



# Department of Justice

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REMARKS BY

ATTORNEY GENERAL NICHOLAS deB. KATZENBACH

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Mr. Chairman and fellow students of antitrust law:

I have come today to talk about the meaning of two specific words and phrases -- in two of my specific areas of responsibility -- one which is totally familiar to all of us but whose meaning is uncertain, and one which is not so familiar, but whose meaning is critically clear.

I.

Let me begin with the phrase I am sure all of us know, but about whose meaning I am less sure. The phrase is "antitrust policy." The very phrase, like sun spots, seems to have a mystical capacity for interfering with efficient communication. Let me cite an example or two.

There was a great deal of talk about "antitrust policy" two years ago when Lee Loevinger left us as head of the Antitrust Division to be succeeded by Bill Orrick. One distinguished business newspaper offered a clear interpretation headlined, "Loevinger Transfer May Signal Softer Approach." The article concluded that the clear reason for Mr. Loevinger's departure was that he had been too tough: " x x x It seems probable that the legacy of Mr. Loevinger's departure will be a tamer antitrust policy less likely to raise political problems."

At about the same time, another distinguished newspaper offered its interpretation of the reason for the change -- that Mr. Loevinger had been too soft: "It has been evident for some time that . . . no identifiable Kennedy Administration antitrust program was developing," -- this story said. ". . . Many experts in the field have believed that there has been an absence of imaginative, big new cases and a coherent aim toward specific areas of the law."

I confess that I could find no way to reconcile these two views of what has been the Administration's antitrust policy: What to one observer was too vigorous, was, to another observer, too timid.

I raise this two-year-old point because only last week we secured a new illustration about how enduring the linguistic difficulty can be. It concerned Bill Orrick's resignation as head of the Antitrust Division to return, after four years of outstanding government service, to his private law practice in San Francisco, and the President's appointment of Donald Turner as his successor.

Mr. Turner is one of the most experienced, thoughtful and able antitrust authorities in the country and his arrival -- like Bill's -- does honor to the Department. The immediate question which his appointment raised, however, was what does it signify with respect to the Administration's "antitrust policy"?

The distinguished newspaper which had thought that Lee Loevinger was too strong and Bill Orrick would be softer, now said Mr. Orrick had "leaned to a comparatively tough and sweeping policy" while Mr. Turner's appointment possibly signified "a less militant approach to antitrust enforcement."

But the same week, another widely read publication said that Don Turner "has written widely on the subject and is considered an expert with a tough approach."

Plainly, each of these publications is entitled to its views of the Administration's antitrust efforts, however divergent. What I wish to call attention to is the vexing semantic difficulties these stories reflect in describing "antitrust policy."

I think it must be recognized -- I think all of you do recognize -- that antitrust policy is not policy to be created and shaped simply by whoever happens to hold the title of Attorney General or Assistant Attorney General for Antitrust.

We are bounded on both sides. On the one side we are bounded by facts -- the activities of the business community. We could not even contemplate an anti-merger suit unless a merger were being planned.

On the other side, antitrust policy is bounded by law. Whatever our philosophy may be in bringing a particular case -- whether too timid or too militant -- the most that can be said is that the Department proposes and the Supreme Court disposes.

There is, of course, a wide area of discretion between the boundaries of fact and law. There are, in fact, a large number of merger proposals. And we have, in fact, been given fairly extensive scope by recent court decisions. In these circumstances, which mergers are illegal? Which mergers should we oppose in court?

I think it is only in the answers to such questions that the phrase "antitrust policy" has significance.

For simplicity's sake let me describe antitrust cases in two categories. One category involves activities which I think all of us agree are illegal on their face, such as price-fixing. I am aware of no uncertainty with respect to that kind of antitrust violation.

The second category involves cases which are a great deal less certain -- like many mergers -- in which the propriety of the conduct involved may depend solely on a detailed and arguable court finding.

Some of the fundamental uncertainty in this second area is inescapable. I think none of us would prefer the obvious solution: a long series of explicit, inflexible statutes to cover a variety of specific activities. One of the great strengths of the antitrust laws, like the Constitution, is that they are broad statements, adaptable to changing conditions.

And conditions -- both with respect to business activity and court decisions -- are changing with both considerable force and considerable speed.

In just the past three years, the Supreme Court has handed down decisions in not one or two but eight major merger cases. The Court has determined: -- that the Sherman Act does, indeed, apply to mergers;

- that mergers of major competitors are very likely improper;
- that potential competition is a significant factor to be considered in evaluating mergers;
- that a merger resulting in 30 percent of the market can be invalid;
- and, only last week, that reciprocity is an appropriate test of the validity of a merger.

These decisions, each of considerable significance, have come almost faster than it has been possible to digest them. And yet compare them with the accelerating rate of merger activity in the business community. Only Wednesday, the Federal Trade Commission reported that the number of mergers last year increased almost 20 percent over 1963 -- from 1,479 in 1963 to 1,797 in 1964.

Our figures in the Antitrust Division show that in the first three months of 1965 the number of mergers increased almost a third over a like period in 1964, from 363 to 501.

Not only are more companies merging, but larger companies are merging. The FTC's report listed 109 mergers in 1955 involving companies with assets of \$100 million or more. By last year, the figure of 109 had risen to 207.

