be structured.

The theme of the Fortune piece is that the antitrust laws speak in terms of economic efficiency, but act as populist mechanisms to preserve an atomized, pluralistic society at the cost of efficiency, and ultimately to the detriment of consumers who may be better off with higher concentration in many industries than with a proliferation of smaller competitors. This argument contends that the proper role of antitrust laws in America is to police those practices that are demonstrably inflationary -- meaning, it would seem, price fixing and little else. The "big case" should be discarded as a waste, and much of the merger law of the last 20 years should, in this analysis, also be abandoned. I cannot agree.

A look at some of the principal merger cases referred to in the article might suggest that this phase of antitrust law is dedicated to asphyxiating any corporate combination resulting in more than a microscopic increase in market concentration. The article mentions in this connection Brown Shoe, Von's, and Clorox. What the article fails to say is that they are landmark cases. It is in the nature of our

legal system to create outer boundaries, rather than reliably to mark areas of safe passage. These precedents serve a prophylactic value by establishing some of the outer reaches of merger policy, and some of the theories by which other cases may be analyzed. To suggest that these cases are everyday features, or indeed -- as Fortune did -- that the current travail of the domestic shoe industry -- and by implication, of steel, television makers, and textile companies -- can be traced back to the Brown Shoe decision, is to let your imagination range out of control uninhibited by careful legal analysis.

In the decisions mentioned above critics of the Antitrust Division and antitrust law have read an innate fear of bigness, enshrinement of an agrarian-populist philosophy that would have us say, as did Huey Long, "Every man a King," and also, as I do not think the Kingfish said, "No corporation an empire."

Well, maybe I can startle you all a bit by eschewing polite denial of this heritage and instead 'fessing up to the origins of antitrust law: yes, it is there -- in the Grange movement organized after the War Between the States, in the demands of the 1874 Illinois Anti-monopoly Party for legislation against corporate monopoly and extortion. It is there in the muckraking literature of Henry Demarest Lloyd and his colleagues, and in the party platforms of presidential elections early in this century. The American mind has always had a suspicion of large concentrations of capital, a skepticism about the need for the

big always to get bigger, a concern for the preservation of certain values cherished by our society and thought not so well to flourish in the company of corporate oligarchs: entrepreneurial ambition, innovation, a sense of values that includes but also extends beyond per-share earnings. You cannot read the legislative history of our antitrust laws without perceiving that Congress had something in mind -- in 1890, in 1914, in 1953, in 1976 -- beyond a technocratic vision of economic efficiency. We are a country that started to grow up without a tradition of landed gentry or of tight control over the means of and access to wealth. When, perhaps in spite of ourselves, we have drifted towards such concentration, the body politic has acted with enough consistency to teach that antitrust law finds a wellspring other than at the intersection of supply and demand curves.

That said, is Fortune right: is our antitrust law a hopeless muddle of populist sentiment given a veneer of economics? The answer is "No!" Just as our entire government structure is wrought of delicate checks and balances, resulting not in motionless equipoise, but instead in the movement of pendulum swings towards competing interests, so also is there an inherent and dynamic tension in antitrust law and its applications. The exhortations of Fortune not withstanding, economics is not so precise a science that we

can often confidently claim entirely to understand the dynamics of a complex market structure. We are certainly far from being able to predict with absolute certainty that an increase in concentration will have precise and quantifiable adverse effects on competition, or on performance. Rather, our legislative and judicial systems have melded the imprecisions of economic theory with what may be considered a series of rebuttable political presumptions. Among those presumptions are that more competitors are generally preferable to fewer, and that large capital agglomerations can do more competitive mischief than small ones.

The Antitrust Division did not make up these statements of political folk wisdom. The courts have not created them out of thin air. They are fairly accurate legal transliterations of public sentiment. The crux of the misperception in the Fortune article was the assumption that populism has been falsely engrafted on what would otherwise be an exercise in pure economic logic. So I believe that American antitrust law does have a parentage of skepticism of "big" business. But when I tell you how that suspicion manifests itself, you ought ultimately to conclude that, far from being anti-business, there are few if any agencies of the government that are more sympathetic to the business community than is the Antitrust Division.