I do not mean to give in any way the impression that an increasing number of mergers necessarily equate with an increasing number of antitrust violations. There is little, if any, question about the great bulk of mergers. Of the more than 1,700 mergers last year, we brought suit against 17 -- less than 1 percent.

What I do seek to stress, however, is that the accelerating developments of both fact and of law make our common understanding of where we are and where we are going far harder to satisfy.

For our part, there well may be more we can do to help clarify which types of activity might run afoul of the antitrust laws. What principles, for example, impel us to try to block Company A's merger with Company B, but not a merger between Company C and D?

In dealing with a subject so vast, so dynamic and so fluid as American industry, establishing clearer guidelines is not an easy task. In some fields, it may even be impossible. But under Mr. Orrick we have already begun seeking to shape policy guidelines and it is our hope that this effort can be continued and even accelerated under Mr. Turner.

Sensibly, this should not be simply a unilateral effort within the Department. It should reflect an informed recognition of the nature and legitimate requirements of business. And that means we will seek out and welcome your views.

The extent to which we can conduct a reasonable dialogue and the extent to which we can digest and absorb change and then act on it in the most consistent possible manner is the same extent to which we can, all of us, make

the phrase "antitrust policy" less of a slogan and more of a fact.

## II

Let me turn now to a second word whose meaning reflects a major area of my responsibility. The word is "Neogre" -- N-E-O-G-R-E. It comes from a voting registration form filled out by a 42-year old white Mississippi farmer.

As a test of literacy, he was asked to interpret a section of the Mississippi Constitution which said "There shall be no imprisonment for debt." I would like to read you his entire answer:

"I thank," he wrote, "that a Neogre Should Have 8 years in college Be fore voting Be Couse He dont under Stand."

It is not, perhaps, necessary for me to inform you that the man was registered to vote, without question or hesitation. It is perhaps equally unnecessary to report that throughout the South, Negro citizens--including graduate students, ministers, teachers, and National Science Foundation fellows -- have been refused registration and denied the right to vote for leaving out a comma, or making a one-day error in computing their age in years, months, and days.

The overall impact of such discrimination is evident from statewide voting statistics. In Alabama, 69 percent of the voting age whites and 19 percent of the voting age Negroes are registered. In Louisiana, the figure for whites is 80 percent and the figure for Negroes is 32 percent. In Mississippi the figures are 80 percent for whites and 6 percent for Negroes.

Congress has been alert to such discrimination. Three times in the past eight years it has enacted voting rights measures. Yet all three times those laws have been met with evasion, obstruction, delay, and disrespect. It is for those reasons that we are now deeply engaged in a new legislative effort in Congress to enact the Voting Rights Act of 1965, to insure, once and for all, that every citizen, whatever his race, can vote.

"The time of justice," the President said in his memorable civil rights address to Congress in March, "has now come."

One of the main aims of the proposed voting measure is to undo the discriminatory effect of the literacy test. The measure calls for the suspension of such tests in states which have employed them for discriminatory purposes. This provision has provoked some question; literacy tests are often thought of as so necessary and so routine that their elimination sounds shocking.

But this is an uninformed view. My personal feeling is that literacy tests have outlived any function they might once have served. There are a great many ways for citizens -- even should they be illiterate -- to develop an understanding of government. Whatever my personal feelings, however, the fact remains that the majority of the states -- at least thirty -- already find it possible to conduct their elections without any literacy test whatsoever.

I doubt there is anyone who would argue that the quality of government in these states is inferior to that in the states which impose -- or purport to impose -- such a test.

There are those who concede that literacy tests have been applied unfairly in the past. But, they argue, why correct that injustice now by infringing on the clear right of the states to set their own election standards? Why not, instead, seek to insure that literacy tests are applied fairly?

They go on to suggest wiping the voting registration books clean and conducting statewide re-registration, according to non-discriminatory standards, with fair application of literacy tests to both races. There is an appealing logic to this argument, but in truth it is superficial and unrealistic logic.

Let me offer three reasons why such re-registration is not only not an answer, but is, indeed, only another form of evasion:

First, to call for the suspension of literacy tests does not represent an imposition of federal will on certain states. It is these states, not the federal government, which have made the choice as to enforcement of the literacy test.

They have chosen, on a sustained basis, not to demand literacy of white applicants -- as in the case of the man who wrote about the "Neogre." Having made that decision, federal action would only make these states apply the same standards of literacy -- or non-literacy, equally to whites and Negroes.

Second, re-registration would present a consummate irony. Our purpose with this measure is to solicit the consent of all the governed. It is to increase the number of citizens who can vote -- not to decrease the number, not to decrease democracy.

Third, and finally, re-registration would merely perpetuate discrimination because it would be conducted, controlled, and enforced by the existing political structure. This structure has been erected by an electorate from which Negroes are systematically excluded. To entrust re-registration to such a structure is approximately like appointing the fox to guard the chicken coop.

The alternative to statewide re-registration is that alternative written into the Voting Rights bill. It does not eliminate literacy tests; it provides rather that they be suspended for a period long enough to allow Negroes as well as white to enter the electorate. At the end of that period, when the electorate fairly represents the population, a state would be free to re-establish the literacy test or any other fairly administered standard of voting.

The Voting Rights bill, in short, would allow us, at long last, to translate our good intentions into ballots. It would allow America, finally, to elevate the very phrase "voting rights" from a truism into a truth.