First, I ask you to consider the kinds of cases in which the populist tradition manifests itself: merger cases and

monopolization cases. It seems that at a certain point in every business cycle, a collective mania seizes major corporations, probably with the fond assistance of their investment bankers. They start buying each other up, sometimes at what seem to be enormously high prices. The motivations for these mergers vary, but frankly they rarely seem pure economic rationalism. Cash-rich companies with depressed stock prices seem to feel they had best buy someone before they get bought themselves. Cyclical businesses try to even out their earnings swings by buying steady, low-glamour money-makers. Unglamorous industries try to hype their earnings by picking up more volatile but potentially profitable businesses. Extractive industries try to integrate forward, and manufacturers integrate back. Corporations facing unfriendly takeovers frantically seek arranged marriages. One occasionally detects the nervous hand of incumbent management trying to preserve its perquisites from some would-be suitor or insurgent. Oh yes. Occasionally one does find a merger that simply makes economic sense, marrying industries that complement each other without clogging competition. Mostly, though, if it is economic rationalism that prompts a merger, it is the logic that says it is easier and cheaper to buy one's way into a new market than to expand there internally.

What is surprising in this melee is not how many merger cases we bring, but how few. While some of this restraint by

the Division and the FTC can be attributed to wise counsel being given corporations by their attorneys, forestalling clearly objectionable deals, much of our restraint is just that: recognition that mergers are not inherently evil, that corporate America can generally be left to tend to its affair unless economic harm will or may result, in other words, unless one of those political presumptions gets involved. That may happen when we see a horizontal merger in a concentrated market. Our attacks on vertical mergers are comparatively rare, and the conglomerate cases frequently boil down to a horizontal analysis at one remove. The Division and the FTC end up attacking only a miniscule proportion of even the large mergers we see.

When we do file a merger case, we always believe that economic theory is itself sufficient to justify the relief we seek. Inevitably, our economics are contested by the data and projections of the adversary. It is at this point in the process that those rebuttable political presumptions are raised, not necessarily by the government but often as well by the courts themselves. Terms such as "incipiency" and "potential competition" may lack econometric precision, but are no less valid in their application to antitrust law than quantifiable data. I am not referring to subjective analysis or judicial whimsy in the process. What I perceive rightfully to be a part of the antitrust adjudicative process is that

in circumstances where economics as a science cannot dispositively establish the existence or absence of a violation of Clayton Act Section 7, courts look to and remember the history of the antitrust laws, and sometimes tip the balance towards expression of the social philosophy of antitrust law.

The facts refute any notion that the courts or the enforcement authorities have run amok in some campaign against economic efficiency, holding up some vast number of worthwhile, useful mergers. A host of mergers are occurring now, and few, as an absolute matter, are being challenged. It is rather clear that congressional sentiment, if it can be distilled, is that we act too seldom in this area, not too often. Perhaps it is not fair to gauge expressions of public sentiment from statements of congressional will, but if our representative system of government is to be taken at face value, the courts and the enforcement agencies have not gone astray in merger policy. They have been listening to Congress.

Parenthetically I found it a little silly for the editors of Fortune to express a hope that Congress would not override Illinois Brick because such a rebuke might make the Supreme Court more wary of basing its decisions on pure economic rationalism. In other words, Congress should not perform its function in a manner that would cause the Supreme Court to become more cognizant of the will of Congress in antitrust

enforcement. The editors of Fortune, reversing their traditional stance, appear in this instance to endorse, not condemn, the notion of judicial lawmaking.

The other area of antitrust enforcement that imports the populist heritage is monopoly policy. We are stuck with a bit of a conundrum in our attitudes about monopolists. The law proscribes efforts to become a monopolist and a lot of the most effective means of remaining one, but does not necessarily make illegal the state of being one. The risks of monopoly are widely acknowledged -- the ability to control prices and output, stagnation, etc. -- but we also recognize that in a perfect competitive market a markedly superior competitor may end up with monopoly power. How, then, do we reconcile the distrust of monopoly power born of its abuses at the turn of the century with the need to encourage vigorous competition?

I think the answer, as evidenced by our enforcement history, is that we do leave competitors alone. Sometimes effective monopolies emerge. Suit is not necessarily brought when it is clear only that a firm has established itself as dominant in its market. Rather, when that dominance continues for a long time, when the return on investment for the monopolist becomes and remains sufficiently high that it ought to attract new market entrants but does not, then our suspicion is aroused. I guess we view with skepticism the notion that any one enterprise can have a perpetual corner on bright people and good ideas, that skill, foresight and

industry are immutable characteristics attained by a corporation to a degree that competition can never catch up. Our populist heritage bespeaks a presumption that entrepreneurial talent is in pretty good supply in this country, and that if a monopolist is playing by the rules and not using its market power to stifle competition, sooner or later, it will get knocked off its perch. When competition doesn't begin to make inroads, we are concerned, and ultimately may bring suit.

The risk to us of this approach is that the monopolist may by then have accumulated sufficient resources to turn our suit into an epic battle, a la Jarndyce v. Jarndyce. I rather resent the notion, though, that a case should be considered "wasteful" or "detrimental to consumers" because the evidence fills a lot of filing cabinets or the trial is prolonged. I plan to do everything in my power to speed up litigation of major cases -- but that does not include abandoning them because of their size. Important things are hard and complicated, and sometimes do take a long time. We should look beyond the number of pages of record when we assess antitrust enforcement.

Antitrust law is in the final analysis pro-business law, because it is wholly predicated on the notion of free market

competition. The young attorneys in Washington and our field offices that some of you, particularly in corporate practice, view as wild-eyed fanatics bent on rending our economic fabric are instead defenders, not of the status quo, but of the philosophy of competition that our status quo purports to incorporate. Our targets are not corporations per se, but corporations that have forgotten how, or decided they don't want, to compete. If you feel yourself to be a "victim" of antitrust enforcement, listen closely to what the Antitrust Division claims you have done wrong: it will always be a failure to let market forces operate freely, or an attempt to impede the operations of competitors, or through mergers and acquisitions a reduction of the probability that competition can exist in your marketplace. This is not unbridled populism. It is certainly not a presumption that business must be controlled lest it do evil. What you hear from the Antitrust Division is a greater statement of faith in the competitive free enterprise system than a lot of its ostensible proponents actually practice.

I think you all know perfectly well that a lot of American industry and commerce operates very far from the notions of classical competitive microeconomics. For every industry such as microelectronics, in which year after year

competition has been pushing down prices in real dollars while expanding and improving the product lines and demands for them, there are ten industries more similar to the model of primary metals: a small number of producers who over the years have evolved cozy relationships with each other that leave the entire industry subject to world demand fluctuations, but somehow offer no room for competition between producers. Some business practices have become so venerated that it is assumed the right to follow them is, if not graven on stone tablets, at least within the intent of the framers of the Constitution. It is assumed to be a just and proper exercise of free speech to post prices conspicuously before customers and competitors alike; any suggestion that this practice is more akin to price fixing than to a First Amendment right evokes instantaneously the ghost of John Peter Zenger and turns pin-striped corporate executives into rabid would-be civil libertarians.

The greatest sympathy that I and the Attorney General feel for the business community is for the bizarre, and quite possibly cruel and inhumane, procedure that companies often must go through to determine whether they have violated anti-trust laws. Much of the antipathy toward antitrust law can probably be justifiably laid at the feet of its practitioners.

Nothing seems so fertile as the creative mind of an attorney who is paid on hourly rates. Because the stakes in antitrust cases are so often large, clients are too often persuaded that the case demands endless discovery, interminable motions, countless conferences, and staggering fees. The product of this frenetic activity is too often waste--of judicial resources and of the client's monies. It is waste that results in transfer payments from ultimate consumers through the conduit of providers of goods and services into the pockets of counsel.

I acknowledge that an antitrust case cannot be handled in the same manner as straightforward tort or contract actions. Economic litigation will never be simple. But until we impose some control over dilatory tactics, over practices that increase billable hours but not understanding of the facts, and over the shamanistic faith that, given enough time and data, economists and computers will "solve" the most abstruse problems of economic analysis, we will continue to erode any remaining belief that antitrust enforcement has a valid place in our national economic policy.

I do not view the Antitrust Division as having a mission that transcends competition policy. Washington has ample advocates of other consumer or public interest viewpoints,

including quite a few who obviously feel that antitrust law is part of the problem rather than the answer. Yet, so long as we are entrusted with carrying out the economic policies of the Sherman and Clayton Acts, we will look on those laws as still vital statements of how our society has chosen to order itself. We will continue to read in those laws both a hesitancy to entrust our economic fate wholly to the few and economically large, and a wholehearted commitment to the proposition that business competition and a healthy business sector is fundamental to our national well being.